Celebrating the Impact of Senator Birch Bayh

A Lasting Legacy on the Constitution and Beyond

Wednesday
October 16, 2019

3:30 p.m. – 4 p.m., Check-in
4 p.m. – 6:30 p.m., Program

CLE COURSE MATERIALS
Table of Contents

1. Speaker Biographies [view in document]

2. CLE Materials

Panel 1: Women’s Rights

National Coalition for Women and Girls in Education, 2012) Title IX at 40: Working to Ensure Gender in Education. [View in document]


Panel 2: Amending the Constitution: 25th Amendment, 26th Amendment, and the Electoral College

25th Amendment Text. [View in document]

26th Amendment Text and Brief Explanation. [View in document]

Goldstein, Joel K. 86 Fordham L. Rev. 1137, 2017. The Bipartisan Bayh Amendment [View in document]

Amar, Akhil Reed; Amar, Vikram David. How to Achieve Direct National Election of the President Without Amending the Constitution. [View in document]

Feerick, John D. 79 Fordham L. Rev. 907. Presidential Succession and Inability: Before and After the Twenty-Fifth Amendment. [View in document]

Wegman, Jesse. N.Y. Times Birch Bayh and the Quest for a More Perfect Constitution. [View in document]

Panel 3: Senator Bayh’s Enduring Legacy and Example as a Public Servant

Clymer, Adam. N.Y. Times. Birch Bayh, 91, Dies; Senator Drove Title IX and 2 Amendment. [View in document]

79 Fordham L. Rev. A Modern Father of Our Constitution: An Interview with Former Senator Birch Bayh. [View in document]

Pamphlet on Impact of the Bayh-Dole Act. [View in document]
**Akhil Reed Amar**

Akhil Reed Amar is Sterling Professor of Law and Political Science at Yale University. He is one of the nation’s leading constitutional scholars, and has written numerous articles on presidential succession, the Twenty-Fifth Amendment, and the Electoral College. Professor Amar is one of the developers of the National Popular Vote Plan, which Senator Bayh endorsed. He has testified before Congress on a range of constitutional issues, and is a frequent commentator in prominent popular publications and on national news networks. His most recent book, “The Constitution Today: Timeless Lessons for the Issues of Our Era,” was published in 2016.

**Lowell R. Beck**

Lowell Beck has served in top positions in three of the nation’s most prominent organizations. As assistant director of the ABA’s Washington office, Mr. Beck helped lead the organization’s efforts to develop and lobby for the Twenty-Fifth Amendment. He later served as deputy executive director of the ABA. While he was the founding executive director of Common Cause, the organization lobbied for the approval of the Twenty-Sixth Amendment. Mr. Beck subsequently served as President of the National Association of Independent Insurers. He authored the 2016 book “I Found My Niche: A Lifetime Journey of Lobbying and Association Leadership.”

**Jason Berman**

Jason Berman was a close advisor to Senator Birch Bayh for over a decade. Mr. Berman left the Senator’s office as Chief of Staff to become the first Vice President for Public Affairs for Warner Communications. He next served as Chairman and CEO of the Recording Industry of America before President Clinton appointed him Special Counsel for Trade. After leaving the White House, Mr. Berman became Chairman and CEO of the International Federation of the Phonographic Industry, the international trade organization for record labels. He is currently on the Board of the Baruch College Fund, City College of New York and is Chairman of its Scholarship Campaign.

**John R. Bohrer**

John R. Bohrer is a reporter, historian, and television news producer. He is currently the executive producer of MSNBC’s “The 11th Hour With Brian Williams.” Formerly a senior producer of “Morning Joe,” Mr. Bohrer prepared anchors for interviews with dozens of presidential candidates and newsmakers. His first book, “The Revolution of Robert Kennedy,” was published in 2017. His writing has appeared in New York magazine, The New Republic, Politico, and USA Today, among others. He is a graduate of Washington College in Chestertown, Maryland, where he was a student of Senator Bayh.

**John D. Feerick**

John D. Feerick holds the Sidney C. Norris Chair of Law and Public Service at Fordham University School of Law, where he was Dean from 1982 to 2002. Dean Feerick was influential in the drafting and ratification of the Twenty-Fifth Amendment, including through his service on a special American Bar Association conference on presidential inability. After he worked with Senator Bayh on the Twenty-Fifth Amendment, the pair turned their attention to developing and advocating for a constitutional amendment to implement direct popular election of the president. Dean Feerick’s most recent book is “The Twenty-Fifth Amendment: Its Complete History and Applications.”

**Stephanie Gaitley**

Coach Stephanie Gaitley is tipping off her 34th year as a Head Coach, and eighth year as the Head Coach of Fordham’s women’s basketball team. Coach is currently the 16th winningest active NCAA coach. Additionally she ranks as the 32nd winningest coach all time in the NCAA. A 1982 graduate and Hall of Famer at Villanova, Coach helped lead the Wildcats to the Final Four and was named a COSIDA Academic All American. Coach has saved her best efforts of her career for Rose Hill. Under her leadership the Rams have averaged 21 wins per year, captured two Atlantic 10 Championships, two NCAA tournament bids, and four WNIT tournament bids. Coach has been selected as the New York Metropolitan Coach of the Year twice and the Basketball Coaches Association of New York once. Coach has a career record of 633-365 and has the second most wins in the history of the Atlantic 10 Conference.

**Joel K. Goldstein**

Joel K. Goldstein is a leading scholar on constitutional issues involving the presidency, especially the vice presidency and the Twenty-Fifth Amendment. From 2005 to 2019, he was the Vincent C. Immel Professor of Law at Saint Louis University School of Law, where he joined the faculty in 1994. As a Rhodes Scholar, he participated in an American Bar Association symposium on the vice presidency held at Fordham Law School that Senator Bayh attended. His book, “The White House Vice Presidency: The Path to Significance, Mondale to Biden,” was published in 2016.

**Billie Jean King**

Billie Jean King is a 39-time tennis Grand Slam champion and pioneering advocate for gender equality. From the early years of her legendary tennis career, Ms. King advocated for women’s rights, calling for equal pay in the men’s and women’s games. She tirelessly campaigned for passage of Title IX, including by
testifying before Congress. She is the founder of the Women’s Sports Foundation, which has used Title IX to pursue equal athletic and educational opportunities for women. Following her tennis career, Ms. King became the first woman professional sports commissioner when she co-founded and led World Team Tennis. In 2009, she was the first female athlete to be awarded the Presidential Medal of Freedom, the nation’s highest civilian honor.

**Linda Klein**
Linda Klein is the Past President of the American Bar Association and senior managing shareholder at Baker Donelson Bearman Caldwell & Berkowitz. She served as the President of the ABA from 2016 to 2017. In 1997, Klein became the first woman to serve as president of the State Bar of Georgia. During her term, she devised a proposal and advocated for funding of legal assistance for indigent victims of domestic violence. A member of the American Law Institute, Klein is listed in “The Best Lawyers in America,” “Who’s Who in America” and “Chambers USA.”

**Kelly Krauskopf**
Kelly Krauskopf is the Assistant General Manager of the Indiana Pacers. She is the first woman in NBA history to hold this position. Before coming to the Pacers, she was the general manager of the WNBA’s Indiana Fever. Under her leadership, the team made the playoffs in twelve consecutive seasons, reaching the Finals three times and winning the title in 2012. She was previously the WNBA’s first Director of Basketball operations. Ms. Krauskopf played basketball as a student at Texas A&M in the years after Title IX’s passage. She was involved in honoring Sen. Bayh at the inaugural WNBA game in 1997 and again at the Fever’s inaugural game in 2000.

**Patrick Leahy**
Patrick Leahy is the senior U.S. Senator from Vermont. He was elected to the Senate in 1974, and is the most senior member of the chamber. He is currently the Vice Chair of the Senate Appropriation Committee, and serves on the Judiciary Committee, Agriculture, Nutrition & Forestry Committee, and the Committee on Rules and Administration. Senator Leahy served with Senator Bayh on the Judiciary Committee.

**PJ Mode**
PJ Mode served as Chief Counsel of the Senate Subcommittee on Constitutional Amendments and Chief Legislative Assistant to Senator Bayh from 1970 to 1973. During his time in these positions, Mr. Mode was involved in, among other things, the enactment of the Twenty-Sixth Amendment, passage of Title IX, and the defeat of President Nixon’s nomination of Judge Harrold Carswell to the Supreme Court. Mr. Mode was an attorney at the law firm Wilmer, Cutler & Pickering for over three decades, serving as Chairman of the firm from 1987 to 1995. He was subsequently Special Counsel to Citigroup from 2003 to 2013.

**Ira Shapiro**
Ira Shapiro served as Chief U.S. Trade Negotiator with Japan and Canada, and as General Counsel in the Office of the U.S. Trade Representative during the Clinton administration. He served in senior staff positions in the Senate for over a decade, and is the author of two books on the chamber. “The Last Great Senate: Courage and Statesmanship in Times of Crisis” focuses on the Senate in the late 1970s, when Senator Bayh was serving his final term. His most recent book, released in 2018, is “Broken: Can the Senate Save Itself and the Country?” Ambassador Shapiro is currently a senior advisor with the Albright Stonebridge Group.

**Jon Soderstrom**
Jon Soderstrom is the Managing Director of the Office of Cooperative Research at Yale University. The office manages the intellectual assets created at Yale to achieve the maximum benefit for the public and provide a financial return to support the University’s research efforts. The Bayh-Dole Act was response for the creation of the Office and its activities. Dr. Soderstrom was a founding board member and past president of the Association of Federal Technology Transfer Executives. He has testified before Congress on technology transfer issues and served as an expert witness in patent infringement litigations.

**Jesse Wegman**
Jesse Wegman is a member of the *New York Times* editorial board, writing editorials on the Supreme Court and legal affairs. He graduated from New York University School of Law in 2005. Before that, he was a producer and reporter for several National Public Radio programs. His forthcoming book, for which he interviewed Senator Bayh and his staffers, is “Let the People Pick the President: The Case for Abolishing the Electoral College,” and is being published in March 2020 by St. Martin’s Press.
## Contents

**Executive Summary:**
EDUCATION FOR EVERYONE ......................... 1

---

**Title IX and Athletics:**
PROVEN BENEFITS, UNFOUNDED OBJECTIONS ............ 7

---

**Science, Technology, Engineering, and Mathematics (STEM):**
EQUALITY NARROWS THE ACHIEVEMENT GAP ............. 17

---

**Career and Technical Education:**
TACKLING OCCUPATIONAL SEGREGATION OF THE SEXES ........ 27

---

**Ending Sexual Harassment:**
ENFORCEMENT IS KEY ................................... 37

---

**Single-Sex Education:**
FERTILE GROUND FOR DISCRIMINATION ................. 47

---

**Pregnant and Parenting Students:**
OFTEN LEFT BEHIND ...................................... 55

---

**Chronology of Title IX** .................................. 63

---

**NCWGE Affiliated Organizations** ....................... 67

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FORTY YEARS AGO, CONGRESS PASSED Title IX of the Education Amendments of 1972 to ensure equal opportunity in education for all students, from kindergarten through postgraduate school, regardless of sex. This landmark legislation states:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.

— 20 U.S.C. §1681

Girls and women have made great strides in education since the passage of Title IX. The days when girls were blatantly told that they couldn't take shop or advanced math are, for the most part, gone. Females make up a growing proportion of students in many math, science, and technology-related fields, particularly in the life sciences. Given greater opportunities to participate in athletics, they are now doing so in record numbers. They have also made gains in career and technical education at the high school and community college levels. Time and again, girls and women have proved that they have the interest and aptitude to succeed in areas once considered the exclusive purview of males.

Despite tremendous progress, however, challenges to equality in education still exist. Women's advancement in some areas, including computer science and engineering, has stagnated or even declined in recent years. Pregnant and parenting students are frequently subjected to unlawful policies and practices that deter them from completing their education. Nearly half of all middle and high school students report being sexually harassed in school. And single-sex classrooms often cater to stereotypes about how boys and girls learn, to the detriment of both sexes.

These and other challenges affect the ability of all students—male and female—to get the most out of their education. This in turn endangers the ability of U.S. schools and universities to produce skilled workers who can succeed in an increasingly competitive global marketplace.

Who Benefits from Title IX?

Contrary to the opinion of critics, Title IX is not an entitlement program; it offers no special benefits or advantages for girls and women. Rather, it is a gender-neutral piece of legislation designed to ensure equality in education for all students by eliminating sex-based discrimination. Title IX and related regulations provide guidelines, procedures, and tools for preventing and addressing inequities that can hinder students' ability to succeed in school and beyond. Title IX benefits girls and women who want to achieve their maximum potential in education without barriers on the basis of their sex. It also benefits boys and men who want equal access to all education and career options. By prohibiting hostile, threatening, and discriminatory behavior, Title IX protects the rights of all students to learn in a healthy environment. These advantages extend beyond individual
### TITLE IX AT WORK

Following are ten facts about Title IX, including both familiar and lesser-known aspects of the legislation.

1. In schools that receive federal funding, Title IX protects all students—male and female—from discrimination on the basis of sex.

2. Title IX also prohibits sex discrimination in employment, protecting school staff as well as students.

3. Title IX requires schools to provide male and female students with equal opportunities to participate in athletics; it does not set quotas or demand equal funding for different sports.

4. Title IX mandates equity in career and technical education programs, including those traditionally dominated by men (e.g., construction, IT), as well as those traditionally dominated by women (e.g., nursing).

5. Title IX protects girls’ and women’s rights to equity in STEM education, including equal opportunities and access to institutional resources.

6. Title IX offers both male and female students protection against sex-based harassment from teachers, school staff, other students, and school visitors.

7. Title IX sets strict limits on programs that separate girls and boys, and prohibits the discrimination that can occur when such programs are based on gender stereotypes.

8. Title IX protects students from being refused enrollment or excluded from school-related activities because of pregnancy or parenting status.

9. Title IX requires schools to adopt and disseminate policies prohibiting sex discrimination, develop grievance procedures, and designate a Title IX coordinator to oversee compliance. Title IX also protects students and staff from retaliation for reporting violations.

10. Over the past 40 years, major gains in female participation in areas such as science, math, business, and athletics have shown that girls and women have both the interest and the aptitude to succeed in these fields—without detracting from opportunities for males.

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In recent years Title IX has come under attack from critics who claim that the law, which mandates equality in education, actually favors girls and women at the expense of boys and men. However, studies show that Title IX has made greater educational opportunities available for students of both sexes.

This report outlines issues and recommended solutions in six areas covered by Title IX: athletics; science, technology, engineering, and mathematics (STEM); career and technical education; sexual harassment; single-sex education; and the rights of pregnant and parenting students. Through this examination, the National Coalition for Women and Girls in Education (NCWGE) seeks to inform the continued search for policies that will promote equal educational opportunity in all of these areas.

### ATHLETICS

Title IX has increased female participation in sports exponentially. In response to greater opportunities to play, the number of high school girls participating in sports has risen tenfold in the past 40 years, while six times as many women compete in college sports. These gains demonstrate the key principle underlying the legislation: Women and girls have an equal interest in sports and deserve equal opportunities to participate.

Despite these advances, hurdles for female athletes remain. Girls and women still have fewer opportunities to participate in school sports than their male counterparts. In addition, different groups are not represented equally: Less than two-thirds of African-American and His-
panic girls play sports, while more than three-quarters of Caucasian girls do. In addition to having fewer opportunities, girls often endure inferior treatment in areas such as equipment, facilities, coaching, and scheduling.

Criticism of the effects of Title IX on athletics often springs from misconceptions about how the law works. Title IX does not mandate quotas or demand equal funding for all sports. Nor has opening opportunities for girls and women come at the expense of boys and men; in fact, athletic participation among males has continued to rise over the past 40 years.

SCIENCE, TECHNOLOGY, ENGINEERING, AND MATH (STEM)

With greater opportunity to study and work in science, technology, engineering, and math, girls and women have made great progress in these fields over the past 40 years. Nonetheless, more work is needed to achieve equality. Stereotypes about male and female abilities—none of which are supported by science—can affect access to opportunities for girls and women in STEM as well as student performance. Hiring and promotion policies in academia and elsewhere also hold women back.

Recent gains in girls’ mathematical achievement demonstrate the importance of cultural attitudes in the development of students’ abilities and interests. They also demonstrate the law’s impact on society. As learning environments have become more open since the passage of Title IX, girls’ achievement has soared. For example, the proportion of seventh- and eighth-grade girls who scored in the top 0.01% of students on the math SAT rose from 1 in 13 in the early 1980s to 1 in 3 by 2010.

At the college and postgraduate levels, women have made huge gains in some STEM fields but only modest progress in others. Women now earn more than half of all bachelor’s degrees in biological and social sciences. In math, physics, engineering, and computer science, however, the proportion of women earning bachelor’s degrees has remained stagnant or even declined over the past decade.

