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FOREWORD

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TRIBUTE

**CELEBRATING THE IMPACT OF SENATOR
BIRCH BAYH: A LASTING LEGACY ON THE
CONSTITUTION AND BEYOND**

FOREWORD

John D. Feerick and John Rogan***

Nearly 200 years before Birch Bayh arrived in the U.S. Senate, James Madison arrived at the Constitutional Convention with a sense of what was ailing the newly united states: concern for the national interest was missing.¹ The states were at odds with each other,² and Madison believed “the people of the United States . . . were putting their own interests above the good of the whole.”³ With Madison in an influential role, the Framers designed the U.S. Constitution to encourage elevating the nation’s interests.⁴ In promoting ratification, Madison submitted that the Constitution provided a defense against “conflicts of rival parties” undermining “the public good.”⁵

Of course, the Constitution did not provide a government that would perfectly guard against the perils of self-interest or many of the other challenges the nation would encounter. The Constitution’s first words acknowledged its imperfections. It promised “a more perfect Union”⁶—a nation that was a work in progress from its inception.⁷ The United States’s

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1. See James T. Kloppenberg, *To Promote the General Welfare: Why Madison Matters*, 2019 SUP. CT. REV. 355, 361–62.

2. Michiko Kakutani, *The Long Hot Summer and the More Perfect Union*, N.Y. TIMES (Apr. 20, 2007), <https://www.nytimes.com/2007/04/20/books/20book.html> [<https://perma.cc/3ZZ2-5F77>] (“[S]tates issued their own paper money, pursued their own foreign policies and battled one another over trade and commerce; nine states even claimed to have their own navies.”).

3. Kloppenberg, *supra* note 1, at 362.

4. See *id.* at 356.

5. See THE FEDERALIST NO. 10, at 48 (James Madison) (Ian Shapiro ed., 2009).

6. U.S. CONST. pmb1.

7. See Barack Obama, Remarks by the President at the 50th Anniversary of the Selma to Montgomery Marches (Mar. 7, 2015), <https://obamawhitehouse.archives.gov/the-press->

ethos as a nation in pursuit of a better version has itself been borne out by its history. And Senator Birch Bayh, a constitutional framer in his own time, was a towering participant in that history. He shared Madison's concern for the common good and embraced the Constitution's implicit instruction to seek a more perfect nation.

Bayh's achievements during his time representing Indiana in the U.S. Senate between 1963 and 1981 still resonate.⁸ In many ways, they shape the nation we live in today.⁹ The pioneering intellectual property legislation Bayh sponsored, the Bayh-Dole Act,¹⁰ enables research on treatments and vaccines to tackle the COVID-19 pandemic.¹¹ His advocacy against discrimination is a source of opportunity for generations of leaders and a precursor to current demands for racial and gender equality.¹² Disaster victims receive support from the federal government thanks to the legislation he sponsored in 1970.¹³ The Twenty-Fifth Amendment¹⁴ provides clarity to the contemporary discussions of presidential succession and inability.¹⁵ As a presidential election approaches, the Twenty-Sixth Amendment

office/2015/03/07/remarks-president-50th-anniversary-selma-montgomery-marches [https://perma.cc/SQ6T-CRL3] ("These are not just words. They're a living thing, a call to action, a roadmap for citizenship and an insistence in the capacity of free men and women to shape our own destiny.").

8. See Adam Clymer, *Birch Bayh, 91, Dies; Senator Drove Title IX and 2 Amendments*, N.Y. TIMES (Mar. 14, 2019), <https://www.nytimes.com/2019/03/14/obituaries/birch-bayh-dead.html> [https://perma.cc/D8EW-QPJE].

9. See Charles Lane, *We're Living in Birch Bayh's World. We Just Don't Know It.*, WASH. POST (Mar. 18, 2019, 4:24 PM), https://www.washingtonpost.com/opinions/were-living-in-birch-bayhs-world-we-just-dont-know-it/2019/03/18/6cbb1986-498b-11e9-93d0-64dbcf38ba41_story.html [https://perma.cc/NR7Q-U9BC].

