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REMARKS

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REMARKS BY AKHIL REED AMAR*

It's such an honor to be with you all on such an extraordinarily distinguished panel. I'm always so touched when my friend, hero, and role model in life, John Feerick, invites me to come to this extraordinary place and today, in honor of a true legend.

I'm tempted to talk about the Twenty-Fifth Amendment. I'm fascinated by presidential succession issues. Since people are talking about things autobiographically, that's my first television memory—the assassination of President John F. Kennedy. I was in kindergarten. I'm flanked by people who helped write the Twenty-Fifth Amendment itself and someone who literally wrote the book, so I'm not going to talk about the Twenty-Fifth Amendment.

The Twenty-Sixth Amendment does have a great theme. Its theme is the same as Electoral College reform and the Equal Rights Amendment¹ (ERA): it's a theme of equality. Young adults weren't really being treated equally with older adults.² That was a big theme of the 1960s that united many different reform movements.³ That's the theme of Electoral College reform. The basic idea is every vote should count equally, whether it comes from a city, a suburb, or a rural area.⁴ Whether it's from Connecticut, Kentucky, New Hampshire, or Vermont, every vote should count equally. I think that's the deep idea behind the national popular vote.

I think the cleanest way to do it is with a constitutional amendment. There are these efforts to improvise a work-around. I am associated with one of them, the National Popular Vote Interstate Compact.⁵ It's a bit of a

* Sterling Professor of Law and Political Science, Yale University. These remarks were made during the Symposium entitled *Celebrating the Impact of Senator Birch Bayh: A Lasting Legacy on the Constitution and Beyond*, hosted by Fordham Law School's Feerick Center for Social Justice on October 16, 2019, at Fordham University School of Law. The text of these remarks has been lightly edited and footnoted. For an overview of the corresponding Tribute, see *Foreword: Celebrating the Impact of Senator Birch Bayh: A Lasting Legacy on the Constitution and Beyond*, 89 FORDHAM L. REV. 1 (2020).

1. ROBERT A. BRADY, *THE CONSTITUTION OF THE UNITED STATES OF AMERICA AS AMENDED: UNRATIFIED AMENDMENTS & ANALYTICAL INDEX*, H.R. DOC. NO. 110-50, at 30–31 (2007).

2. See Interview, *A Modern Father of Our Constitution: An Interview with Former Senator Birch Bayh*, 79 FORDHAM L. REV. 781, 817–18 (2010).

3. See Eric S. Fish, *The Twenty-Sixth Amendment Enforcement Power*, 121 YALE L.J. 1168, 1184–86 (2012).

4. See Akhil Reed Amar, *Some Thoughts on the Electoral College: Past, Present, and Future*, 33 OHIO N.U. L. REV. 467, 471–73 (2007).

5. See THOMAS H. NEALE, CONG. RSCH. SERV., IF11191, NPV—THE NATIONAL POPULAR VOTE INITIATIVE: PROPOSING DIRECT ELECTION OF THE PRESIDENT THROUGH AN INTERSTATE

harebrained scheme, and I know that because I remember the moment in 2001 when I thought it up in my bathtub.⁶ I thought, “this is a kind of interesting idea,” so I put it up on the web and thought some of my friends might find it an interesting thought experiment. People started taking it seriously, and I thought to myself, “well, actually it does have some problems.”

Here’s one problem, and then I’ll talk about what I actually want to talk about because I was so inspired by that last panel. I want to talk about another kind of equality, which is the ERA, and a different set of arguments about the ERA, which I think is an urgent piece of unfinished business that would honor Senator Birch Bayh’s memory.

The fundamental problem with the National Popular Vote Interstate Compact, which I did help invent, is it can’t fully vindicate this equality and uniformity idea because it would be the first time you tried to count votes from different state baskets in the same system. We’ve never done that before. So, California could say: “Now that we have the National Popular Vote Interstate Compact and we’re going to look at the national popular vote, we’re going to let seventeen-year-olds vote.” Texas might then say: “Ah, that’s very interesting, now California is going to play a little bigger role because more Californians can vote, so we’re going to let sixteen-year-olds vote.” Then Arkansas comes along and says: “Well, actually, we’re going to let dogs vote.”

I believe passionately in this idea of equality, and there are ways of trying to achieve it, but there are some complexities. And I want you, my fellow Americans, to be aware of that. I don’t think I, sitting in the bathtub in 2001, thought everything through as completely as my friend John Feerick did when he, Senator Bayh, and others got the Twenty-Fifth Amendment through, which I don’t think has as many glitches in it as the National Popular Vote Interstate Compact does.