Women’s share of PhDs across all STEM fields has risen dramatically, from just 11% in 1972 to 40% by 2006; the numbers vary widely by field, though, with women earning over half the PhDs in the life sciences but just over 20% in computer science and engineering. Continuing female attrition in STEM programs at all levels comes at a devastating cost to U.S. businesses and research institutions, which need access to the brightest minds in STEM.

CAREER AND TECHNICAL EDUCATION

Career and technical education (CTE) prepares youth and adults for a wide range of careers as well as further education in areas such as information technology, construction, manufacturing, auto engineering, and other skilled trades. Expanding access to technical occupations can help to shrink the gender wage gap. Through CTE, women can gain the knowledge and skills required to enter higher-paying, “nontraditional” occupations for women, defined as those in which less than 25% of the workforce is of their gender.

Since the passage of Title IX, there has been a gradual increase in the number of females in technical and other occupational programs leading to nontraditional careers. Although women and girls have made some advances in CTE since Title IX passed, barriers to entry—including gender stereotypes, implicit bias, unequal treatment, and sexual harassment—remain high. Males may also be discouraged from taking nontraditional courses, including courses in relatively high-growth, high-wage professions in health care and other fields.

Federal law needs to offer states both incentives and resources for ensuring gender equity. It should also mandate sanctions for discrimination. Better tracking and reporting of data, incentives for increasing girls’ and women’s
participation in high-wage occupations, and resources for developing effective recruitment and retention strategies are needed to ensure equal access to CTE for all students.

**SEXUAL HARASSMENT AND BULLYING**

Harassment based on sex, including failure to conform to gender stereotypes, is prohibited by Title IX. Much of what is referred to as “bullying” is actually unlawful peer-on-peer harassment. The law applies whether the harassment involves students of the opposite or of the same sex, and whether it is conducted in person, online, or through other media. Title IX’s protection extends to sexual harassment in all of a school’s programs or activities, whether the harassment occurs on school property, on a school bus, or at an off-site school event.

Despite efforts to curb sexual harassment, this form of discrimination is still prevalent in schools and on college campuses. More than half of girls and 40% of boys in grades 7 through 12 reported being sexually harassed during the 2010–2011 school year. Among lesbian, gay, bisexual, and transgender students, harassment is even more extensive: 85% say they have been verbally harassed, and 19% report physical assault. In addition, nearly two-thirds of college students aged 18–24 experience some form of sexual harassment. The numbers for men and women are similar, although women report greater emotional and educational disruption from harassment.

When sexual harassment occurs, Title IX requires that schools take immediate, effective action to eliminate the hostile environment, prevent its recurrence, and remedy the effects on the victim. These steps are essential for creating a learning environment in which all students can succeed. Better training and strengthening of the law—for example, giving students the same protection from harassment that employees have in the workplace—would help curb this widespread and damaging conduct.

**SINGLE-SEX EDUCATION**

In recent years, there has been a growing trend of separating students on the basis of sex. This trend raises serious equality and policy con-
cerns, and may violate numerous provisions of state and federal law. In public schools, the circumstances under which students can be separated by sex are limited by the Constitution and Title IX. Although the U.S. Department of Education loosened restrictions on single-sex education in 2006, schools must still meet a host of legal requirements before separating students by sex.

Few schools meet these requirements. Many single-sex programs alleging a basis in research are in fact based on claims that amount to little more than repackaged sex stereotypes—for instance, that boys need authority and excel at abstract thinking, while girls need quiet environments that focus on cooperation and following directions. In the classroom, separating boys and girls can reinforce such stereotypes in ways that are stigmatizing and damaging to both groups. Moreover, single-sex programs can discriminate against one group in allocating resources or educational opportunities.

Despite assertions to the contrary, separating students by sex has not been proven to improve educational outcomes. Evaluations generally fail to compare single-sex programs with comparable coed programs or to control for other factors that affect outcomes, such as class size and student ability. Given the flaws in the justification for single-sex education and the documented inequities that spring from separating boys and girls, stricter regulation and compliance monitoring are essential. The Department of Education should rescind the looser 2006 regulations and clarify what is and is not permissible to help put an end to inequitable programs.

**PREGNANT AND PARENTING STUDENTS**

Despite legal protection under Title IX, pregnant and parenting students often face discrimination in school, including being pushed toward separate education programs, facing inequitable absence policies, and being denied access to extracurricular activities.

Pregnant and parenting teens face many obstacles to enrolling in, attending, and succeeding in school. Without adequate support, many drop out, lowering their chances of finding employment that offers economic security. This issue affects boys as well as girls: Close to half of female dropouts and one-third of male dropouts say that becoming a parent is a factor in their decision to leave high school.

Lack of knowledge of the law is a major issue in overcoming discrimination. Measures such as training school officials to understand the rights and needs of pregnant and parenting students and tracking compliance are important for ensuring equal access to education. In addition, greater support for pregnant and parenting students—including flexible leave options and services such as child care, counseling, and tutoring—can help ensure that these students have the opportunity to succeed in school.

**Continued Progress**

Even today, 40 years after the passage of Title IX, the goal of gender equity in education has not been fully realized. Each chapter of this report includes recommendations for the Title IX area covered in that chapter. In addition, NCWGE believes that the following overarching recommendations will enable continued progress:

1. **Awareness.** All stakeholders, including advocacy groups and the federal government, must actively educate the public and educa-
tional entities about Title IX and its broad application of educational equity. Education institutions should be fully aware of their responsibilities under Title IX.

2. Enforcement. The U.S. Department of Education's Office for Civil Rights (OCR) should continue to enhance its Title IX enforcement and public education efforts and should conduct compliance reviews in areas not currently monitored, such as the treatment of pregnant and parenting students. Granting agencies should conduct regular and random Title IX compliance reviews of their grantee institutions, ensuring educational equity across all areas of Title IX.

3. Transparency. Congress should require schools and universities to provide enhanced education data collection and reporting, including full disaggregation and cross-tabulation by gender, race, ethnicity, and disability, so that schools, parents, policymakers, and advocates can see how smaller subgroups of students are doing in school. Data collection among federal grantee institutions should be standardized and include students as well as faculty and administrators at all levels, broken out by salary/compensation, promotion tenure status, and field of study.

4. Coordination. Title IX coordinators in each state, district, and school must be identified, notified of their responsibilities, and given training and resources to do their jobs. A complete list of these individuals and their contact information should be readily available on the U.S. Department of Education website, as well as on the websites of each state Department of Education and school district. OCR should have regular communication with Title IX coordinators to keep them informed. Congress and the Department of Education should coordinate the efforts of state and local Title IX coordinators in expanding programs to attract girls and women to fields in which they are underrepresented, particularly in STEM and trade careers.

5. Funding. Congress should restore federal funding to state education agencies for gender equity work, including funding for state Title IX coordinators and programs and for technical assistance with compliance. Funding should also be maintained for the Department of Education's regional Equity Assistance Centers.

About NCWGE

The National Coalition for Women and Girls in Education is a nonprofit organization established to educate the public about issues concerning equal rights for women and girls in education, monitor the enforcement and administration of current legislation, conduct and publish research and analysis of issues concerning equal educational rights for women and girls, and take the steps necessary and proper to accomplish these purposes.

NCWGE was formed in 1975 by representatives of national organizations concerned about the government's failure to issue regulations implementing Title IX of the Education Amendments of 1972. NCWGE was successful in mobilizing strong support for publication of the Title IX regulations by the then-Department of Health, Education, and Welfare.

NCWGE continues to be a major force in developing national education policies that benefit women and girls; providing a valuable forum to share information and strategies to advance educational equity; advocating for women and girls regarding educational issues, including the interpretation and implementation of Title IX; and monitoring the work of Congress and federal agencies on education policies and programs.
For many, Title IX is synonymous with expanded opportunities in athletics. Before Title IX, women and girls were virtually excluded from most athletic opportunities in schools. Since the legislation passed, girls and women have been able to participate in athletics at much higher rates. Opportunities for girls to participate in high school athletics in particular have increased exponentially.

The benefits of increased participation affect not just female athletes but society as a whole. Research has found that girls who play sports are less likely to get pregnant or take drugs than those who don’t play sports; they’re also more likely to graduate and go on to college. Furthermore, sports participation reduces the risk of developing illnesses such as obesity, heart disease, osteoporosis, and breast cancer, all of which have huge associated social and financial costs.

Although the athletic provisions of Title IX are probably the most well known aspects of the legislation, myths about the requirements and impact of Title IX are prevalent. The law requires that schools treat the sexes equally with regard to participation opportunities, athletic scholarships, and the benefits and services provided to male and female teams. It does not require that schools spend the same amount on both sexes, nor has it resulted in reduced opportunities for boys and men to play sports.

Despite the substantial benefits of participation in sports and Title IX protections against sex discrimination in athletics, the playing field is still not level for girls. Girls are twice as likely to be inactive as boys, and female students have
fewer opportunities to participate in both high school and college sports than their male counterparts. Greater enforcement of Title IX and diligent efforts to advance women and girls in sports are still necessary to achieve truly equal opportunity on the playing fields.

Impact of Title IX on Sports Participation

Opportunities for girls and women in athletics have increased exponentially since the passage of Title IX. During the 1971–1972 school year, immediately before the legislation passed, fewer than 300,000 girls participated in high school athletics. To put that number in perspective, just 7% of all high school athletes were girls. In 2010–2011, the number of female athletes had climbed by more than tenfold to nearly 3.2 million, or 41% of all high school athletes (see the figure on the opposite page).1

Title IX has also had a huge impact on women’s participation in college athletics. In 1971–1972, fewer than 30,000 women participated in college sports. In 2010–2011 that number exceeded 190,000—about 6 times the pre-Title IX rate (see the figure).2 In 1972, women received only 2% of schools’ athletic budgets, and athletic scholarships for women were nonexistent.3 In 2009–2010, women received 48% of the total athletic scholarship dollars at Division 1 schools, although they received only 40% of total money spent on athletics, despite making up 53% of the student body.4

Despite huge gains over the past 40 years, much work still needs to be done. Although overall sports participation rates have grown for both males and females, girls’ and women’s participation still lags behind that of their male counterparts, and increases among females have remained stalled for the past five years. Given the proven health and social benefits of athletics, it is essential that woman and girls be given equal opportunities to participate.

As the numbers show, male participation in both high school and college athletics has continued to increase since Title IX’s enactment. Although the rate of increase among males hasn’t matched growth among females, that is no doubt because opportunities were already so prevalent for boys and men. In fact, males continue to have more opportunities to participate in sports than females at all school levels.

**KEY FINDINGS**

1. **Title IX has increased female participation in sports exponentially.** In response to greater opportunities to play, the number of high school girls participating in sports has risen tenfold in the past 40 years, while six times as many women compete in college sports.

2. **Huge gains in the number of female athletes demonstrate the key principle underlying the legislation:** Women and girls have an equal interest in sports and deserve equal opportunities to participate.

3. **Participation in sports confers both immediate and long-term benefits:** Female athletes do better in school, are less likely to engage in risky behavior, and are healthier than girls and women who do not participate in sports.

4. ** Attacks on Title IX often spring from misconceptions about how the law works.** Courts have consistently upheld the validity of the law.

5. **Despite many gains over the past 40 years, barriers remain to participation in sports for girls and women.** Greater enforcement of the law by the federal and state governments, self-policing of compliance by schools, and passage of the High School Athletics Transparency Bills will help bring about greater equity.
Male and Female Participation in High School Sports, 1972–2011


Male and Female Participation in College Sports, 1972–2011

Benefits of Sports for Women and Girls

The benefits of participation in athletics for girls and women encompass both immediate and long-term health advantages, as well as a range of other benefits that have a deep and lasting impact on society as a whole.

SPORTS LEAD TO BETTER SHORT- AND LONG-TERM HEALTH

Obesity is an emerging children’s health epidemic and a particular concern for girls of color. Of girls aged 6 to 11, 25% of African-American girls and just under 16% of white girls are overweight. Of girls aged 12 to 19, 24% of African-American girls and 15% of white girls are overweight. It is well documented that regular physical activity can reduce the risk of obesity for adolescent girls, making it an important strategy for combating obesity and related illnesses. Minority girls are more likely to participate in sports through their schools than through private organizations, rendering it even more critical that they have equal access to school-sponsored sports to enable them to be physically active.

Participation in school athletics can also have positive health effects later in life. The New York Times recently highlighted research showing that women who played sports while young had a 7% lower risk of obesity 20–25 years later, when women were in their late 30s and early 40s. The study notes that while a 7% decline in obesity is modest, “no other public health program can claim similar success.”

In addition to combating obesity, sports participation decreases a young woman’s chance of developing a range of other diseases, including heart disease, osteoporosis, and breast cancer. The combined social and financial impact of reducing these health issues through school sports programs can be enormous.

ATHLETES ARE LESS LIKELY TO ENGAGE IN RISKY BEHAVIORS

The direct health benefits of increased activity may come as no surprise, but participation in sports can have less obvious benefits as well. These benefits extend well beyond the girls and women affected to include their families and broader social structures.

For example, high school athletes are less likely to smoke cigarettes or use drugs than their peers who don’t play sports. One study found that female athletes are 29% less likely to smoke than non-athletes. Given the high costs of smoking-related illnesses and deaths, these figures are significant.

Adolescent female athletes also have lower rates of both sexual activity and pregnancy than their non-athlete counterparts. In fact, female athletes are less than half as likely to become pregnant in adolescence as their peers who are not athletes. This is true for white, African-American, and Latina athletes.

FEMALE ATHLETES FARE BETTER IN SCHOOL AND BEYOND

Studies have found that female participation in sports offers a range of academic benefits. Young women who play sports are more likely to graduate from high school, have higher grades, and score higher on standardized tests than non-athletes. This pattern of greater academic achievement is consistent across
community income levels. One statewide, three-year study by the North Carolina High School Athletic Association found that athletes achieved grade point averages that were nearly a full point higher than those of their non-athlete peers, in addition to higher graduation rates.

These benefits go some way toward closing certain educational gaps for girls and women. For example, female athletes are more likely to do well in science classes than their classmates who do not play sports. In addition, female athletes of color consistently benefit from increased academic success throughout their education. For example, female Hispanic athletes are more likely than non-athletes to improve their academic standing, graduate from high school, and attend college.

The lessons of teamwork, leadership, and confidence that girls and women gain from participating in athletics can help them after graduation as well as during school. A whopping 82% of female business executives played sports, with the majority saying that lessons learned on the playing field contributed to their success.

The Blame Game: Title IX Myths and Facts

Opponents of Title IX claim that there is a negative impact on boys’ and men’s sports arising from attempts to increase opportunities for girls and women in athletics. These criticisms are based on misinterpretations of the law and are not supported by the facts.

WHAT THE LAW SAYS

Title IX requires that schools treat both sexes equally with regard to three distinct aspects of athletics: participation opportunities, athletic scholarships, and treatment of male and female teams.

Participation. The Department of Education uses a “three-part test” to evaluate schools’ compliance with the requirement to provide equal participation opportunities (see the boxed insert for details). This test was set forth in a Policy Interpretation issued by the Office for Civil Rights (OCR) in 1979 and has withstood legal challenges.

Athletic Financial Assistance. Title IX requires that scholarships be allocated in proportion to the number of female and male students participating in intercollegiate athletics. OCR has made clear that schools will be found in compliance with this requirement if the percent-age of total athletic scholarship dollars received for each sex is within one percent of their levels of participation. In other words, if women comprise 42% of the athletes on campus, the school must provide between 41% and 43% of its athletic scholarship dollars to female athletes.

Equal Treatment of Athletes. Title IX also requires equal treatment of male and female teams. Title IX does not require that each men’s and women’s team receive exactly the same services and equipment, but it does require that male and female athletes receive equal treatment overall in areas such as locker rooms, practice and game facilities, recruitment, academic support, and publicity.

THE THREE-PART TEST

Under the three-part test, schools are in compliance with the law if:

- Males and females participate in athletics in numbers substantially proportional to their enrollment numbers; or
- The school has a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of members of the underrepresented sex; or
- The institution’s existing programs fully and effectively accommodate the interests and abilities of the underrepresented sex.
Recent court challenges highlight the way these provisions have been misinterpreted. For example, a coalition of wrestlers sued the Department of Education in 2002 and 2007, alleging that the three-part test unlawfully discriminates against males. These and similar allegations have been resoundingly rejected by all of the federal appellate courts that have considered them.23

**Myth 1: Title IX requires quotas.** Title IX does not require quotas; it simply requires that schools allocate participation opportunities in a nondiscriminatory way. The three-part test is lenient and flexible, allowing schools to comply even if they do not satisfy the first part. The federal courts have consistently rejected arguments that Title IX imposes quotas.