10. 35 U.S.C. §§ 200–212.

11. Bob Dole, *Innovation Is Key to Defeating COVID-19*, ROLL CALL (July 24, 2020, 5:30 AM), <https://www.rollcall.com/2020/07/24/bayh-dole-innovation-is-key-to-defeating-covid-19/> [https://perma.cc/6TEW-SR8T]; see also Valeria Bauman, *Cutting-Edge Covid Treatments Owe Development to Carter-Era Law*, BLOOMBERG L. (May 21, 2020, 4:50 AM), <https://news.bloomberglaw.com/pharma-and-life-sciences/cutting-edge-covid-treatments-owe-development-to-carter-era-law> [https://perma.cc/G8XU-2GML].

12. See Clymer, *supra* note 8 (highlighting Bayh's sponsorship of Title IX and the Equal Rights Amendment and his leadership in defeating a white supremacist U.S. Supreme Court nominee); see also Dana Hunsinger Benbow, *Sen. Birch Bayh, In Tears: 'I Had No Idea That Title IX Would Have This Kind of Impact.'* INDYSTAR (Mar. 14, 2019, 9:52 PM), <https://www.indystar.com/story/sports/2019/03/14/sen-birch-bayh-tears-i-had-no-idea-title-ix-would-have-impact/3161553002/> [https://perma.cc/N6G2-7NP7].

13. Andrew Morris, *The Federal Government Swoops in After Disasters Like Hurricane Laura. Here's Why.*, WASH. POST. (Aug. 28, 2020, 6:00 AM), <https://www.washingtonpost.com/outlook/2020/08/28/federal-government-swoops-after-disasters-like-hurricane-laura-heres-why/> [https://perma.cc/93QS-74D2].

14. U.S. CONST. amend. XXV.

15. See *id.*; Alan Blinder, *How the 25th Amendment Came to Be, by the People Behind It*, N.Y. TIMES (Sept. 7, 2018), <https://www.nytimes.com/2018/09/07/us/what-is-25th-amendment.html> [https://perma.cc/2478-5CUY]; see also, e.g., Second Fordham University School of Law Clinic on Presidential Succession, Report, *Fifty Years After the Twenty-Fifth Amendment: Recommendations for Improving the Presidential Succession System*, 86 FORDHAM L. REV. 917 (2017).

enfranchises young voters¹⁶ and Bayh's campaign to abolish the Electoral College¹⁷ is an inspiration to modern reformers. These are only a few examples of Bayh's enduring impact, forty years after he left the Senate.

The pieces in the following pages provide a range of perspectives on Bayh's legacy: scholars analyze his work, beneficiaries of his achievements discuss his impact on their lives, and those who knew and worked with him describe the man behind an extraordinary Senate tenure. All of the works in this collection illuminate Bayh's Madisonian commitment to the common good and his belief in the United States as a nation continually striving to improve itself.

The issues Bayh championed and his approach to legislating reflect a senator committed to the good of the nation over his political self-interest. In his tribute, Senator Patrick Leahy, who served with Bayh, calls him a "senator's senator" who "could work with Republicans and Democrats."¹⁸ And Bayh's selflessness extended beyond politics: Leahy recalls how he risked his life to rescue Senator Ted Kennedy from a burning airplane.¹⁹

Jason Berman, who served as Bayh's chief of staff, remembers Bayh as, "above all else," a "legislator" whose "interests ranged from constitutional amendments to disaster relief and juvenile justice reform."²⁰ Berman says, "He was a practical, liberal Democrat in a conservative Republican state, yet the force of his personality and his love of retail campaigning led to statewide victories."²¹ Supporting liberal causes was not the easiest political path for Bayh. But, as Ira Shapiro observes, Bayh was among a group of senators "infused with the idealism and progressivism of the Kennedy years."²² Shapiro, a former Senate staffer, calls the chamber during the period when Bayh served the "Last Great Senate."²³ In that time, the "Senate was made up of people who thought the Senate was there to serve the national interest. Country first."²⁴