Now, how about the ERA? The ERA is all about equality. There are different ways of accomplishing it. There are work-arounds. I believe in the ERA but not quite in the same way that is being proposed to revive it. I want to explain a cleaner way of reviving the ERA.

First, I’m not sure that I believe in the ERA because it changes much of anything. Gandhi was once asked what he thought of Western civilization. He paused for a moment, and he said: “I think it would be a good idea.”⁷ That’s how I think of the ERA.

I think we already have one, and it’s called the Fourteenth Amendment. It is about equality, about birth equality. It doesn’t use the word race. It says everyone is born a citizen. That is, born an equal citizen. That’s whether you’re born Black or white, male or female, gay or straight, Jew or Gentile,

COMPACT (2019), <https://crsreports.congress.gov/product/pdf/IF/IF11191> [<https://perma.cc/BML8-JG3L>].

6. AKHIL REED AMAR, *THE CONSTITUTION TODAY* 335–36 (2016).

7. Vinay Lal, *Gandhi’s West, the West’s Gandhi*, 40 *NEW LITERARY HIST.* 281, 281 (2009).

within wedlock or out of wedlock, firstborn or fifth-born. You're all born equally, whether or not your parents are citizens the day you're born (mine were not the day I was born in Ann Arbor, Michigan).

I think we already have it, and it's been reinforced by the Nineteenth Amendment, but I want to do it again, to say it again, once more with feeling. I don't think it changes the result in *United States v. Morrison*,⁸ which was wrongly decided to begin with because the Fourteenth Amendment already says Congress shall have power to implement equal citizenship.⁹ The first sentence doesn't even say it's about state action and, in any event, the ERA is about government action, so it won't change the result in *Morrison*. We just need to take seriously the Constitution we already have. So that's not why I'm for the ERA.

It doesn't apply to Title IX¹⁰ and all the patchwork because that's about private action, not governmental action.¹¹ The ERA would be about state, local, and federal governmental action.¹² So, that's not why you should do it.

You should do it because we believe in equality. We should say so all at once. We shouldn't have one state try to ratify it now after the initial proposed amendment lapsed long ago. That's a hinky way of doing it. There was a certain time limit, and now they're going to try to change it retroactively? That's not the way to add a great idea back into the Constitution. And I'm not at all sure the U.S. Supreme Court would treat that as valid. Also, several states, having ratified it, tried to rescind it,¹³ and that's the last in time.

Let's do it from the beginning. I want the movement. I want people in all the states to join hands, women and men, Democrats and Republicans, liberals and conservatives, to learn once again how to amend the Constitution, Birch Bayh style. He got things through with people from across the aisle and across the country. The movement itself will be the message. I don't want to do it in some procedurally awkward, irregular way. I want to start again in California, Connecticut, and New York and have a great national movement to affirm the equality of all persons, male and female, gay and straight. That would be a fitting legacy for Birch Bayh, who actually did get these amendments through with people from across the country.

I want men to be involved in this too. I have to tell you my Billie Jean King story. John Feerick is genuinely one of my heroes in life. Another one of my heroes is Bob Woodward. He's the dedicatee of my last book. I tell

8. 529 U.S. 598 (2000).

9. See Akhil Reed Amar, *The Supreme Court 1999 Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 102–09 (2000).

10. 20 U.S.C. § 16811688.

11. See *id.*

12. See BRADY, *supra* note 1, at 31 (“Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.”).

13. See AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 456–57, 457 n.*, 626–27 n.49 (2005).

the story of why I dedicated the book to him in the afterword. He went to Yale College and I went to Yale College. I arrived at Yale College on my eighteenth birthday, sight unseen. It changed my life, and I've never left. I've often wondered why I got in. In retrospect, I realized it was because I was a muckraking high school journalist because Bob Woodward inspired me to take on unjust systems of power. In 1973, I saw Billie Jean King play Bobby Riggs. A year and a half later, I wrote an exposé in my high school newspaper about whether girls at my high school were treated equally with boys. I found out that my high school was spending eight times as much money on boys' sports as it was on girls' sports, and this didn't seem right to me. That's because Billie Jean King inspired a boy, who doesn't do sports, to think about this deep principle of equality.

Senator Bayh inspired me to think about these deep principles of equality. Eighteen-year-old people should be treated equally with twenty-one-year-old people—they all are eligible for the draft. People in California should have the same vote as people in Wyoming. People in cities should have the same vote as people in suburbs. It's a very powerful idea, this equality idea. I think it actually unites Billie Jean King at one end with Birch Bayh at the other. We should do the ERA, we should put that in the Constitution as clearly as possible. But we should do it the Birch Bayh way, the right way, from the beginning, this time with feeling.