**Myth 2: Title IX forces schools to cut sports for boys and men.** Title IX does not require or encourage the cutting of any sports. It does allow schools to make choices about how to structure their programs as long as they do not discriminate. Instead of allocating resources among a variety of sports, many college administrators are choosing to take part in the basketball and football “arms race” at the expense of other athletic programs. In Division I-FBS (formerly Division I-A), for example,
basketball and football consume 80% of total men's athletic expenses. Average expenditures on football alone in this division ($12+ million) exceed average expenditures on all women's sports ($8+ million).\textsuperscript{25}

**Myth 3: Men's sports are declining because of Title IX.** Opportunities for men in sports—measured by numbers of teams as well as athletes—have continued to expand since the passage of Title IX. Between the 1988–1989 and the 2010–2011 school years, NCAA member institutions added 3,727 men's sports teams and dropped 2,748, for a net gain of nearly 1,000 men's teams. The teams added and dropped reflect trends in men's sports: wrestling and gymnastics teams were often dropped, while soccer, baseball, and lacrosse teams were added. Women made greater gains over the same period, but only because they started at such a deficit; 4,641 women's teams were added and 1,943 were dropped. During the 2010–2011 school year, NCAA member institutions actually dropped slightly more women's teams than men's teams.\textsuperscript{26}

**Myth 4: Title IX requires schools to spend equally on male and female sports.** The fact is that spending does not have to be exactly equal as long as the benefits and services provided to the men's and women's programs are equal overall. The law recognizes, for instance, that football uniforms cost more than swimsuits; therefore, a discrepancy in the amount spent on uniforms for men's teams versus women's teams is not necessarily a problem. However, the school cannot provide men with top-notch uniforms and women with low-quality uniforms, or give male athletes home, away, and practice uniforms and female athletes only one set of uniforms. A large discrepancy in overall funding is a red flag that warrants further scrutiny. There is currently a large gap among Division I-FBS schools, where women receive just 28% of the money spent on athletics.\textsuperscript{27}

**Myth 5: Men's football and basketball programs subsidize female sports.** The truth is that these high-profile programs don't even pay for themselves at most schools. Even among the most elite divisions, nearly half of men's football and basketball programs spend more money than they generate.\textsuperscript{28}

**Recent Legislative Action: Attacks and Advances**

**LEGAL AND OTHER CHALLENGES**

Even though much work remains to be done to achieve gender equity in athletics, Title IX opponents continue to try to undermine the law through media attacks, legal challenges, and appeals to Congress and the Executive Branch. The basic claim made by these opponents is that women and girls are inherently less interested in sports than are men and boys, and that providing females with equal opportunities therefore discriminates against males.

The most recent attacks have targeted secondary school programs. In July 2011, the Ameri-
Title IX at 40

The American Sports Council filed a lawsuit against the U.S. Department of Education, claiming that Title IX should not apply to secondary schools. This case, like other similar cases, was dismissed. The court said that the group could not show that Title IX is the cause of their injuries (which they describe as the potential reduction of athletic opportunities for boys) because the law does not require schools to reduce opportunities.

A MAJOR STEP FORWARD

On April 20, 2010, the Department of Education issued a new policy document revoking the harmful 2005 Additional Clarification that weakened schools’ obligations under Title IX to provide women and girls with equal athletic opportunities. The 2005 Clarification created a major compliance loophole by eliminating the requirement (under part three of the three-part test) for schools to look broadly and proactively at whether they are satisfying female students’ interests in sports. Instead, the 2005 policy allowed schools to show that they were fully meeting their female students’ interests in sports simply by sending an email survey to all female students and assuming that a failure to respond indicated a lack of interest.

The 2010 Clarification reverses and replaces the 2005 document, stating that schools cannot rely solely on surveys to demonstrate that they are in compliance with part three. Instead, the Department made clear that schools must adhere to a longstanding policy requiring them to evaluate multiple indicators of interest to show that they are fully and effectively accommodating their female students’ interests.

Barriers to Women’s and Girls’ Participation in Sports

Despite great gains over the past 40 years, barriers to true equality still remain:

- Girls have 1.3 million fewer chances to play sports in high school than boys. Opportunities are not equal among different groups of girls. Fewer than two-thirds of African American and Hispanic girls play sports, while more than three-quarters of Caucasian girls do.
- Three-quarters of boys from immigrant families are involved in athletics, while fewer than half of girls from immigrant families are.
- In addition to having fewer participation opportunities, girls often endure inferior treatment in areas such as equipment, facilities, coaching, scheduling, and publicity.
- At the most competitive level, Division I-FBS schools, women make up 51% of students, yet they have only 45% of the opportunities to

ADDITIONAL RESOURCES


play intercollegiate sports. Female athletes at these schools receive 42% of the total athletic scholarship dollars, 31% of the dollars spent to recruit new athletes, and just 28% of the total money spent on athletics.34

• Since Title IX was passed, there has been a dramatic decrease in the proportionate role of female coaches. In 1972, 90% of women’s teams were coached by females, while today 43% are. Only 2–3% of men’s teams are coached by women. As the number of women’s teams has increased, the percentage of female coaches has continued to drop.35

NCWGE Recommendations

• OCR must receive adequate funding and strengthen its efforts to enforce Title IX by initiating proactive compliance reviews at more educational institutions and providing technical assistance and guidance on emerging Title IX questions.

• Congress should pass the High School Athletics Transparency Bills, which require that high schools report basic data on the numbers of female and male students and athletes, as well as the budgets and expenditures for each sports team. Since this information is already collected, just not made public, this legislation would allow communities to be informed about how their schools are treating boys and girls in sports without creating an additional burden on schools.36

References


20. 34 C.F.R. § 106.37(c).


22. 34 C.F.R. § 106.41(c) (1–10).


24. See, for example, *Williams v. Sch. Dist. of Bethlehem*, 998 F.2d 168, 171 (3d Cir. 1993); Pederson v. La. State Univ., 213 F.3d 858, 880 (5th Cir. 2000); *Miami University Wrestling Club v. Miami University*, 302 F.3d 608, 612–13 (6th Cir. 2002); *Chalenor v. Univ. of N.D.*, 291 F.3d 1042, 1046 (8th Cir. 2002); *Roberts v. Colo. State Univ.*, 998 F.2d 824, 828–29 (10th Cir. 1993), among others.


Science, Technology, Engineering, and Mathematics

EQUALITY NARROWS THE ACHIEVEMENT GAP

With greater opportunity to study and work in science, technology, engineering, and math (STEM), girls and women have made significant progress in these fields over the past 40 years. Nonetheless, barriers to equality remain. Stereotypes about male and female abilities in math and science—which are perpetuated by society but have been debunked by scientific research—affect opportunities for girls and women in STEM. Hiring and promotion practices in academia and elsewhere also can hold women back.

In a global marketplace that is increasingly driven by technology, leveling the playing field for women in STEM is an essential strategy for boosting U.S. competitiveness. Ensuring that all students have equal opportunities is key to creating an environment where talent and innovation can flourish in our schools, businesses, hospitals, research facilities, and government agencies.

Reasons for the STEM Gender Gap

The stereotype that boys are innately better than girls at math and science is pervasive in the U.S., but recent trends in achievement—as well as years of scientific research—demonstrate that this notion is simply incorrect. Although the number of women still lags behind the number of men in many STEM fields, the reasons for this gap are cultural
KEY FINDINGS

1. The achievement gap between male and female students in science, technology, engineering, and math (STEM) is steadily closing, but cultural biases and institutional barriers still hinder the advancement of girls and women in these fields.

2. Despite overall gains, women’s participation in some STEM fields has stagnated or even declined in the past decade. In addition, female attrition in STEM at every level of education is still high. This attrition comes at a devastating cost to U.S. competitiveness in the global marketplace.

3. Title IX compliance with regard to STEM education is essential in order to take full advantage of the potential of our country’s best and brightest minds to advance technology and innovation.

4. Increased awareness of Title IX protections, outcome-based investments in outreach and retention programs, institutional policies that ease restrictions on faculty who need time off to care for family members, and stronger monitoring of regulatory compliance would help ensure that our nation’s schools, colleges, and research institutions are fostering an environment that encourages women to stay and thrive in STEM fields.

CULTURAL BIASES

Scientific research has not demonstrated that innate differences exist between boys and girls in terms of mathematical or scientific abilities. Spatial reasoning abilities and math performance are not biologically “programmed” by gender; rather, they are influenced by social context and degree of gender equality in a society.

The impact of cultural bias on student interest and performance in STEM fields is well studied. In a recent large-scale study, researchers Kane and Mertz (2012) demonstrated that the societal influence of gender stereotypes and bias against women in science is related to gender differences in aptitude. They compared the scores of 300,000 eighth graders in 34 countries on a standardized math and science test with population scores on the Implicit Association Test on gender and science, the standard test for detecting unconscious bias developed by researchers at Harvard. Kane and Mertz’s study shows a strong link between the implicit gender-science stereotype of the country and the gender difference in test performance. This statistically significant correlation provides the most compelling evidence to date that differences between male and female students’ performance in math and science are caused by cultural, rather than biological, factors.

Implicit biases can have an impact on whether girls and women enter and stay in STEM fields. Gender biases can affect students in both overt and subtle ways. They may prevent female students from pursuing science and math from the beginning, play a role in their academic performance, and influence whether parents and teachers encourage them to pursue science and engineering careers. They may also directly or indirectly influence whether women are hired, as well as hinder the promotion rate and career advancement of female employees.

STEREOTYPE THREAT

Stereotypes about girls’ math and science ability can affect their performance through an effect called “stereotype threat”—the feeling of being judged by a negative stereotype, or fear of reinforcing that stereotype. Stereotype threat is known to negatively affect girls’ performance. In one landmark study, girls who were primed...
to feel inadequate did significantly worse than their male peers on a challenging math test, whereas girls in the control group, who did not face a stereotype threat condition, scored similarly to the boys. In the decade since that investigation appeared, some 300 additional studies have been published that support this finding.

Recent gains in girls’ mathematical achievement demonstrate the importance of culture and learning environments on students’ abilities and interests. As learning environments have become more open since the passage of Title IX, girls’ achievement has soared. For example, the proportion of girls who score in the top 0.01% of seventh and eighth graders on the math SAT rose from 1 in 13 in the early 1980s to 1 in 3 more recently. This short-term closing of the gender gap provides further evidence that gender differences in math ability are not innate.

**Progress Since Title IX**

Under Title IX, educational programs that receive federal funding are prohibited from discriminating on the basis of sex and must ensure equity in STEM education for all students. In addition, federal agencies that award grants to educational institutions are obligated to take steps to ensure that these institutions provide equal opportunities for women and girls in STEM education, including equal consideration in promotion and tenure for faculty.

Women and girls have made great progress in many STEM areas, but more needs to be done to achieve true gender parity. In fields like biology, psychology, and chemistry, girls now make up close to, or more than, half of those receiving bachelor’s or postgraduate degrees. However, participation rates of women and girls in secondary and postsecondary technical fields, particularly engineering and computer science, are still very low.

**K-12 Education**

Among secondary school students, the gender gap in math and science is closing. In high school, girls earn more credits and have higher grade point averages in math and science than their male peers. Girls are more likely to take biology, chemistry, and pre-calculus than boys are, although they are less likely to take physics. Despite these gains, the performance gap in standardized testing persists, as girls still perform lower than boys on the math SAT.

Girls are taking more advanced placement (AP) classes overall, but fewer go on to take AP tests in STEM fields. According to the National Center for Education Statistics, in 2009 only 17% of students who took the AP test in computer science were girls. The participation rates of girls in STEM-related programs of study in high school career and technical education continue to lag behind their participation in math and science, at only 20%. Even with girls’ growing participation and success in math and science at the K-12 level, this academic success very
POSTSECONDARY EDUCATION
At the postsecondary level, women are less likely to select a STEM major than a non-STEM major, and are more likely than their male counterparts to switch to a non-STEM major during their first year of college. With the growing number of students choosing community college as their first college experience, the STEM gender gap on community college campuses across this country is concerning. In 2009, only 22% of associate's degrees in STEM were earned by women. Even more troubling, the percentage of associate's degrees awarded to women in STEM fields has declined by 25% over the last eight years.13 (See the chart below.)

The shifting educational experiences of women in college, including the presence of female graduate students, affect their persistence in STEM fields.14 One review of student enrollment in STEM courses over a nine-year period (2001–2009) found that attrition varied greatly by field. In biology, for example, women made up 56% of introductory classes and 60% of fourth-semester classes. In contrast, the proportion of women taking computer science declined from 31% in the first semester to just 17% in the fourth semester (see the table on the next page, top). High attrition in many STEM fields signals a cultural problem that needs to be addressed through institutional and attitudinal changes as well as broader participation of women in STEM fields.

Percentage of Associate's Degrees Awarded to Women by STEM Field, 2000–2001 and 2008–2009

<table>
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<tbody>
<tr>
<td>Biological &amp; Biomedical Sciences</td>
<td>67.9%</td>
<td>67.9%</td>
</tr>
<tr>
<td>Physical Sciences</td>
<td>46.8%</td>
<td>41.8%</td>
</tr>
<tr>
<td>Mathematics &amp; Statistics</td>
<td>36.3%</td>
<td>37.4%</td>
</tr>
<tr>
<td>Science Technologies</td>
<td>31.5%</td>
<td>30.4%</td>
</tr>
<tr>
<td>Computer &amp; Information Sciences</td>
<td>16.2%</td>
<td>24.7%</td>
</tr>
<tr>
<td>Engineering &amp; Engineering Sciences</td>
<td>13.9%</td>
<td>29.1%</td>
</tr>
<tr>
<td>All STEM Fields</td>
<td>22.0%</td>
<td>22.0%</td>
</tr>
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Women are earning more bachelor’s degrees in some STEM fields in recent decades, most notably the biological and social sciences. Women’s representation in these fields has climbed steadily since Title IX passed, and women now earn more than half of degrees granted in psychology. In other areas, however—including mathematics, physics, and engineering—progress has remained stagnant over the last decade, and in computer science, the percentage of women earning graduate and undergraduate degrees has actually declined in recent years.

At the postgraduate level the numbers are similar, with women earning slightly over half of PhDs in the life sciences (including health and biological sciences) and 46% of PhDs in social sciences (including sociology and economics), but only 29% of PhDs in physical sciences (including astronomy, chemistry, physics, and earth sciences) and just over 20% of PhDs in computer science and engineering. (See the graph at the top of the next page.) Since the passage of Title IX in 1972, progress has been impressive across all fields in science, engineering, math, and medicine, with women’s share of PhDs rising from just 11% in 1972 to 40% by 2006. As noted, however, this growth varies widely by field.

### Women in Academia

While the proportion of female assistant professors is somewhat consistent with the number of female PhDs in STEM, women are less likely than men to be promoted to full professorship, tenure status, and the highest ranks of academia, such as deans and department chairs. This gap reflects a tradition of institutional practices that make it difficult for women to advance through the ranks of academia.

Women have made some gains; their representation among all tenured or tenure-track professor positions in STEM increased from 9.5% in 1979 to 28% in 2006. Yet women made up only 19% of full professors in these fields in 2006. As with other measures of achievement, attainment of full professor status varies by field, with women making up 33% of full professors in psychology and near or over a quarter in the social and life sciences, but only 5% in engineering and less than 9% in math and physical sciences. (See the graph at the bottom of the next page.) The percentage of female full professors in computer science has actually
Percentage of STEM Doctoral Degrees Awarded to Women by Field, 1972–2006

NOTE: Data on computer sciences was not collected until 1978.

Women as a Percentage of Full Professors by Field of Doctorate, 1973–2006

NOTE: Missing data points indicate years when data were not collected or the sample size was too small for statistical significance. See the source for further notes on the data.
declined in recent years, from 23% in 1999 to 17% in 2006.

The academic pipeline for women in STEM fields is perpetually leaking, with the attrition of women outpacing that of men at all levels, from undergraduate school through tenured professorship. Even though many women persist through the attainment of a PhD, women continue to leak out of the academic pipeline at each step of career transition and promotion.

Part of the problem is that the tenure track often coincides with prime childbearing age for female academics. Without flexible options such as stop-the-tenure-clock, having children can be detrimental to a female faculty member’s chances of promotion and tenure. Typically, faculty members who do not receive tenure within a certain amount of time after obtaining a PhD will be encouraged to leave the institution, although some institutions allow them to remain at the lower adjunct or assistant professor level. For faculty members who take time off to raise families, the lack of supportive policies is detrimental to their careers and ultimately harmful to the STEM workforce.

Women who marry, and especially those who have babies, are considerably less likely to advance than those who don’t; those with babies are 29% less likely to enter a tenure-track position than those who don’t, and married women are 20% less likely to enter a tenure-track position than their single counterparts. In contrast, having children does not seem to affect men’s likelihood of attaining promotions or tenure. Overall, women are 25% less likely to attain full professorship than men.16

STEM Careers

As in academia, the culture and expectations in STEM careers can make advancement in the workplace difficult for women, particularly those with family obligations. According to National Science Foundation (NSF) statistics, women comprise 47% of the total U.S. workforce, including more than half of all professional and related occupations, but only 24% of workers in STEM fields.17

The range of female participation in different STEM careers varies widely. According to the NSF, 49% of the workforce in life and biological sciences is female, with the total number of women in these fields increasing by 50% over the past two decades. In contrast, the proportion of women working in engineering is still extremely low. Women made up 11% of engineers in 2009, up from 6% in 1983. Over the same time period, the percentage of female engineering technicians increased barely at all, from 18% to 19%.