Bayh put country first by advocating for an amendment to update the Constitution's presidential succession procedures. Joel Goldstein, a preeminent scholar of the vice presidency and Twenty-Fifth Amendment, observes in his article: "Legislators had little inclination to invest the huge amount of time and energy to secure a constitutional amendment regarding a

16. U.S. CONST. amend. XXVI (guaranteeing the right to vote to U.S. citizens over eighteen years of age); Clymer, *supra* note 8.

17. John R. Bohrer, *Birch Bayh's Long War on the Electoral College*, BUZZFEED (Nov. 6, 2012, 2:37 PM), <https://www.buzzfeednews.com/article/johnrbohrer/birch-bayhs-long-war-on-the-electoral-college> [<https://perma.cc/4UQY-HZAE>].

18. Patrick Leahy, *Remarks*, 89 FORDHAM L. REV. 75, 75 (2020).

19. *Id.*

20. Jason Berman, *Remarks*, 89 FORDHAM L. REV. 25, 25 (2020).

21. *Id.*

22. Ira Shapiro, *Remarks*, 89 FORDHAM L. REV. 95, 96 (2020).

23. IRA SHAPIRO, *THE LAST GREAT SENATE: COURAGE AND STATESMANSHIP IN TIMES OF CRISIS* (2012).

24. *See* Shapiro, *supra* note 22, at 97.

topic that offered no political payoff.”²⁵ Goldstein identifies Bayh’s many leadership skills that were critical to placing the Twenty-Fifth Amendment in the Constitution. These skills included astute political and legal judgment, a deep commitment to solving hard problems, an inclusive approach, and a willingness to compromise.²⁶

Lowell Beck and one of us (Dean John Feerick) worked with Bayh on the Twenty-Fifth Amendment. As assistant director of the American Bar Association’s (ABA) Washington, D.C., office, Lowell Beck worked alongside the office’s director, Donald Channell, as they collaborated with Bayh in developing and promoting the amendment.²⁷ Beck recalls that the senator’s “energy and enthusiasm” and “perseverance” were crucial.²⁸ “He accomplished so much on landmark issues because he knew the importance of working closely with all members of Congress . . . [a] practical approach, which is not so prevalent today,” Beck observes.²⁹

Dean Feerick wrote a 1963 *Fordham Law Review* article³⁰ that influenced the Twenty-Fifth Amendment’s crafting,³¹ and he was a key collaborator with Bayh on the provision.³² His piece in this collection highlights Bayh’s “thinking and reasoning” as he shepherded it through Congress.³³ What emerges is a picture of a legislator tactfully building consensus and thinking carefully about the legal and policy implications of various alternatives. Feerick quotes Bayh arguing that the “political whims of a particular day” cannot impact presidential succession procedures because they “go to the very heart of our democratic form of government.”³⁴ Bayh’s fellow senators lauded his approach to securing the amendment’s approval. As Feerick notes, Senator Sam Ervin said the amendment’s success was due to “the perseverance, the patience, and the willingness to compromise which was manifested on a multitude of occasions by the junior Senator from Indiana.”³⁵

Political gain was not on Bayh’s mind when he secured passage of the Bayh-Dole Act after losing reelection in 1980.³⁶ Jon Soderstrom describes

25. Joel K. Goldstein, *Birch Bayh and the Twenty-Fifth Amendment: Lessons in Leadership*, 89 FORDHAM L. REV. 51, 53 (2020).

26. *See id.* at 66–74.

27. Lowell Beck, *Remarks*, 89 FORDHAM L. REV. 21, 22 (2020).

28. *Id.* at 22–23.

29. *Id.* at 23.