KEY RESOURCES ON WOMEN AND STEM


In mathematics and computer science, the proportion of women has actually declined, from 31% in 1983 to 25% in 2009. It is unlikely that women’s ability in these fields has deteriorated, so this decline more likely reflects working conditions or other factors that impede female participation.

At the same time, men have made gains in several areas within health care that have traditionally been dominated by women, a finding that highlights the benefits of equal opportunity in STEM for all workers. For example, men made up 22% of health technicians in 2009, up from 16% in 1983. Similarly, men comprised 8% of registered nurses in 2009, up from just 4% in 1983.

In addition, corporations are letting employees take advantage of more flexible work options. In 1991, the Bureau of Labor Statistics found that only 14% of women had flexible work schedules. As of 2007, that number had climbed to 26%. This flexibility will give female employees more opportunity to stay in their STEM careers.

As the global marketplace becomes more focused on technology and innovation, it’s important to ensure that men and women have equal opportunities to participate and advance through the STEM pipeline. The attrition of women and girls from STEM fields does not benefit their male counterparts; rather, it incurs a major opportunity cost to our nation’s economic competitiveness in science and technology. Institutional and workplace policies that promote the full participation of women are needed in order to take advantage of our nation’s capacity for innovation.

Raising Awareness of Title IX and STEM

Those who look at the website of the U.S. Department of Education’s Office for Civil Rights (OCR), the federal agency that regulates and monitors compliance with Title IX, might assume that Title IX protections from sex discrimination in education apply only to sexual harassment, pregnancy, and athletics. In fact, Title IX also protects girls’ and women’s right to equality in STEM education, including equal access to academic and career and technical education courses; school-sponsored activities at the elementary, middle, high school, and college levels; and equal compensation, lab space, and institutional resources at research universities.

For example, if the use of a counseling test or other instrument results in a substantial under-representation of women in STEM courses, the school must take action to ensure that such disproportion is not the result of discrimination in the instrument, its application, or counseling practices in order to be in compliance with Title IX. Unfortunately, however, infractions often go unreported because many students—and even educators—do not realize that Title IX applies to STEM.

Raising awareness of existing protections is essential for ensuring that girls and women have equal access to education and careers in STEM. Often individuals who are responsible for Title IX are not aware of their responsi-
I love science and I like seeing how things work. I love to take things apart and see if I can get them back together. I always try to figure out how things work.”

—Preteen girl, Austin, TX

“I think [STEM work] can be very rewarding in the end when you get the result that you were looking for, or when you find a completely different result than what you were looking for; just knowing that you were able to start from a question or hypothesis and work to find this result that could possibly make a big difference in people’s lives.”

—Teenage girl, Indianapolis, IN

“Everyone knows about teaching as a career, but not everyone our age really thinks about engineering. They don’t know all that much about it.”

—Preteen girl, Wilmington, DE

“My dad always tells me this is where you have the potential…but not arts, but engineering. If you have the support it makes you believe in it, even if nobody else does.”

—Teenage girl, Austin, TX

“I think some girls don’t want to do [STEM] because they don’t think it’s something girls should do. It’s a boy subject; they should stay far away from it.”

—Teenage girl, Indianapolis, IN

NCWGE Recommendations

- The Department of Education guidelines for Title IX coordinators, which outline their responsibilities in ensuring equality in STEM education, should be broadly disseminated and publicized.
- Congress should direct federal, state, and local agencies to establish outreach and retention programs at the elementary, secondary, and postsecondary levels to engage girls and women in STEM activities, courses, and career development.
- Colleges and universities should establish standardized guidelines for tenure-track eligibility and offer a stop-the-clock option for women and men with small children.
- Federal grants should include interim technical support for researchers needing to take a leave of absence for care-giving purposes, and cover the cost of child care during travel that is related to the grant.
- Gender bias training is needed for awards selection committees and faculty department
chairs, professors, deans, and administrators at all levels of the STEM pipeline.

- All federal science agencies should conduct Title IX and STEM reviews to ensure that their grantee institutions are providing equal opportunities for women and girls in STEM, including education for students and promotion and tenure for faculty.

References


16. Leaks in the Academic Pipeline for Women. Available at http://ucfamilyedge.berkeley.edu/leaks.html/.


18. Ibid.


As part of its general ban on sex discrimination in schools, Title IX outlawed discrimination in career and technical education (CTE) classrooms. Forty years later, male students continue to predominate in courses that lead to many high-skill, high-wage jobs, while female students make up the majority in the low-wage, low-skill programs. These enrollment patterns reflect, at least in part, the persistence of sex stereotyping and discrimination.

Lowering the barriers to female enrollment in CTE is a key step in reducing the wage gap between male and female workers. Given worldwide demand for workers with technical knowledge, increasing female participation in CTE is unlikely to come at the expense of their male counterparts; rather, by increasing the total pool of skilled workers, it will help keep the United States competitive and benefit the economy as a whole.

Encouraging gender equity in CTE will also reduce barriers for males seeking entry into fields traditionally occupied by female workers, including high-growth areas such as nursing and other medical professions. Thus, ensuring equitable participation in CTE by eliminating discriminatory practices and increasing the engagement of women and girls in STEM has important implications for all students.

A Path to Economic Growth

CTE prepares both youth and adults for a wide range of careers. These careers may require varying levels of education, including industry-recognized credentials, postsecondary certificates, and two- and four-year degrees.
TRAINING SKILLED PROFESSIONALS
CTE is offered in middle schools, high schools, career and technical centers, community and technical colleges, and other postsecondary institutions. According to the U.S. Department of Education’s Office of Vocational and Adult Education, almost all high school students take at least one CTE course, and one in four students take three or more courses in a single program area. One-third of college students are involved in CTE programs, and as many as 40 million adults engage in short-term postsecondary occupational training. CTE is organized around 16 career clusters1 based on a set of common knowledge and skills that prepare learners for a full range of opportunities.

Currently, 12% of the U.S. population aged 18–24 is enrolled in a two-year college.2 Enroll-
pation and achievement in CTE should not be bound by sex separation in education, gender stereotypes, harassment, or other barriers that prevent girls and women—including single mothers, pregnant and parenting students, displaced homemakers, and welfare recipients—from becoming economically self-sufficient.

Impact of Title IX on Equity in CTE

Title IX sought to end discrimination in CTE among educational institutions that routinely denied students admission into classes deemed “improper” for their sex.

Historically, vocational classes were restricted by gender. Males took shop and automotive courses, while females took classes in child care, cosmetology, typing, and home economics. Separation by gender reinforced social stereotypes about what was considered “women’s work” and “men’s work.”

Title IX made it unlawful for schools to steer students into career and technical education classes based on their gender. Further, it required schools take steps to ensure that disproportionate enrollment of students of one sex in a course was not the result of discrimination. (For more details on the legislation and how it has evolved, see the section beginning on page 31, titled “Title IX Regulation and Enforcement.”)

BARRIERS TO EQUALITY

Although discrimination is unlawful, barriers to equality in CTE remain high. Hurdles range from a lack of role models and information on nontraditional fields to overt discrimination.
Female students also face career counseling biased by gender stereotyping, unequal treatment by teachers, and various types and degrees of sexual harassment.

Girls and women are discouraged from pursuing traditionally male training programs in ways that are both subtle—such as an instructor inadvertently allowing male students to monopolize attention—and not so subtle—such as a guidance counselor telling a student that an electronics course is “not for girls.” Those who brave the barriers to take nontraditional courses often face an unwelcoming atmosphere, and many report harassment by fellow students or even teachers.

Males may be similarly discouraged from taking nontraditional courses, including courses in relatively high-growth, high-wage fields such as nursing, as well as in lower-wage fields like child care. Title IX is gender-neutral and applies to males as well as females, so discrimination in these settings is also unlawful.

**OPPORTUNITIES FOR GROWTH**

In the 40 years since the passage of Title IX, there has been a slight, gradual increase in the number of women and girls in technical and other occupational programs leading to nontraditional careers. According to an analysis of data from the U.S. Department of Education’s Office of Vocational and Adult Education (OVAE), conducted by the National Coalition for Women and Girls in Education (NCWGE) CTE task force, women’s participation in CTE programs leading to nontraditional careers has increased from close to 0% in 1972 to over 25% nationally in 2009–2010.\(^{11}\) Because of the lack of uniform definitions and reporting procedures, however, much of the gain may be attributable to female participation in broadly defined categories such as arts, audiovisual technology, and communications. Men have also made gains in nontraditional fields, with those preparing for teaching and nursing careers, relatively high-paying occupations, growing steadily.

The federal statute that funds CTE, the Carl D. Perkins Career and Technical Education Act of 2006 (known as the Perkins Act), requires states to set targets for performance on a measure of nontraditional enrollment and completion by gender. As the following chart indicates, a handful of states have boosted female participation and completion to unprecedented levels. Six report female participation in nontraditional fields of more than 40% at the secondary level, and five report completion rates at the postsecondary level of 45% or more—well above the national average of 28% and 27%, respectively.

Despite women’s gains in nontraditional fields as a whole, the rate of female enrollment in certain career clusters remains at stubbornly low levels, with some well beneath the 25% threshold. As shown in the figure on page 32, females made up less than 25% of participants in science, technology, engineering, and math programs nationally (21% at the secondary level and 24% at the postsecondary level), and much lower numbers in manufacturing (17% and 11%, respectively); architecture and construction (15% and 10%); and transportation, distribution, and logistics (8% and 7%).\(^{12}\)

Experience shows that obstacles to equity in CTE can be overcome by a commitment to change from the institution’s leadership.
Schools that have taken measures such as assigning staff to monitor and coordinate activities, providing specialized professional development for career counselors and educators, forging partnerships with employers, and introducing students to role models have had success in enrolling and retaining students in CTE focused on areas that are nontraditional for their gender.13

**Title IX Regulation and Enforcement**

Gender equity in CTE is influenced by the statutes and regulations governing career and technical education. The Perkins Act, the key statute governing equity in CTE, has undergone several iterations, with accompanying shifts in requirements and funding. It is due for reauthorization by Congress in 2013.

**Evolving Legislation**

In 1976, Congress amended the Vocational Education Act to require that each state hire a “sex equity coordinator” and provided $50,000 for each state to support this position. In 1979, the Office for Civil Rights issued guidelines to reduce discrimination in vocational education. The guidelines required states to collect and report data, conduct compliance reviews, and provide technical assistance.14

The high water mark for the designation of federal of resources for integrating girls and women into CTE was arguably attained with passage of the Carl D. Perkins Vocational Education Act of 1984. With that measure, Congress not only retained the required sex equity coordinators but also required states to set aside 3.5% of their funding for programs to eliminate sex bias and stereotyping, plus another 8.5% for serving individuals with significant barriers to occupational skill training, including displaced homemakers returning to the workforce after caring for family members, single parents, and pregnant or parenting teens. From 1984 through 1998, an average of $100 million a year was spent on programs to eliminate sex bias in career and technical education.15 By 1997, the number of sex equity programs exceeded 1,400 across the country.16

In 1998, the reauthorization of the Perkins Act removed most of these requirements and set-asides except for a small reserve of $60,000 to $150,000 a year for state “leadership activi-

### States with High Female Participation in Nontraditional Perkins-Funded CTE Programs, 2010

<table>
<thead>
<tr>
<th>SECONDARY PARTICIPATION OF 40%+</th>
<th>POSTSECONDARY COMPLETION OF 45%+</th>
</tr>
</thead>
<tbody>
<tr>
<td>District of Columbia</td>
<td>District of Columbia</td>
</tr>
<tr>
<td>Iowa</td>
<td>Nevada</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>New Mexico</td>
</tr>
<tr>
<td>New Mexico</td>
<td>Oregon</td>
</tr>
<tr>
<td>New York</td>
<td>Tennessee</td>
</tr>
<tr>
<td>Washington</td>
<td></td>
</tr>
<tr>
<td>National average=28%</td>
<td>National average=27%</td>
</tr>
</tbody>
</table>

Secondary and Postsecondary Female Enrollment by Career Cluster, 2009–2010

- Education & Training: 77.7% (Secondary), 76.8% (Postsecondary)
- Health Science: 81.6% (Secondary), 73.3% (Postsecondary)
- Human Services: 85.7% (Secondary), 71.7% (Postsecondary)
- Hospitality & Tourism: 60.7% (Secondary), 55.3% (Postsecondary)
- Marketing Sales & Services: 63.5% (Secondary), 49.7% (Postsecondary)
- Finance: 62.8% (Secondary), 49.5% (Postsecondary)
- Arts, Audiovisual Technology, & Communication: 49.7% (Secondary), 49.7% (Postsecondary)
- Business, Management, & Administration: 62.8% (Secondary), 49.3% (Postsecondary)
- Law, Public Safety, & Security: 43.7% (Secondary), 42.5% (Postsecondary)
- Government & Public Administration: 72.6% (Secondary), 41.7% (Postsecondary)
- Information Technology: 27.1% (Secondary), 40.8% (Postsecondary)
- Agriculture, Food, & Natural Resources: 37.0% (Secondary), 38.2% (Postsecondary)
- Science, Technology, Engineering, & Math: 23.9% (Secondary), 21.1% (Postsecondary)
- Manufacturing: 11.0% (Secondary), 16.8% (Postsecondary)
- Architecture & Construction: 9.6% (Secondary), 15.1% (Postsecondary)
- Transportation, Distribution, & Logistics: 7.1% (Secondary), 8.1% (Postsecondary)
- TOTAL: 56.4% (Postsecondary), 46.0% (Secondary)

ties” for students preparing for nontraditional careers. The law created performance measures requiring states to increase participation in and completion of nontraditional CTE programs among students of underrepresented genders. This “nontraditional measure” was one of four core performance measures for the entire Perkins program. The law provided no sanctions or incentives for improvement, however, thereby creating a culture of limited activity at the state and local level.

The most recent iteration of the law, adopted in 2006, continued the approach of requiring states to meet negotiated targets for placing males and females into programs leading to nontraditional occupations. For the first time, however, the law authorized sanctions and required triggers for state and local improvement plans for not meeting performance measures. The legislation also retained the $60,000–$150,000 state leadership set-aside for individuals preparing for nontraditional fields.

LOOKING AHEAD
In April 2011, the Department of Education released its blueprint for reauthorization of the Perkins Act, which stressed the development of rigorous CTE shaped by four core principles:

1. Effective alignment between CTE programs and the labor market to prepare students for in-demand occupations in high-growth industry sectors.

2. Strong collaborative efforts among secondary and postsecondary institutions, employers, and industry partners to improve the quality of CTE programs.

3. Meaningful accountability for improving academic outcomes and building technical and employability skills in CTE programs for all students. [emphasis added]

4. Increased emphasis on innovation through state policies that support effective practices at the local level.

The word “nontraditional” does not appear in the 14-page blueprint, which ultimately needs to be refined, translated into statutory language, and adopted by Congress, a process not expected to be completed until 2013.

Without referring specifically to programs leading to nontraditional careers, the proposal would require states to collect data to “identify equity gaps in performance on the local and state levels, including where students of a particular background (including gender) are disproportionately enrolled in or absent from certain programs.” In addition to gender, state and local data would be collected on students’ race, ethnicity, disability, socioeconomic status, and English proficiency. States would be required to improve their data collection systems and use common definitions and performance indicators.

The blueprint also calls for requiring states to provide “wrap-around” supports such as tutoring and counseling to ensure that there are no equity gaps in participation or performance in CTE programs. In another dramatic change, it
STEM Equity Pipeline
The National Alliance for Partnerships in Equity Education Foundation’s STEM Equity Pipeline started in 2007 with support from the National Science Foundation (NSF) and is now supported by corporate, foundation, and federal funds. The STEM Equity Pipeline provides a suite of professional development offerings focused on increasing the participation and completion of women in high school and community college science, technology, engineering, and math (STEM)-related programs of study. By working with state leadership teams, the project has been successful in influencing state policy, increasing resource investment, and integrating gender equity into professional development for STEM educators in 12 states.

Local pilot sites implement the Program Improvement Process for Equity in STEM™ (PIPESTEM™), where teams of administrators, teachers, counselors, and students conduct a performance gap analysis and implement research-based strategies to increase female participation in STEM programs. Outcomes include an increase in Project Lead the Way (pre-engineering) participation from 8 to 30 girls at one site and from 0 to 21 (33%) at another; an increase from 0% to 43% women in design technology; an increase in females in auto technology from 12% to 36%; and an increase of senior girls in advanced-level math from 15% to 55% in two years.

WomenTech Extension Services
The National Institute for Women in Trades, Technology, and Sciences (IWITTS) received a $2 million NSF grant for a project at eight community colleges in California to develop and expand a model for closing the gender gap. Each college identified two nontraditional programs, including 3D animation, computer networking and information technology, HVAC (heating, ventilation and air conditioning), welding, electronics, and automotive technology. The first cohort started in 2007, and female enrollment has increased annually in six of the eight colleges. At one college, women's retention rose from 81% to 100% in 15 months.

Grace Hopper Scholars Program, Community College of Baltimore
The Scholars Program encourages women and other underrepresented groups to pursue careers in computer science and related fields, such as information technology and computer-aided design and graphics. Ninety percent of the students are women, and students of color exceed their representation in the overall student body. Full-time Scholars are five times more likely to complete an associate's degree or certificate than the overall student body.

Scholarships of up to $3,125 are available to help cover tuition, fees, books, supplies, equipment, transportation, and dependent care; low-cost day care is available on campus. Students receive a $300 incentive to complete their first math credit or 200-level computer course. Retention is encouraged through community-building, including assigned industry mentors and a mandatory summer skill-development program.

St. Paul College
St. Paul College, a community and technical college in St. Paul, MN, has engaged in aggressive recruiting to attract more men to the health care profession, and respiratory care in particular. The number of men enrolled in the college's respiratory care program has increased dramatically. In 2002, the program had only 5 male participants. By 2006, that number had jumped to 88 out of a total 169 enrolled students, or 52%. Male graduation rates post similar numbers; since 2005, males have made up anywhere from 42% to 62% of respiratory care graduates.

Connecticut Regional Center for Next-Generation Manufacturing
The NSF has funded the Connecticut College of Technology (COT), a virtual organization serving 12 community colleges, to prepare students for STEM careers in high-demand fields such as green technology, lasers, photonics, precision manufacturing, and alternative energy. The program allows high school students to take and receive credit for dual-enrollment programs in engineering and technology at nearby community colleges. Women's participation between
calls for states to use a competitive process to allocate funds to local consortia of secondary and postsecondary schools.

As the Administration and Congress move toward reauthorizing the Perkins Act, striking a balance between the carrot and the stick approach will be important. For the statute to be effective, it needs to dedicate resources to activities that promote gender equity in CTE while at the same time maintaining the performance targets and sanctions embedded in the 2006 accountability measures.

NCWGE Recommendations

- Congress should continue to include accountability measures, improvement plans, and sanctions that hold states and municipalities accountable for increasing women's completion of CTE programs that prepare them for high-wage careers in which they represent less than 25% of the workforce.
- The Office for Civil Rights (OCR) should collaborate with OVAE and better align its Methods of Administration process for ensuring Title IX compliance in CTE with OVAE's processes for monitoring compliance and providing technical assistance to states.
- OVAE should create a national network of research and practice experts who can provide professional development and technical assistance on building programs that increase gender equity in CTE.
- States and municipalities should be required to report and use disaggregated data at the program level to identify performance gaps and drive program improvement. To best target improvements, gender-specific data must be cross-tabulated with other demographic characteristics, including race, socioeconomic status, disability, and parental status.
- Increasing women's participation in and completion of high-wage CTE programs should be included as a criterion for any incentive program proposed in future CTE legislation.
- Congress should legislate requirements for leadership and resource investment at the state and local levels to implement research-based strategies for increasing female participation and achievement in nontraditional CTE programs.
- Federal, state, and local decision making must include gender equity in CTE as a quality standard for investments in program development, improvement, and expansion.
References

1. For more information about the 16 career clusters, see http://www.careertech.org/career-clusters/glance/clusters.html/.


12. Ibid.


Harassment affects students’ well-being and their ability to succeed academically. Supreme Court rulings have established that sexual harassment of students constitutes discrimination in education and violates Title IX.

Efforts to address sex-based harassment have increased as knowledge of this issue has spread. In particular, awareness campaigns by educational institutions and Title IX advocates, as well as legal remedies, have resulted in organized efforts by schools to curb such harassment. Nonetheless, sexual and gender-based harassment remain pervasive problems in K-12 schools and on college campuses.

While sexual harassment disproportionately affects girls and women, studies show that boys and men also experience harassment. When any students experience sexual or gender-based harassment on campus or in the classroom, the hostile environment created by such conduct can undermine educational opportunities for those students and their peers.

What Constitutes Harassment?

Harassment can take many forms. It includes verbal acts like name-calling, posting of inappropriate images and graphics, written statements, or other actions that may be physically threatening, harmful, or humiliating. Harassment of students may come from other students or from school employees such as teachers, coaches, or other staff. To constitute
sexual harassment, the conduct must be of a sexual or gender-based nature.

**WHEN HARASSMENT INVOKES TITLE IX**

Harassment prohibited by Title IX includes any unwelcome or unwanted behavior based on sex, including conduct of a sexual nature. It also can include harassment of a student because he or she does not conform to stereotypical notions of masculinity or femininity, such as harassment of a male student because he is on the dance team or exhibits effeminate mannerisms, or harassment of a female student because she takes shop class or wears short hair and baggy clothes. Although Title IX does not specifically prohibit discrimination on the basis of sexual orientation or gender identity, when lesbian, gay, bisexual, or transgender (LGBT) students are subjected to harassment because of failure to conform to gender stereotypes, Title IX applies.

Title IX’s protection extends to sexual harassment in all of a school’s programs or activities, whether the harassment occurs on school property, on a school bus, or at an off-site school event. Schools are obligated to respond to sexual harassment charges if the conduct is severe or pervasive enough that it creates a hostile school environment—meaning that it interferes with or limits a student’s ability to participate in or benefit from school, including all activities and services.

Harassment does not have to include intent to harm or be directed at a specific target. The harasser and the victim do not have to be of the opposite sex, and the harassment does not need to take the form of a sexual advance.

Any form of sexual violence, including rape, constitutes sexual harassment and is covered under Title IX as well as other statutes. The U.S. Department of Education’s Office for Civil Rights (OCR), which enforces Title IX, recently
reaffirmed in its April 2011 Guidance that rape is always severe enough to create a hostile school environment.¹

A school- or district-wide anti-bullying policy does not free a school from complying with Title IX. Regardless of any policies in place, if sexual or gender-based harassment is sufficiently severe, pervasive, or persistent, a school is obligated under Title IX to take effective steps to end the harassment.

**BULLYING, CYBERBULLYING, AND SEXUAL HARASSMENT**

Many forms of bullying, including hazing and cyberbullying, constitute sex-based harassment that is prohibited under Title IX. Such harassment includes demeaning a student because of his or her gender or sexual activity. For example, harassment may include common behaviors such as using cell phones or the Internet to target students by calling them sexually charged epithets like “slut” or “whore”; spreading sexual rumors; rating students on sexual activity or performance; disseminating compromising photographs of a student; or circulating, showing, or creating emails or websites of a sexual nature. Conduct often dismissed as just “boys being boys” or “mean girls,” when severe, can actually be prohibited harassment.

In order to clarify schools’ obligations under Title IX with regard to harassment, OCR issued a Guidance document in October 2010 specifying that Title IX prohibits sex-based bullying and harassment that interferes with a student’s education, whether it is conducted in person or in electronic form. The Guidance states, “bullying fosters a climate of fear and disrespect that can seriously impair the physical and psychological health of its victims and create conditions that negatively affect learning, thereby undermining the ability of students to achieve their full potential.”²

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**Scope of Harassment at the K-12 Level**

Bullying and other forms of harassment are prevalent in schools. Recent surveys have found that both male and female students are affected in large numbers, although girls face harassment more frequently than boys. Harassment can have serious emotional consequences for these students; it can also cause educational problems such as difficulty concentrating on schoolwork, absenteeism, and poor academic performance.³

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**ELEMENTARY SCHOOL**

A 2010 nationwide survey of more than 1,000 students and 1,000 teachers at elementary schools, conducted by the Gay, Lesbian and Straight Education Network (GLSEN), found that sexual harassment is common even though most schools have anti-bullying and/or anti-harassment policies in place:⁴

- Three-quarters of all elementary school students (75%) reported that students at their school are called names, made fun of, or bullied with at least some regularity.
Nearly half of elementary school teachers (47%) believe that bullying, name calling, or harassment is a very serious or somewhat serious problem at their school.

Students who do not conform to traditional gender norms are more likely than others to say they are called names, made fun of, or bullied at least sometimes at school (56% versus 33%).

One-third of students (33%) have heard kids at school say that girls should not do or wear certain things because they are girls. Even more (39%) have heard their peers say that boys should not do or wear certain things because they are boys.

Nearly half of all teachers (48%) reported that they hear students make sexist remarks at their school.

SEXUAL HARASSMENT RESOURCES


MIDDLE AND HIGH SCHOOL

Sexual harassment is part of everyday life at many middle and high schools. A nationally representative survey of 1,965 students in grades 7–12 found that nearly half of students (48%) experienced some form of sexual harassment during the 2010–2011 school year. The majority of those students (87%) said it had a negative effect on them. Nearly all the behavior documented in the survey was peer-to-peer sexual harassment.

Other findings include the following:

• Girls were significantly more likely than boys to face sexual harassment, although the numbers for both were high, with 56% of girls and 40% of boys reporting that they had been sexually harassed.

• Sexual harassment by text, email, Facebook, or other electronic means affected 30% of all students. Many of the students who were sexually harassed through cyberspace were also sexually harassed in person.

• Verbal harassment was the most frequently cited behavior, reported by 46% of girls and 22% of boys. Physical harassment was also disturbingly common, particularly among girls. Unwelcome touching was reported by 13% of girls and 3% of boys, while 4% of girls and less than 1% of boys said they had been forced to do something sexual.

• Being called gay or lesbian in a negative way was reported by girls and boys in equal numbers (18%), although reactions differed, with 21% of boys and 9% of girls identifying it as their worst experience with harassment.

• The survey revealed a cycle of harassment, with many victims reporting that they victimized others. Most students who admitted to sexually harassing another student (92% of
girls and 80% of boys) were targets of sexual harassment themselves.

**HARASSMENT OF LGBT STUDENTS**

Another national survey looking specifically at the experiences of LGBT students in sixth through twelfth grades found that the overwhelming majority of these students face some form of sex-based harassment:

- Nearly nine out of ten LGBT students (85%) were verbally harassed at school because of their sexual orientation; 64% were harassed because of their gender expression.
- More than one-third of these students (40%) were physically harassed (e.g., pushed or shoved) at school in the past year because of their sexual orientation, and 27% were physically harassed because of their gender expression.
- One in five (20%) were physically assaulted (e.g., punched, kicked, injured with a weapon) because of their sexual orientation, and 13% because of their gender expression.
- More than half of LGBT students (53%) were harassed or threatened by their peers via electronic media.

**Sexual Harassment on College Campuses**

Sexual harassment is prevalent on college campuses and can prevent students, both male and female, from receiving the full social and academic benefits of higher education. Creating a campus environment that is free from bias and harassment is important both for ensuring success in education and for shaping

### Effects of Sexual Harassment on the Educational Experience of College Students, by Gender

<table>
<thead>
<tr>
<th>Effect</th>
<th>Female (%)</th>
<th>Male (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Avoided the person that bothered or harassed them</td>
<td>26</td>
<td>48</td>
</tr>
<tr>
<td>Stayed away from particular buildings or places on campus</td>
<td>11</td>
<td>27</td>
</tr>
<tr>
<td>Found it hard to study or pay attention in class</td>
<td>16</td>
<td>16</td>
</tr>
<tr>
<td>Had trouble sleeping</td>
<td>16</td>
<td>16</td>
</tr>
<tr>
<td>Got someone to protect them</td>
<td>16</td>
<td>16</td>
</tr>
<tr>
<td>Changed their group of friends</td>
<td>12</td>
<td>12</td>
</tr>
<tr>
<td>Lost their appetite/not interested in eating</td>
<td>13</td>
<td>13</td>
</tr>
<tr>
<td>Did not participate as much in class</td>
<td>10</td>
<td>10</td>
</tr>
<tr>
<td>Stopped attending a particular activity or sport</td>
<td>9</td>
<td>9</td>
</tr>
<tr>
<td>Skipped a class or dropped a course</td>
<td>9</td>
<td>9</td>
</tr>
</tbody>
</table>

Note: Base = Respondents who experienced harassment (n=1,225); 659 female and 556 male college students ages 18–24.

the attitudes and behaviors that will govern the nation’s future workforce and broader society.

A research report from the American Association of University Women, *Drawing the Line: Sexual Harassment on Campus,* found that sexual harassment on campus is widespread yet often goes unreported:

- Nearly two-thirds of college students, including 62% of women and 61% of men, experience some type of sexual harassment.
- Fewer than 10% of these students tell a college or university employee about their experiences, and an even smaller number report them to a Title IX coordinator.
- LGBT students are more likely to be harassed; nearly three-quarters (73%) say they have experienced sexual harassment on campus.
- Men and women are equally likely to be harassed, but in different ways and with different responses. Women are more likely to be upset, angry, or afraid after being sexually harassed, and are also more likely to drop a class, avoid an area or activity, or otherwise change their behavior in ways that affect their educational experience.

- Men are more likely than women to harass, although substantial numbers of both sexes are involved; 51% of male students admit to sexually harassing someone in college, compared with 31% of female students.

A campus culture that tolerates inappropriate verbal and physical contact and that intentionally or unintentionally discourages reporting these behaviors undermines the emotional, intellectual, and professional growth of millions of young adults and violates Title IX. Sexual harassment on campus takes an especially heavy toll on young women, making it harder for them to get the education they need to take care of themselves and their families in today’s economy.

**Title IX Protection Against Sex-Based Harassment**

**ENFORCEMENT AND REDRESS**

In 1992, the Supreme Court recognized that sexual harassment is a type of sex discrimination prohibited by Title IX and held that monetary damages are available in an action brought to enforce Title IX. In the 1998 case of *Gebser v. Lago Vista School District,* the Court established the standard for recovering damages in a harassment case: A harassed student must show that a school official with authority to take corrective measures had “actual knowledge” of the harassment and responded with “deliberate indifference”—a higher standard than exists for employees who are sexually harassed.

A year later, in *Davis v. Monroe County Board of Education,* the Supreme Court ruled that
schools may also be liable for damages under Title IX for peer-on-peer harassment. To recover damages, the harassed student must show that the school had actual knowledge of the harassment and responded with deliberate indifference, and that the harassment was "so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school." The Court made clear that these standards are limited to private actions for monetary damages.

In addition to filing a lawsuit for damages, a student who has been harassed can file a suit for injunctive relief or seek a remedy from OCR. OCR has repeatedly made clear in its Guidance documents that if a school knows, or should know, that a hostile environment exists, it is "responsible for taking immediate effective action to eliminate the hostile environment and prevent its recurrence." A school also has a responsibility "to remedy the effects on the victim that could reasonably have been prevented had the school responded promptly and effectively."

In 2009, in a unanimous decision, the Supreme Court clarified that Title IX is not the exclusive mechanism for addressing gender discrimination in schools. Plaintiffs are also able to bring suits under 42 U.S.C. § 1983 for gender discrimination in schools that violate the Equal Protection Clause, so multiple avenues of relief exist for those who have experienced discrimination in education on the basis of sex.

REQUIRED PROCEDURES FOR RESPONDING TO HARASSMENT

An April 2011 Guidance document from OCR noted the seriousness of sexual harassment, including sexual violence, and spelled out Title IX's procedural requirements for schools in responding to reported incidents:

1. Institutions covered by Title IX are required to create and widely distribute a notice of nondiscrimination, designate at least one employee to coordinate its efforts, and adopt and publish grievance procedures for prompt and equitable resolution of complaints of sex discrimination, including sexual harassment and sexual violence.

2. Schools must ensure that their employees are trained to identify harassment and report it to appropriate school officials. In addition, schools must provide training so officials with the authority to address harassment know how to respond properly.

3. When a harassed student or other party files a complaint, the school must investigate the allegations in a prompt, thorough, and impartial way. Both parties must have an equal opportunity to present witnesses and other evidence. In determining whether sexual harassment occurred, the school must
use the “preponderance of the evidence” standard of proof; in other words, the
complainant must show that it is more likely than not that the sexual harassment
occurred.

4. It is improper for a school to require a student who complains of harassment
to work out the problem
directly with the alleged perpetrator. In cases
of sexual assault, even voluntary mediation is
not appropriate.

5. Both parties must be notified in writing
about the outcome of the complaint and any
appeal.

To create a school environment in which all
students can succeed, students must feel com-
fortable acknowledging and reporting harass-
ment, and schools must respond in accordance
with Title IX requirements.

NCWGE Recommendations

• Congress should enact
legislation to ensure that stu-
dents receive the same level
of protection from harass-
ment in school that employ-
ees receive in the workforce. Schools, like
employers, should be obligated to prevent
harassment and to address any harassment
that they know about, or should know about.
Also, harassment should be deemed to create
a hostile environment when it is sufficiently
severe or pervasive to deny a victim access to
the educational opportunities and benefits
provided by the school.

• Congress should pass the Student Non-
Discrimination Act, which would establish
a federal ban on discrimination and harass-
ment in public K-12 schools based on a
student’s actual or perceived sexual orienta-
tion or gender identity. Congress should
also pass the Safe Schools Improvement Act,
which would require schools and districts
to develop comprehensive student conduct
policies that include clear prohibitions
regarding bullying and harassment.