30. John D. Feerick, *The Problem of Presidential Inability—Will Congress Ever Solve It?*, 32 FORDHAM L. REV. 73 (1963).

31. *See* BIRCH BAYH, ONE HEARTBEAT AWAY: PRESIDENTIAL DISABILITY AND SUCCESSION 46, 49 (1968).

32. *See id.* at 49; John D. Feerick, *Senator Birch Bayh’s Death Spurs Memories of the 25th Amendment’s Origins*, N.Y.L.J. (May 15, 2019, 3:09 PM), <https://www.law.com/newyorklawjournal/2019/05/15/senator-birch-bayhs-death-spurs-memories-of-the-25th-amendments-origins/> [https://perma.cc/Z59P-6ARF].

33. John D. Feerick, *The Twenty-Fifth Amendment—In the Words of Birch Bayh, Its Principal Author*, 89 FORDHAM L. REV. 31, 34 (2020).

34. *Id.* (quoting 109 CONG. REC. 24,421 (1963)).

35. *Id.* at 49 (quoting 111 CONG. REC. 15,594–95 (1965)).

36. David Cohen, *Former Indiana Sen. Birch Bayh Dies at 91*, POLITICO (Mar. 14, 2019), <https://www.politico.com/story/2019/03/14/birch-bayh-indiana-senate-239688>

the profound impact of the law, which reformed licensing of federally funded inventions.³⁷ Soderstrom, who manages Yale University’s intellectual property, declares, “Senator Bayh has made the most significant impact on the U.S. and global economy of any individual who has ever come before and who lives today, full stop.”³⁸ He tells the story of how the Bayh-Dole Act fueled the creation of a drug that became one of the first effective treatments for AIDS.³⁹ Now, as mentioned, the law has enabled breakthroughs in COVID-19 research.⁴⁰ In Soderstrom’s view, Bayh advocated for the legislation “because it just seemed like the right thing to do—to unleash the entrepreneurial spirit behind . . . intellectual property.”⁴¹

It was a desire to do “the right thing” that led Bayh to call for abolishing the Electoral College. His evolution to supporting a nationwide popular vote as the method for picking the president is the focus of remarks by Jesse Wegman,⁴² who interviewed Bayh for his recent book on the Electoral College.⁴³ Wegman recounts how President Lyndon B. Johnson asked Bayh to lead an effort to abolish faithless electors,⁴⁴ who decline to vote for the winner of the popular vote in their states.⁴⁵ After studying the issue and holding hearings, Bayh decided that abolishing the Electoral College was the only answer—even though it was not the answer Johnson, a president from his political party, sought.⁴⁶

Wegman calls one of Bayh’s speeches “the most powerful argument that has been made for the popular vote in American history.”⁴⁷ The speech quoted James Madison’s assertion that “direct election brings with it many virtues and no vices.”⁴⁸ Bayh urged, “Let us echo Madison. Let us put our trust in the people.”⁴⁹ The campaign to replace the Electoral College, which involved another close partnership between Bayh and the ABA,⁵⁰ led to an overwhelming vote in favor by the House of Representatives.⁵¹ But it came up short in the Senate amid opposition from Southern segregationists.⁵²

[<https://perma.cc/P3SW-KJUM>] (“Despite the loss, Bayh worked in the lame-duck session with Kansas Republican Bob Dole to pass the Bayh-Dole Act . . .”).

37. See Jon Soderstrom, *Remarks*, 89 FORDHAM L. REV. 99, 100 (2020).

38. *Id.* at 99.

39. *Id.* at 102.

40. Bauman, *supra* note 11.

41. Soderstrom, *supra* note 37, at 102.

42. Jesse Wegman, *Remarks*, 89 FORDHAM L. REV. 103, 107 (2020).

43. JESSE WEGMAN, *LET THE PEOPLE PICK THE PRESIDENT: THE CASE FOR ABOLISHING THE ELECTORAL COLLEGE* (2020).

44. Wegman, *supra* note 42, at 105.

45. WEGMAN, *supra* note 43, at 142.

46. Wegman, *supra* note 42, at 107.

47. *Id.* at 105.