• OCR should conduct public education and
technical assistance activities to guide school
districts in their compliance efforts, particu-
larly in light of the October 2010 and April
2011 Guidance documents issued and recent

• Educational institutions at all levels should
create clear and accessible sexual harassment
policies to protect and educate students.
These policies should be part of school
discipline policies and codes of conduct and
should include provisions for effectively
protecting students after harassment has
occurred.16 These policies also should protect
against harassment based on actual or per-
ceived LGBT status.

• Title IX coordinators and their respective
schools/universities should proactively dis-
seminate information and conduct trainings
in the school and campus community to
ensure that students and employees are aware
of sexual harassment policies, as well as the
school’s process for filing complaints.

• Schools must safeguard harassment victims
by providing close follow-up, including
working with victims’ families, until the
danger of continued harassment has passed.

• Students, faculty, staff, and parents/guard-
ians should talk openly about attitudes and
behaviors that promote or impede progress
toward a harassment-free climate in which
all students can reach their full potential.
References


11. Ibid. at 639; Gebser, 524 U.S. at 283.

12. OCR, Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, Title IX (January 19, 2001). Available at http://www.ed.gov/about/offices/list/ocr/docs/shguide.html.


14. Although the facts of the Fitzgerald case had to do with sexual harassment, the Supreme Court’s holding applies more broadly to all types of cases regarding sex discrimination in schools.


Single-Sex Education

FERTILE GROUND FOR DISCRIMINATION

Both the U.S. Constitution and Title IX limit the separation of students by sex in publicly funded educational programs and activities. Although Title IX regulations issued by the U.S. Department of Education in 2006 opened the door to single-sex education, discrimination based on sex is still unlawful.

Combined with questionable assertions about differences in brain development and learning styles between boys and girls, the regulatory change has fueled a new trend toward greater separation of sexes in public education. Single-sex education in a public school setting is fraught with pitfalls, however. Research has shown more similarities than differences in the sexes on a wide range of student indicators, and programs that cater to gender stereotypes can create environments that limit learning for both girls and boys. There is also a risk that single-sex programs may discriminate, either in resource allocation or in the range of educational opportunities offered.

Legal History and Safeguards

One of the primary purposes of Title IX was to put an end to educational practices that separated boys and girls on the basis of assumptions and stereotypes about their interests and capabilities. A widespread example was steering girls into home economics classes and boys into wood shop. Because of this history of educational inequity, as well as the continued
risk of sex stereotyping, both Title IX and the U.S. Constitution include safeguards to ensure that educational programs that classify students on the basis of sex are not discriminatory.

Although it permits some single-sex schools, Title IX prohibits separation of boys and girls within coeducational schools except under certain narrow circumstances. Moreover, the Constitution requires that any gender-based classification (whether in a coeducational school or a single-sex school) have an “exceedingly persuasive justification,” and be “substantially related” to an important governmental objective. The Supreme Court has limited when sex classifications are justified, noting that such classifications must be “determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women,” and has further clarified that “overbroad stereotypes” about the typical talents, capacities, and preferences of men and women are an impermissible basis for separation of the sexes.

In 2002, spurred by provisions in the education reform law known as No Child Left Behind that permitted funding of “innovative” programs—including single-sex education “consistent with applicable law”—the Department of Education issued a notice that it intended to relax regulatory restrictions. The Department commissioned a study to survey existing research on the efficacy of single-sex education, which found that research on single-sex schools generally failed to meet accepted standards in terms of research design and methodology. The study ultimately concluded that the results of even the better-designed studies were “equivocal.” Moreover, the Department received overwhelming objections from a diverse coalition of advocates for equality in education to its 2004 proposed regulations, which allowed more flexibility in the use of single-sex education.

Nonetheless, in 2006, the Department of Education issued Title IX regulations that eased previous regulatory restrictions significantly. Under the 2006 regulations, schools can exclude boys or girls from classrooms on the basis of vague goals such as “improving the educational achievement of students” by offering “diverse educational options,” “provided that the single-sex nature of the class or extracurricular activity is substantially related

### KEY FINDINGS

1. **In recent years, there has been a growing trend of separating students on the basis of sex.** This trend raises serious equality and policy concerns, and may violate numerous provisions of state and federal law.

2. **In public schools, the circumstances under which students can be separated by sex are limited** by the Constitution and Title IX. Although the U.S. Department of Education loosened restrictions in 2006, schools must still meet a host of legal requirements before separating students by sex. Few meet these safeguards.

3. **Many single-sex programs claiming a basis in research are in fact based on claims** that amount to little more than repackaged sex stereotypes—for instance, that boys need authority and excel at abstract thinking, while girls need quiet environments that focus on cooperation and following directions.

4. **In the classroom, separating boys and girls can reinforce stereotypes** in ways that are stigmatizing and damaging to both groups. Moreover, single-sex programs can discriminate against one group in allocating resources or educational opportunities.

5. **Despite assertions to the contrary, separating students by sex has not been proven** to improve educational outcomes. Evaluations generally fail to compare single-sex programs with comparable coed programs or to control for other factors that affect outcomes, such as class size and student ability.

6. **The weaker 2006 regulations have opened the door to discrimination.** The Department of Education should rescind these regulations and clarify what is and is not permissible to help put an end to inequitable programs.
to achieving that objective.” Few schools have attempted to—or could—demonstrate that superior student achievement is substantially related to sex separation. The regulations also authorize schools to conduct their own evaluations of programs, with no outside monitoring or guidance on how evaluations should be conducted. The result has been a de facto slackening of standards and an increase in discriminatory practices that harm both boys and girls.

Claims about Sex Separation

The “reasoned analysis” for single-sex programs called for by the Supreme Court is often notably absent from the rationale for separate programs, particularly when scientific claims are examined carefully. Many single-sex programs started since the 2006 regulation change are based on the notion that boys’ and girls’ brains are so fundamentally different that they need to be taught not only separately but also using different methods, even though neuroscientists and experts in child development and education have discredited these assertions. Rather than sound science, such conclusions often rest on stereotypes about the interests and abilities of boys and girls.4

PURPORTED GENDER DIFFERENCES

Advocates for single-sex education often argue that separation by sex is necessary because of purported hard-wired differences in the brains of girls and boys. In his book Why Gender Matters,5 Leonard Sax—a physician and psychologist who founded the National Association for Single Sex Public Education and runs teacher training sessions nationally—makes these claims, among others:

- Girls’ hearing is far more sensitive than boys’, so teachers should speak softly to girls but yell at boys.

- When girls are under stress blood rushes away from their brains, while stress causes blood to rush to boys’ brains, thus priming them to learn.

- Boys should receive strict, authoritarian discipline and respond best to power assertion. Boys may be spanked, while girls may not.

- A boy who likes to read, does not enjoy contact sports, and does not have a lot of close male friends should be firmly disciplined, required to spend time with “normal males,” and made to play sports.

Michael Gurian, author and founder of the Gurian Institute, which also trains teachers, propounds similar theories. For instance, according to Gurian:6

- Boys are better than girls in math because their bodies receive daily surges of testosterone, while girls have equivalent mathematics skills only during the few days in their menstrual cycle when they have an estrogen surge.

- Boys are by nature abstract thinkers and so are naturally good at things like philosophy and engineering, while girls are by nature concrete thinkers.

- Full female participation in athletics is not “neurologically or hormonally realistic.”
DEBUNKING ASSUMPTIONS
While these assertions are presented as recent scientific discoveries, they have been overwhelmingly debunked by reputable scientists. For example, the Association for Psychological Science recently selected six independent cognitive experts to examine sex differences in learning math and science. These experts concluded, “None of the data regarding brain structure or function suggests that girls and boys learn differently or that either sex would benefit from single-sex schools.”

Other research abounds. A research review conducted at the time of the 2006 regulation changes found that half a century of research across Western countries has not shown any dramatic or consistent advantages for single-sex education for boys or girls. Neuroscientist and Chicago Medical School professor Lise Eliot, who recently published a book exploring gender differences and their biological and social causes, concludes, “the argument that boys and girls need different educational experiences because ‘their brains are different’ is patently absurd. The same goes for arguments based on cognitive abilities, which differ far more within groups of boys or girls than between the average boy and girl.”

Psychologist Janet Shibley Hyde, another recognized expert on gender differences and similarities, concludes that the available data suggest that the sexes are far more similar than different in terms of cognition. She further states, “Educators should be wary of arguments for single-sex education that rest on assumptions of large psychological differences between boys and girls. These assumptions are not supported by data.” A 2011 Science article by the American Council for Coeducational Schooling researchers, “The Pseudoscience of Single-Sex Schooling,” concluded that single-sex education “is deeply misguided, and often justified by weak, cherry-picked, or misconstrued scientific claims rather than by valid scientific evidence.”

EVIDENCE-BASED CONCLUSIONS
Although there is no doubt that some single-sex education programs have enjoyed successful outcomes, no rigorous studies have linked their successes to the single-sex structure rather than to other factors. For example, studies that have claimed to demonstrate a causal relationship between the single-sex structure and improved outcomes have failed to control for variables such as class size, socioeconomic status, or student ability.

Separating boys and girls based on sex stereotyping is not only unlawful but also potentially harmful. Assuming, for instance, that boys need active, loud environments focused on abstract thinking skills and girls need quiet activities that emphasize concrete thinking makes it less likely that the classroom will meet the varying learning needs of all students. Teaching to these stereotypes limits opportunities for both boys and girls and keeps both from learning the full range of skills necessary for future success in school, work, and life.
How Sex Separation Plays Out in the Classroom

Most single-sex programs in public education started after 2000. By 2008–2009, there were more than 1,000 coeducational public schools that included at least some single-sex programming at the K-12 level, including academic classes. It is estimated that today there are more than 100 all-girl or all-boy public schools, including public charter and magnet schools. The Department of Education’s Civil Rights Data Collection of 2010 indicates that more single-sex academic classes in coed public schools exist for boys than for girls.13

Below are examples of programs that either flout the spirit of or outright fail to comply with the legal standards set forth in Title IX, the Constitution, and the 2006 Department of Education regulations. These programs often reinforce gender stereotypes, fail to offer comparable subjects for boys and girls, provide no comparable option for students who prefer coeducation, or allocate fewer resources for girls’ programs. Greater accountability, including monitoring for compliance with regulations, is needed to end such discriminatory practices.

REINFORCING GENDER STEREOTYPES

Press accounts, public records requests, and litigation surrounding single-sex programs provide strong evidence that fears about the impact of relaxing the Title IX regulations are well founded. Many school administrators around the country have latched onto the notion that teachers should provide very different classroom experiences for boys and girls. Often this approach results in forcing boys and girls into gender stereotypes that serve neither group. For example, boys-only classes often focus on sports and leadership themes, while girls-only programs teach manners and cooperation.

Information for these examples and those in the following sections comes mostly from press reports, as there is often little public oversight or debate regarding the initiation of these programs, and few schools even indicate publicly that they operate sex-separated classes.

- A single-sex kindergarten program in Pittsburgh taught boys vocabulary using basketball and relay races, while teachers read girls stories about fairies and princesses and used wands and tiaras as learning incentives.14

Voices Against Discrimination

“Segregating boys and girls didn’t make things any better for our children. In fact they made things worse. Our kids were basically being taught ideas about gender that come from the Dark Ages.”

—Parent of middle school child in a single-sex program, Mobile, Alabama

“A loud, cold classroom where you toss balls around…might be great for some boys, and for some girls, but for some boys, it would be living hell.”

—Diane F. Halpern, professor of psychology, Claremont McKenna College

“My fears were realized when I found out that the whole idea behind separating the girls from the boys was the notion that they needed to be taught using different teaching styles—and even curricula. In the girls’ classes, they were assigned books about romance, and in the boys’ classes, they were reading books about hunting and dogs. My second daughter had another three years at the school, and I couldn’t face the idea of her getting three more years of that kind of conditioning.

The biggest lesson I hope my girls learn from this experience is that they can be vocal, strong, and independent, and they don’t need to be coddled or spoken softly to in order to accomplish anything they want to in life.”

—Parent who successfully challenged single-sex programming in a Louisiana public middle school
• In single-sex first-grade classes at a charter school in Lansing, Michigan, boys drew monsters and played games with balls, while girls had tea parties to teach social skills and manners.\textsuperscript{15}

• A single-sex middle school in South Carolina allowed boys to move around the classroom and toss a ball to determine whose turn it was to talk, while girls raised their hands to talk in a room that smelled like flowers, and “were taught to cooperate in different ways.”\textsuperscript{16}

• Starting in 2011–12, all sixth-grade math, science, and humanities courses were separated by sex at a middle school in Tacoma, Washington. Boys played catch to help learn multiplication, while girls could “do what girls do: talk at great length about their subjects.” The principal said the school would offer a coed option only if “enough” parents requested it.\textsuperscript{17}

• A Wisconsin superintendent justified a plan to create single-sex high school science classes based on “research data” showing that boys like “creative hands-on projects that culminate in something with a different level of understanding,” while girls followed directions and “may not even understand what happened in the science lab, but they got the right answers.”\textsuperscript{18}

FROM STEREOTYPES TO DISCRIMINATION

When sex stereotypes guide educational programming, discrimination follows. Single-sex programs in the public school setting that are demonstrably inequitable fail to comply with Title IX, even under the 2006 regulations. These programs may be challenged for practices that violate students’ civil rights, such as involuntary assignment to single-sex classrooms, failure to provide coeducational options in addition to the single-sex classes, and inequitable use of resources.

Recognizing the problems associated with this programming, including reliance on sex stereotypes, some schools or districts have chosen to discontinue their single-sex programming. Following are two examples of single-sex programs that were successfully challenged.

**Proposed high school conversion from coed to dual academies, Pittsburgh, PA.** After two of the district’s high schools, Westinghouse and Peabody, were designated for corrective action under No Child Left Behind, the school board approved a proposal to close the Westinghouse grade 9–12 program and open in the same location the Young Men’s and Young Women’s Academies, to serve grades 6–12. The academies were scheduled to open in the 2011–2012 school year.

The program, which was piloted the previous year in several classrooms at another public high school, was structured as two single-sex academies to cater to “the separate needs of young women and young men.”\textsuperscript{19} However, the school board failed to produce or cite any data tracking the outcomes of the pilot program. Information about the academies, received through an open records act request filed by the American Civil Liberties Union (ACLU) of Pennsylvania, claimed that “research solidly indicates that boys and girls learn differently,” including that “adolescent girls’ brains exhibit high levels of communication between different subject matter, cultures and time periods, while young men make meaning through movement,”\textsuperscript{21} although no such research was cited.

The academies were to offer a longer school day and were intended to have a more rigorous academic focus. The program offered boys—but not girls—access to a summer program to improve their readiness for the academic programs at the new academies. The plan called for students to be assigned to one of the single-sex academies, giving parents a limited time to opt out. The program was abandoned in fall 2011 after the ACLU threatened to file a complaint with the Office for Civil Rights (OCR).
Middle school separation of boys and girls, Mobile County, AL. In 2009 the Mobile County Public School System implemented single-sex programs in eight middle schools without notifying parents. At one school, boys and girls ate lunch at different times and were not allowed to speak to each other on school grounds. For boys, teachers were instructed to create “competitive, high-energy classrooms” and teach “heroic behavior”; for girls, to create “cooperative, quiet classrooms” focusing on “good character.” In sixth-grade language arts, boys were told to brainstorm action words used in sports, while girls were told to describe their dream wedding cake.

“Electives” were pre-assigned: girls took drama and boys took computer applications, with no option for changing classes. The principal told parents that “boys’ and girls’ brains were so different they needed a different curriculum.” The program was terminated shortly after it began in all eight schools after the ACLU threatened a lawsuit on behalf of two parents.

The Challenge of Evaluation

In addition to the flawed scientific rationale for single-sex education, lack of sound evaluation of single-sex programs is an ongoing problem. In particular, studies claiming positive results generally do not have comparable control groups in coed programs, making it impossible to draw meaningful comparisons. Where they do draw comparisons, they generally fail to control for school and student variables known to affect academic outcomes.

A typical example is an evaluation conducted in South Carolina. In November 2010, the South Carolina Department of Education released a survey of parents, teachers, and students participating in single-gender classes. Its methodological flaws included having no control group of students in coed classes; asking questions likely to lead to a positive answer; and failing to take into account the self-fulfilling expectations of parents, teachers, and students who had selected single-gender classes. It did not compare actual student performance of boys and girls or of students in single-sex classes with comparable students in coed classes.

The South Carolina Department of Education justified its inadequate review of the effectiveness of single-sex classes by saying that it interpreted the Department of Education’s 2006 regulation this way: “Federal law only requires schools to ‘review’ their data every two years, not to report it. As such, there is no requirement for any school to publish or communicate the impact of their single-gender program.” It is perhaps notable that South Carolina has since significantly reduced funding for its Office of Single-Gender Programs and has removed the 2010 survey from its website.

NCWGE Recommendations

• The U.S. Department of Education should rescind its 2006 changes to the Title IX regulations, which loosened restrictions on single-sex education, and clarify what is and is not permissible.

• Federal guidelines should increase accountability and transparency by requiring reporting of single-sex programs and their evaluations on public websites. Schools should also be required to disclose and provide public access to program data.

• The Department of Education, state education agencies, school boards, and school administrators (including Title IX coordinators) should improve monitoring and enforcement of Title IX compliance to
prevent discriminatory practices that hinder learning and limit equal opportunities.

- Federal and state education agencies should increase efforts to educate school adminis-
   trators and officials, parents, teachers, and local policy makers on their respective rights and responsibilities under Title IX, and on the role of Title IX coordinators in the law’s implementation.

References


21. Young Men’s Academy Young Women’s Academy Program Sketch [draft]. (Undated document, on file with ACLU).


TITLE IX’S PROMISE OF EQUAL opportunity for girls and women is far from being fulfilled when it comes to pregnant and parenting students. Many people, including students, do not know that Title IX prohibits discrimination based on pregnancy and parenting. Pregnant students are frequently pushed toward separate educational facilities, subjected to punishing leave policies, or denied access to extracurricular activities despite the fact that such conduct violates Title IX. Faced with these and other obstacles, many pregnant and parenting students drop out of school, thus lowering their chances of finding stable employment that will let them support their families.

Equal treatment and support for pregnant and parenting students is critical to ensuring that all female students have equal access to educational opportunities. It is also important for helping young fathers stay engaged in their children’s lives, remain in school, and complete their education.

Legal Protection for Pregnant and Parenting Students

GENERAL PROTECTION
One of the less well-known aspects of Title IX is that it protects the rights of pregnant and parenting students to stay in school and have equitable educational opportunities. Title IX prohibits discriminating against any student on the basis of sex, which includes a student’s “actual or potential” parental, family, or marital
status and “pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom.”

Generally speaking, this means that schools must give all students who might be, are, or have been pregnant (whether currently parenting or not) equal access to school programs and extracurricular activities. Schools must treat pregnant and parenting students in the same way that they treat other students who are similarly able or unable to participate in school activities. And Title IX requires schools to prevent and address sex-based harassment, which includes harassment based on pregnancy.¹

**TITLE IX REGULATIONS**

In addition to general protection, Title IX regulations detail how the law applies to a range of specific educational activities and policies that affect pregnant and parenting students. These regulations govern activities both in the classroom and outside of class.

**Class attendance.** Pregnant and/or parenting students may not be prevented from attending class on the basis of pregnancy. Separate programs or schools for pregnant and parenting students must be completely voluntary and must offer opportunities equal to those offered for non-pregnant students.

**Excused absences.** Absences due to pregnancy or childbirth must be excused for as long as is deemed medically necessary by the student’s doctor.

**Make-up work.** Schools must let students make up the work they missed while out due to pregnancy or any related conditions, including recovery from childbirth. If a teacher or professor awards “points” or other advantages based on class attendance, students must be given the opportunity to earn back the credit from classes missed because of pregnancy.

**Tutoring or other accommodations.** If the school provides tutoring or homebound instruction services to other students with medical conditions or temporary disabilities, it must provide such services to pregnant or parenting students on the same basis.

**Participation in school activities outside of class.** Schools must allow pregnant or parenting students to continue participating in activities.

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1. Despite legal protection under Title IX, pregnant and parenting students often face discrimination in school, including being pushed toward separate education facilities and facing inequitable absence policies.

2. Pregnant and parenting teens face many barriers to enrolling in, attending, and succeeding in school. Without adequate support, many drop out, lowering their chances of finding employment that offers economic security.

3. This issue affects boys as well as girls. Close to half of female dropouts and one-third of male dropouts say that becoming a parent is a factor in their decision to leave high school.

4. Lack of knowledge of the law is a major hurdle to overcoming discrimination. Measures such as training school officials to understand the rights and needs of pregnant and parenting students and tracking compliance are important for ensuring equal access to education.

5. Greater support for pregnant and parenting students, including flexible leave options, funding for services such as child care and tutoring, and guidance in developing educational goals can help ensure that these students have the opportunity to succeed in school.

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and programs outside of class such as sports, extracurricular activities, labs, field trips, and career rotations. The school can require a doctor’s note for pregnant students to participate in activities only if it requires a doctor’s note from all students who have conditions that require medical care.

**Scholarships.** Schools cannot terminate or reduce athletic, merit, or need-based scholarships because of pregnancy.

**Challenges in Education**

Research by the Center for Assessment and Policy Development suggests that the most common barriers to education faced by pregnant and parenting students are: 1) being strongly encouraged to attend stand-alone alternative programs of questionable academic quality; and 2) unlawful leave and absence policies.

Schools may push students toward separate programs or facilities for pregnant students out of fear that these students will be a bad influence on others, or to avoid having to deal with pregnancy-related health issues. However, separate programs generally don’t include the full range of academic coursework and are often sub-par. In 2007, New York City announced a decision to shut down its alternative program for pregnant and parenting students, which offered parenting classes and child care access but no opportunities for graduation or preparation for postsecondary education or careers.

By law, participation in separate programs must be voluntary, yet students report that schools often tell them that they have no choice. In other cases schools simply refuse to enroll pregnant students, either directing them elsewhere or actually encouraging them to drop out and get their GED instead of trying to finish high school. Students also report that many schools consider pregnancy or parenting-related absences “unexcused,” or fail to let them make up missed work—practices that impede academic success and are specifically prohibited under Title IX.

Other findings on pregnant and parenting students paint a disturbing picture:

- Only 51% of women who were teen mothers earned their high school diplomas by age 22.3
- Fewer than 2% of young teen mothers (those who have a baby before age 18) attain a college degree by age 30.4
- In a nationwide survey, half of female dropouts said that becoming a parent was a factor in their decision to leave high school; one-third said it was a major factor.5
- The same survey found that parenthood was a factor in leaving school for one-third of male students who dropped out.
- Parents and other students with care-giving responsibilities are the group mostly likely to say they “would have worked harder if their schools had demanded more of them and provided the necessary support.”6

High dropout rates among pregnant and parenting students stem from the many hurdles
these students face in enrolling in, attending, and succeeding in school:

1. The challenge of juggling schoolwork with parenting responsibilities.

2. Lack of access to affordable, quality child care, transportation, and other critical services.

3. Discrimination from teachers, coaches, or school administrators, including policies and practices that prevent pregnant and parenting students from succeeding.

4. Lack of flexibility and accommodation for the unique needs of pregnant and parenting students, such as excusing absences for taking care of a sick child; allowing time and space to express breast milk; and permitting students to schedule classes later in the day to accommodate morning sickness, child care limitations, or transportation barriers.

Although some of these challenges are unavoidable, providing support for these students—including, at a minimum, complying with the provisions of Title IX—can remove barriers to success.

Supporting pregnant and parenting students at the postsecondary level is also crucial, given the importance of a college education in the current economy. According to the Institute for Women’s Policy Research (IWPR), parents of dependent children make up nearly a quarter of U.S. undergraduates, or 3.9 million students. Half of those are single parents, who are more likely than others to come from disadvantaged backgrounds.

In addition, nearly half of parenting students work full-time while enrolled. For these students, obtaining quality, affordable child care is one of the greatest challenges; the availability of child care is cited as an important factor in making the decision to attend college by four out of five parenting students.7 IWPR notes that while the federal Child Care Access Means Parents in School (CCAMPIS) program finances some child care for low-income parents, funding is limited ($16 million in 2010) and applied unevenly.

Challenges in Ending Discrimination

Despite clear legal protection for pregnant and parenting students, practices that hinder the ability of these students to succeed in school are widespread. Discrimination and biases persist; many schools enact policies to punish pregnant and parenting students or make an example of them. Lack of knowledge of students’ rights and poor enforcement also contribute to the problem.

LACK OF KNOWLEDGE

No reliable data exists on the numbers of pregnant or parenting students or on the numbers of these students who face discrimination in violation of Title IX. Better data on these numbers—which could be gathered via the Department of Education’s Civil Rights Data Collection process—would help in crafting strategies for countering discrimination.

Lack of knowledge among schools is another major hurdle. Many schools have not appointed Title IX coordinators, in violation of the statute,
so they may not know that Title IX applies to pregnant and parenting students. Others simply do not fully understand their responsibilities to these students under the law. For example, colleges and universities sometimes allow individual instructors to set policies for their own classes, including refusing entry to pregnant students, because school administrators fail to recognize that the school is accountable for such discrimination.8

Some schools are misled by policies at the state and local level that actually violate Title IX. At least two state Departments of Education recently had official policies in place that violated Title IX with regard to pregnant and parenting students. Those policies excluded students who were pregnant or recovering from childbirth from receiving services, such as homebound instruction, that were made available to those with other medically excused absences. (See the boxed insert for examples.)

Students themselves often have no idea that Title IX prohibits discrimination against pregnant and parenting students.9 These students are particularly vulnerable if their school gives them incorrect information about enrollment, absence, or other policies. Given the high dropout rate among students who become pregnant, ensuring that these students understand their rights with regard to education is essential.

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**ENDING DISCRIMINATION AGAINST PREGNANT AND PARENTING STUDENTS**

When Title IX is enforced, it can make a huge difference in ensuring educational opportunities and access for pregnant and parenting students.

**Success at the State Level**

- Until recently, Georgia state regulations excluded pregnancy as an eligible condition for the homebound instruction assistance offered to students who missed school for other medical reasons. The National Women’s Law Center (NWLC) notified the state Department of Education of the Title IX violation and worked with officials to get the policy changed. In 2009, the pregnancy exclusion was removed.

- A Michigan state law requiring school districts to provide homebound or hospitalized instructional services for students who missed school for medical reasons expressly excluded students who were pregnant or recovering from childbirth. Again NWLC intervened, and in 2010 the state Department of Education changed its guidelines to include medically excused absences due to pregnancy, childbirth, and recovery.

**Court Rulings**

Several federal court cases have addressed the issue of whether a school may exclude a pregnant or parenting student from membership in the National Honor Society (NHS). Most, although not all, rejected schools’ efforts to defend their exclusion of a pregnant student by characterizing it as based on premarital sex, not on pregnancy:

- At least two federal courts have determined that exclusion of pregnant or parenting students constitutes unlawful discrimination under Title IX.a

- One district court found that denying NHS membership to a pregnant student violated Title IX because a male student who had fathered a child out of wedlock was not similarly excluded.

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**LACK OF ENFORCEMENT**

Enforcement of Title IX has proved difficult. Students are unlikely to lodge formal complaints with the Office for Civil Rights (OCR) for a number of reasons, including lack of knowledge of their rights, already feeling overwhelmed and vulnerable, and lack of resources or guidance from the adults in their lives. These issues make it even less likely that they will file lawsuits in court.
The latest publication from OCR on the application of Title IX to pregnant and parenting students was a pamphlet issued in 1991, so it is critical that OCR issue updated guidance to better publicize the law’s requirements and help schools understand their responsibilities. OCR did remind schools in 2007 that terminating athletic scholarships or other financial assistance based on pregnancy or a related condition is prohibited under Title IX, in response to press reports of female athletes terminating pregnancies because they were afraid of losing their scholarships.

**Beyond the Law: Creating Effective Policies**

Schools should ensure that their leaders and staff understand the rights of pregnant and parenting students under Title IX. That is just one piece of the puzzle for improving outcomes, however. Schools that want to increase graduation rates and provide support for motivated students facing the challenges of parenthood can do much more than just avoid discrimination.

Recommendations for schools, both at the secondary level and at the postsecondary level, include the following:

- Create flexible leave options and mechanisms for making up missed work.
- Provide services such as child care, transportation, and tutoring.
- Excuse absences related to the illness of a student’s child.
- Allow students time and space to express breast milk.
- Provide added guidance and case management to help students develop short- and long-term educational goals, apply for public benefits, and access available health and other social services in the community.
- Offer life skills classes that provide information on parenting as well as comprehensive and medically accurate information on secondary pregnancy prevention.
- Track data on student outcomes.

All of these measures can help ensure that pregnant and parenting students have the opportunity to succeed in school.

**Recent Developments**

Two recent federal actions take aim at improving high school graduation rates and increasing access to education for pregnant and parenting students.

The Pregnant and Parenting Students Access to Education Act, introduced in the House of Representatives in July 2011, authorizes the U.S. Secretary of Education to make state and local grants to promote education for pregnant and parenting students. The act was devised to support states in creating a plan for educating pregnant and parenting students, providing professional development and technical assistance to school districts, and coordinating services with other state agencies. The act also has provisions for rigorous program evaluation and for collection and reporting of data on pregnant and parenting students, including educational outcomes. This legislation would provide states and school districts with much-needed resources not only for ensuring Title IX compliance but also for promoting graduation and college and career readiness for pregnant and parenting students.
The Pregnancy Assistance Fund, a component of the Affordable Care Act, provides $25 million annually for fiscal years 2010 through 2019 for the purpose of awarding competitive grants to states and Native American tribes or reservations. The law provides for up to 25 grants of $500,000 to $2 million a year. In the first year, awards went to 17 states for programs to connect young families with the supportive services they need and to ensure a focus on important outcomes such as graduation rates, maternal and child health outcomes, and parenting skills.11

NCWGE Recommendations

- OCR should enhance enforcement of Title IX in this area by conducting compliance reviews and issuing communications that remind schools of their obligations to pregnant and parenting students.

- Dropout prevention programs should be targeted to meet the needs of both boys and girls, including specific measures to prevent teen pregnancy and to support pregnant and parenting students so they can remain in school.

- Legislation directing schools to track the academic progress of pregnant and parenting students would aid enforcement and create a body of data on where—and how—efforts to keep these students in school have succeeded.

- The federal government should fund programs to provide enhanced support for pregnant and parenting students, including accommodations and services that would enable parents to complete their education. Passing the Pregnant and Parenting Students Access to Education Act would be one way to help achieve this goal.

- Funding should be increased to make quality and affordable child care accessible to student parents, including through the CCAMPIS program.12

### RESOURCES FOR STUDENTS AND SCHOOLS

The National Women's Law Center offers a range of resources on this topic, including information for pregnant and parenting students about their rights as well as information for schools.

- **Pregnant and Parenting Students’ Rights.** Available at [http://www.nwlc.org/sites/default/files/pdfs/PPStudentRightsUnderTitleIX.pdf](http://www.nwlc.org/sites/default/files/pdfs/PPStudentRightsUnderTitleIX.pdf).


References


6. Ibid.


Chronology of Title IX

1964 Title VII of the Civil Rights Act of 1964 is enacted, prohibiting discrimination in employment based on race, color, sex, national origin, or religion. Title VI of this Act prohibits discrimination in federally assisted programs—including education programs—on the basis of race, color and national origin, but not on the basis of sex.

1970 Congress holds first hearings on sex discrimination in higher education.

1972 Title IX of the Education Amendments of 1972 is enacted, prohibiting discrimination on the basis of sex in all federally funded education programs and activities.

1974 The Tower Amendment, which would have exempted revenue-producing sports from Title IX compliance, is proposed and rejected. The alternative Javits Amendment passes, providing that Title IX regulations be issued and include reasonable provisions considering the nature of particular sports.

Congress passes the Women's Educational Equity Act, designed to build a gender-equity infrastructure at the local and national levels that both supports Title IX and combats sex stereotyping in education.

1975 The U.S. Department of Health, Education and Welfare (HEW) issues final Title IX regulations. Elementary schools are given one year to comply. High schools and colleges are given three years to comply. Several attempts in Congress to disapprove the HEW regulations and to amend Title IX are rejected.

HEW publishes “Elimination of Sex Discrimination in Athletics Programs” in the Federal Register and sends it to school officials and college and university presidents.

1976 The NCAA unsuccessfully files a lawsuit challenging the Title IX athletic regulations.

1977 A U.S. Court of Appeals rules that sexual harassment is sex discrimination and therefore covered under Title IX.

1979 After notice and comment, HEW issues a Policy Interpretation, “Title IX and Intercollegiate Athletics,” introducing the “three-part test” for assessing compliance with Title IX’s requirements for equal participation opportunities.

The U.S. Supreme Court rules in Cannon v. University of Chicago that private individuals have the right to sue under Title IX.

1980 Federal education responsibilities are transferred from HEW to the new Department of Education. Primary oversight of Title IX is transferred to the Department’s Office for Civil Rights (OCR).

OCR issues the Interim Athletics Investigator’s Manual on Title IX compliance to investigators in its regional offices.
1982 The U.S. Supreme Court upholds Title IX regulations prohibiting sex discrimination in employment.

1984 The U.S. Supreme Court rules in Grove City v. Bell that Title IX applies only to the specific programs within an institution that receive targeted federal funds. This decision effectively eliminates Title IX coverage of most athletics programs and other activities and areas of schools and colleges not directly receiving federal funds.

1987 OCR publishes Title IX Grievance Procedures: An Introductory Manual to assist schools with their obligation to establish a Title IX complaint procedure and designate a Title IX coordinator to receive those complaints.