48. *Id.* at 106 (quoting 112 CONG. REC. 10,999 (1966)).

49. 112 CONG. REC. 10,999 (1966).

50. JOHN D. FEERICK, *THAT FURTHER SHORE: A MEMOIR OF IRISH ROOTS AND AMERICAN PROMISE 270–78* (2020).

51. See H.R.J. Res. 681, 91st Cong. (1969).

52. See Dave Roos, *How the Electoral College Was Nearly Abolished in 1970*, HIST. (Aug. 25, 2020), <https://www.history.com/news/electoral-college-nearly-abolished-thurmond> [<https://perma.cc/C4YE-VZ3E>].

Bayh's advocacy for the popular vote was not just about putting the national interest over politics. The effort also demonstrates his commitment to furthering the pursuit of a "more perfect Union." In the speech Wegman quotes, Bayh asserts that abolishing the Electoral College is "a logical, realistic, and proper continuation of this nation's tradition in history—a tradition of continuous expansion of the franchise and equality in voting."⁵³

The expansion of equality is central to the history of this country's ongoing improvement of itself. Constitutional scholar Akhil Amar observes in his remarks that equality is the theme running through some of the most significant aspects of Bayh's legacy: Electoral College abolition, the Twenty-Sixth Amendment, and the Equal Rights Amendment.⁵⁴ Replacing the Electoral College with the popular vote would make the votes of citizens in different states equal. The Twenty-Sixth Amendment, Amar asserts, recognizes that "[e]ighteen-year-old people should be treated equally with twenty-one-year-old people—they all are eligible for the draft." And the Equal Rights Amendment, if ratified, would add to the Constitution an explicit prohibition on gender discrimination.⁵⁵

The impact of Bayh's advocacy for gender equality is the focus of a panel discussion in this Tribute.⁵⁶ Billie Jean King, a pathbreaking tennis legend and equality advocate,⁵⁷ discusses her experiences as a college athlete in the time before Bayh sponsored Title IX⁵⁸ to ban sex discrimination at federally funded educational institutions.⁵⁹ King recalls working two jobs to support herself, while male collegiate athletes received scholarships.⁶⁰ She describes thanking Bayh for Title IX, telling him that women and girls "wouldn't have [had] the lives we had."⁶¹

King's copanelists reminisce about drawing inspiration from her famous victory over Bobby Riggs in the 1973 "Battle of the Sexes" tennis match.⁶² Kelly Krauskopf and Stephanie Gaitley received scholarships to play college basketball,⁶³ and without Title IX, Gaitley speculates that she might not have gone to college.⁶⁴ She is now the head coach of Fordham University's women's basketball team, and she requires her players to study Title IX.⁶⁵ Krauskopf played a central role in launching the Women's National Basketball Association and its team in Bayh's home state of Indiana. She

53. Wegman, *supra* note 42, at 106 (quoting 112 CONG. REC. 10,998–99).

54. Akhil Reed Amar, *Remarks*, 89 FORDHAM L. REV. 9, 9 (2020).

55. *See id.* at 12.

56. *See generally* Panel Discussion, *Senator Birch Bayh's Contributions to Women's Rights*, 89 FORDHAM L. REV. 81 (2020).

57. *See* Peter Dreier, *Billie Jean King and Remarkable Success of Title IX*, HUFFPOST (June 24, 2012, 2:42 PM), <https://www.huffpost.com/entry/billie-jean-king-and-remarkable-success-of-title-ix> [https://perma.cc/2YJB-9HTA].

58. 20 U.S.C. §§ 1681–1688.

59. *See* Panel Discussion, *supra* note 56, at 88.

60. *Id.*

61. *Id.* at 84.

62. *Id.* at 81.

63. *Id.* at 89, 90.

64. *Id.* at 88.

65. *Id.*

hosted Bayh at the Indiana Fever's first game, which drew a capacity crowd, and recalls telling him in a tearful exchange, "This would never have happened had you not done what you had. Had you not pushed for Title IX"66

Title IX's benefits extend beyond the sports world. Linda Klein, the panel's moderator, sees the impact of the legislation on her legal education at the last law school to accept women.⁶⁷ Klein went on to become the first woman to serve as president of the State Bar of Georgia and then served as president of the ABA.⁶⁸ As ABA president, she awarded Bayh a presidential citation for his legislative achievements.⁶⁹

Jessica Neuwirth, the copresident of the ERA Coalition, describes the ongoing fight for gender equality.⁷⁰ Her focus is the campaign to finish Bayh's effort to add the Equal Rights Amendment to the Constitution.⁷¹ The ERA, Neuwirth asserts, "will be his greatest legacy."⁷²

Bayh's pursuit of equality included fighting racial injustice. PJ Mode recounts Bayh's campaign against the nomination of a self-proclaimed white supremacist to the U.S. Supreme Court.⁷³ Mode, a chief counsel of Bayh's Subcommittee on Constitutional Amendments, explains that "no one thought there was any chance of defeating" the nomination.⁷⁴ But Bayh's long-shot effort succeeded in defeating Carswell's nomination by a Senate vote of 51 to 45.⁷⁵ Mode hails Bayh's moral leadership: "[K]nowing that he would pay a price for the decision—he nevertheless stepped up because he could not stand aside and see a white supremacist take a seat on the Supreme Court."⁷⁶

Bayh's historic legislative legacy would not have been possible without his inspiring character traits. Katherine Bayh, his wife, distills those traits into advice for the next generation of leaders.⁷⁷ "Throughout his career, Birch believed that our country's future was in the hands of the generations coming behind him," she says. "[W]hether it was when he was passing legislation to enfranchise the eighteen-year-old vote, or equalizing academic and athletic opportunities for girls and young women, or teaching and

66. *Id.* at 84.

67. *Id.* at 92.

68. *Biography of Linda A. Klein*, AM. BAR ASS'N https://www.americanbar.org/groups/leadership/aba_officers/klein/ [<https://perma.cc/BHZ7-ZALP>] (last visited June 22, 2020).

69. *ABA to Co-host the First 50 Years of the 25th Amendment Anniversary Program on May 10*, AM. BAR ASS'N (May 5, 2017), https://www.americanbar.org/news/abanews/aba-news-archives/2017/05/aba_to_co-host_the_f/ [<https://perma.cc/F6NL-ABNH>]; see also ABA Center for Public Interest Law, *The First 50 Years of the 25th Amendment: Welcome and Introductions*, YOUTUBE (May 18 2017), https://www.youtube.com/watch?v=dyW8e9t38aU&feature=emb_title.

70. See Panel Discussion, *supra* note 56, at 85–87.

71. *Id.* at 93.

72. *Id.* at 85.

73. See PJ Mode, *Remarks*, 89 FORDHAM L. REV. 77, 77 (2020).

74. *Id.*

75. *Id.* at 79.

76. *Id.*

77. See Katherine Bayh, *Remarks*, 89 FORDHAM L. REV. 13, 14 (2020).

listening to students”⁷⁸ Bayh’s three “hallmarks of a good and happy life” were: helping others by listening to their concerns, appreciating help from others, and compromising for mutual benefit.⁷⁹

Birch Bayh was the kind of leader James Madison knew this country needed. As the only two constitutional authors to frame more than one amendment, Madison and Bayh are fittingly joined in history.⁸⁰ By elevating the national interest, they advanced the nation’s undying pursuit for perfection and set an example for a better future.

78. *Id.* at 13 (footnotes omitted).

79. *See id.* at 14.

80. *See Presidential Succession*, C-SPAN, at 05:42 (Apr. 16, 2010), <https://www.c-span.org/video/?293043-1/presidential-succession> (remarks of William Treanor).