1988 Congress overrides President Reagan’s veto to pass the Civil Rights Restoration Act, which restores Title IX coverage to all of an educational institution’s programs and activities if any part of the institution receives federal funds.

1990 OCR updates and finalizes its Title IX Athletics Investigator’s Manual.

1992 The U.S. Supreme Court rules unanimously in Franklin v. Gwinnett County Public Schools that plaintiffs who sue under Title IX may be awarded monetary damages.

   The NCAA publishes a Gender-Equity Study of its member institutions, detailing widespread sex discrimination in athletics programs.

1994 The Equity in Athletics Disclosure Act passes, requiring federally assisted, coeducational institutions of higher education to disclose certain gender equity information about their intercollegiate athletics programs, allowing better monitoring of Title IX compliance.

1996 OCR issues the “Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test,” explaining in detail how schools can comply with each prong of the three-part participation test first set forth in the 1979 Policy Interpretation.

   The U.S. Court of Appeals for the First Circuit, after an extensive analysis, upholds the lawfulness of the three-part test in Cohen v. Brown University.

   The U.S. Government Accountability Office issues a report entitled Issues Involving Single-Gender Schools and Programs, which concludes that such programs may violate Title IX, the U.S. Constitution, and state constitutions.

1997 OCR issues “Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties,” which establishes standards for Title IX compliance and emphasizes that institutions are responsible for preventing and punishing student-on-student sexual harassment.

1998 The U.S. Supreme Court rules in Gebser v. Lago Vista Independent School District that a student may sue for damages for a teacher’s sexual harassment only if the school had notice of the teacher’s misconduct and acted with “deliberate indifference”—a higher standard for recovering damages than employees have to meet for harassment in the workplace.
1999 The U.S. Supreme Court rules in *Davis v. Monroe County Board of Education* that Title IX covers student-on-student harassment and that damages are available if the school had notice of, and was deliberately indifferent to, the harassment. The Court holds that the harassment must be so severe, pervasive, and objectively offensive that it deprives the victim of the benefits of education.

Two teen mothers who were denied membership in the National Honor Society because of their parental status settle their Title IX lawsuit, *Chipman v. Grant County School District*.

2000 The Department of Justice issues the Final Common Rule on Title IX enforcement for all federal agencies that do not already have their own regulations.

President Clinton issues Executive Order 13160, stating that federal civil rights protections, including Title IX's prohibition against sex discrimination, apply to federally conducted education and training programs and activities, because “The Federal Government must hold itself to at least the same principles of nondiscrimination in educational opportunities as it applies to the education programs and activities of State and local governments, and to private institutions receiving Federal financial assistance.”

2001 OCR issues “Revised Sexual Harassment Guidance” reaffirming in large part the compliance standards described in the 1997 Guidance. It makes clear that standards set forth in the 1998 and 1999 Supreme Court rulings (*Gebser* and *Davis*) apply only to suits for damages, not to OCR's enforcement or to suits for injunctive relief.

The Department of Justice issues the *Title IX Legal Manual*, providing guidance to federal agencies regarding compliance with Title IX.

2002 The National Wrestling Coaches Association files suit against the Department of Education challenging the three-part test. The Department establishes a Commission on Opportunity in Athletics to evaluate changes to Title IX athletics policies.

The President's budget calls for elimination of the Women's Educational Equity Act; the Bush Administration ends the WEAA Equity Resource Center in 2003.

2003 The Commission on Opportunity in Athletics issues its report, recommending significant and damaging changes to the Department of Education's regulatory policies. The Secretary of Education rejects all recommendations and issues a “Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance” affirming the existing policies.

2005 Lawrence H. Summers, President of Harvard University, draws criticism for proposing that “innate” differences in sex may explain why fewer women succeed in science and math careers. One year later, Summers announces his resignation from Harvard; Drew Gilpin Faust becomes the first female president of Harvard in 2007.

The U.S. Supreme Court rules in *Jackson v. Birmingham Board of Education* that individuals, including coaches and teachers, have a right of action under Title IX if they are retaliated against for protesting sex discrimination.

The Department of Education issues an “Additional Clarification of Intercollegiate Athletics
Policy Guidance: Three-Part Test—Part Three,” which weakens schools’ obligations under Title IX by allowing them to rely on a single email survey to support assertions that they are meeting women’s interest in playing sports.

2006 The Department of Education promulgates new regulations expanding the authorization for schools to offer single-sex programs.

The College of Education at Arizona State University releases a study showing that current research into single-sex education is neither conclusive nor of acceptable quality. The study notes that the research “is mostly flawed by failure to control for important variables such as class, financial status, selective admissions, religious values, prior learning or ethnicity.”

2009 The Supreme Court holds, in *Fitzgerald v. Barnstable School Committee*, that individuals can bring suits alleging sex discrimination by public entities under both Title IX and the U.S. Constitution.

2010 OCR releases guidance to schools clarifying that, under current civil rights laws, they are responsible for stopping, remediing, and preventing bullying and harassment based on sex, including gender stereotypes. If a school fails to recognize and address discriminatory harassment, it can be held responsible for violating students’ civil rights.

The Department of Education rescinds the 2005 “Additional Clarification of Intercollegiate Athletics Policy Guidance: Three-Part Test—Part Three,” returning athletics enforcement efforts to the previous standard, which requires schools to evaluate multiple indicators of interest to demonstrate that they are fully and effectively accommodating their female students’ interests.

2011 OCR releases guidance clarifying that schools are obliged to prevent and respond to sexual violence under Title IX’s prohibition of sex discrimination. The guidance reiterates that sexual harassment of students, including acts of sexual violence, are prohibited under Title IX.

NOTE: The following publications were used as references for this timeline: Kristen Galles, “Title IX History,” summary prepared by Equity Legal, 2003; Bernice R. Sandler and Harriett M. Stonehill, “Appendix C: A Brief History of Student-to-Student Harassment,” in *Student-to-Student Sexual Harassment K-12: Strategies and Solutions for Educators to Use in the Classroom, School, and Community* (Rowman & Littlefield Education, 2005); Susan Ware, “Title IX: A Brief History with Documents,” in the *Bedford Series in History and Culture* (Bedford/St. Martin’s, 2007); Women’s Sports Foundation, “Title IX Legislative Chronology,” available at http://www.womensportsfoundation.org/home/advocate/title-ix-and-issues/history-of-title-ix/history-of-title-ix/.


## NCWGE Affiliated Organizations

<table>
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<th>Name</th>
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| American Association for the Advancement of Science | http://www.aaas.org  
1200 New York Avenue NW  
Washington, DC 20005                                 |
| American Association of University Women          | http://www.aauw.org  
1111 16th Street NW  
Washington, DC 20036                                  |
| American Civil Liberties Union                    | http://www.aclu.org  
Women's Rights Project  
125 Broad Street  
New York, NY 10004                                |
| Washington Legislative Office                     | 915 15th Street NW  
Washington, DC 20005                                  |
| American Federation of Teachers                   | http://www.aft.org  
555 New Jersey Avenue NW  
Washington, DC 20001-2079                           |
| American Psychological Association                | http://www.apa.org  
Women's Programs Office  
750 First Street NE  
Washington, DC 20002-4242                            |
| Association for Gender Equity Leadership in Education | http://www.agele.org  
317 South Division Street, PMB 54  
Ann Arbor, MI 48104                                  |
| Association for Women in Science                  | http://www.awis.org  
1321 Duke Street, Suite 210  
Alexandria, VA 22314                                 |
| Association of American Colleges and Universities | http://www.aacu.org  
1818 R Street NW  
Washington, DC 20009                                 |
| Business and Professional Women’s Foundation      | http://www.bpwfoundation.org  
1718 M Street NW, #148  
Washington, DC 20036                                 |
| Center for Advancement of Public Policy           | http://www.capponline.org  
323 Morning Sun Trail  
Corrales, NM 87048                                  |
| Center for Women Policy Studies                    | http://www.centerwomenpolicy.org  
1776 Massachusetts Avenue NW, Suite 450  
Washington, DC 20036                                 |
| Council of Chief State School Officers Resource Center on Educational Equity | One Massachusetts Avenue NW, Suite 700  
Washington, DC 20001-1431                           |
| DC Office of the State Superintendent of Education (OSSE) | http://osse.dc.gov  
Postsecondary and Career Education Division  
810 First Street NE  
Washington, DC 20002-4227                           |
| Equal Rights Advocates                            | http://www.equalrights.org  
180 Howard Street, Suite 300  
San Francisco, CA 94105                              |
| Feminist Majority Foundation                      | http://www.feminist.org  
1600 Wilson Boulevard, #801  
Arlington, VA 22209                                  |
| Girl Scouts of the USA                            | http://www.girlscouts.org  
816 Connecticut Avenue NW  
3rd Floor  
Washington, DC 20036                                |
120 Wall Street  
New York, NY 10005                                   |
| Girlstart                                         | http://girlstart.org  
1400 W Anderson Lane  
Austin, TX 78757                                    |
| Healthy Teen Network                              | http://www.healthyteennetwork.org  
1501 Saint Paul Street, Suite 124  
Baltimore, MD 21202                                  |
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| Institute for Women’s Policy Research                                      | http://www.iwpr.org
1200 18th Street NW, Suite 301
Washington, DC 20036                                                       |
| Legal Momentum                                                               | http://www.legalmomentum.org
395 Hudson Street
New York, NY 10014                                                          |
| and                                                                          | 1101 14th Street NW, Suite 300
Washington, DC 20005                                                         |
| Mexican American Legal Defense and Educational Fund (MALDEF)                | http://www.maldef.org
1116 16th Street NW Suite 100
Washington DC, 20036                                                        |
| Ms. Foundation for Women                                                     | http://www.ms.foundation.org
12 MetroTech Center, 26th Floor
Brooklyn, NY 11201                                                          |
| Myra Sadker Advocates for Gender Equity                                      | http://www.sadker.org
6988 North Chula Vista Reserve Place
Tucson, AZ 85704                                                             |
| National Alliance for Partnerships in Equity                                | http://www.napequity.org
P. O. Box 369
Cochranville, PA 19330                                                      |
| National Association for Girls & Women in Sport                             | http://www.aahperd.org/nagws
1900 Association Drive
Reston, VA 20191                                                            |
| National Association of Collegiate Women Athletic Administrators            | http://www.nacwaa.org
2000 Baltimore
Kansas City, MO 64108                                                        |
| National Center for Lesbian Rights                                           | http://www.ncrights.org
870 Market Street, Suite 570
San Francisco, CA 94102                                                      |
| National Council of Administrative Women in Education                       | 3710 Southern Avenue, SE
Washington, DC 20020                                                        |
| National Council of Negro Women                                             | http://www.ncnw.org
633 Pennsylvania Avenue, NW
Washington, DC 20001                                                        |
| National Council of Women’s Organizations                                    | http://www.womensorganizations.org
714 G Street SE
Washington, DC 20003                                                        |
| National Education Association                                               | http://www.nea.org
1201 16th Street NW, Room 613
Washington, DC 20036                                                        |
| National Girls Collaborative Project                                         | http://www.ngcproject.org
19020 33rd Ave W, Suite 210
Lynnwood, WA 98036                                                          |
| National Organization for Women                                              | http://www.now.org
1100 H Street NW, 3rd floor
Washington, DC 20005                                                        |
| National Partnership for Women and Families                                  | http://www.nationalpartnership.org
1875 Connecticut Avenue, NW, #650
Washington, DC 20009-5728                                                    |
| National Women's History Project                                             | http://www.nwhp.org
3440 Airway Drive, Suite F
Santa Rosa, CA 95403                                                         |
| National Women's Law Center                                                 | http://www.nwlc.org
11 Dupont Circle NW, Suite 800
Washington, DC 20036                                                        |
| National Women's Political Caucus                                           | http://www.nwpc.org
PO Box 50476
Washington, DC 20091                                                        |
| Society of Women Engineers                                                  | http://www.swe.org
203 N La Salle Street, Suite 1675
Chicago, IL 60601                                                            |
| U.S. Student Association                                                     | http://www.usstudents.org
1211 Connecticut Avenue NW, Suite 406
Washington, DC 20036                                                        |
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<td>YWCA</td>
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The Proposed Equal Rights Amendment: Contemporary Ratification Issues

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July 18, 2018
Summary

The proposed Equal Rights Amendment to the U.S. Constitution (ERA), which declares that “equality of rights under the law shall not be denied or abridged by the United States or any State on account of sex,” was approved by Congress for ratification by the states in 1972. The proposal included a seven-year deadline for ratification. Between 1972 and 1977, 35 state legislatures, of the 38 required by the Constitution, voted to ratify the ERA. Despite a congressional extension of the deadline from 1979 to 1982, no additional states approved the amendment during the extended period, at which time the amendment was widely considered to have expired.

Since 1982, Senators and Representatives who support the amendment have continued to introduce new versions of the ERA, generally referred to as “fresh start” amendments. In addition, some Members of Congress have also introduced resolutions designed to reopen ratification for the ERA as proposed in 1972, restarting the process where it ended in 1982. This was known as the “three-state strategy,” for the number of additional ratifications then needed to complete the process, until Nevada and Illinois ratified the amendment in March 2017 and May 2018, respectively, becoming the 36th and 37th states to do so. The ERA supporters’ intention here is to repeal or remove the deadlines set for the proposed ERA, reactivate support for the amendment, and complete the ratification process by gaining approval from the one additional state needed to meet the constitutional requirement, assuming the Nevada and Illinois ratifications are valid.

As the 115th Congress convened, resolutions were introduced in the House of Representatives and the Senate that embraced both approaches. H.J.Res. 33, introduced by Representative Carolyn Maloney, and S.J.Res. 6, introduced by Senator Robert Menendez, propose “fresh start” equal rights amendments. H.J.Res. 53, introduced by Representative Jackie Speier, and S.J.Res. 5, introduced by Senator Benjamin Cardin, would remove the deadline for ratification of the ERA proposed by Congress in 1972.

First introduced in Congress in 1923, the ERA proposed to the states in 1972 by the 92nd Congress included the customary seven-year ratification time limit. Although through 1977 the ERA was approved by 35 states, various controversies brought the ratification process to a halt as the deadline approached. In 1978, Congress extended the deadline through 1982. Opponents claimed this violated the spirit, if not the letter of the amendment process; supporters insisted the amendment needed more time for state consideration. Further, they justified extension because the deadline was placed not in the amendment, but in its preamble. Despite the extension, no further states ratified during the extension period, and the amendment was presumed to have expired in 1982. During this period, the ratification question was further complicated when five state legislatures passed resolutions rescinding their earlier ratifications. The Supreme Court agreed to hear cases on the rescission question, but the ERA’s ratification time limit expired before they could be argued, and the Court dismissed the cases as moot.

Many ERA proponents claim that because the amendment did not include a ratification deadline within the amendment text, it remains potentially viable and eligible for ratification indefinitely. They maintain that Congress possesses the authority both to repeal the original 1979 ratification deadline and its 1982 extension, and to restart the ratification clock at the current 37-state level—including the Nevada and Illinois ratifications—with or without a future ratification deadline. In support, they assert that Article V of the Constitution gives Congress broad authority over the amendment process. They further cite the Supreme Court’s decisions in Dillon v. Gloss and Coleman v. Miller in support of their position. They also note the precedent of the Twenty-Seventh “Madison” Amendment, which was ratified in 1992, 203 years after Congress proposed it to the states.
Opponents of reopening the amendment process may argue that attempting to revive the ERA would be politically divisive, and that providing it with a “third bite of the apple” would be contrary to the spirit and perhaps the letter of Article V and Congress’s earlier intentions. They might also reject the example of the Twenty-Seventh Amendment, which, unlike the proposed ERA, never had a ratification time limit. Further, they might claim that efforts to revive the ERA ignore the possibility that state ratifications may have expired with the 1982 deadline, and that amendment proponents fail to consider the issue of state rescission, which has never been specifically decided in any U.S. court.

The “fresh start” approach provides an alternative means to revive the ERA. It consists of starting over by introducing a new amendment, similar or identical to, but distinct from, the original. A fresh start would avoid potential controversies associated with reopening the ratification process, but would face the stringent constitutional requirements of two-thirds support in both chambers of Congress and ratification by three-fourths of the states.
The Proposed Equal Rights Amendment: Contemporary Ratification Issues

Contents

Introduction .................................................................................................................................................. 1
Most Recent Developments ......................................................................................................................... 2

115th Congress Proposals ......................................................................................................................... 2
  Fresh Start Proposals ............................................................................................................................. 2
  Discussion .................................................................................................................................................. 3
  Removing the ERA Ratification Deadline: The “Three-State Strategy” ................................................. 4
  Discussion .................................................................................................................................................. 5
Recent Activity in the State Legislatures: Nevada and Illinois .................................................................. 5
Contemporary Public Attitudes toward the Equal Rights Amendment ..................................................... 6
An Equal Rights Amendment: Legislative and Ratification History, 1923-1972 ........................................ 7
  Five Decades of Effort: Building Support for an Equal Rights Amendment in Congress, 1923-1970 ................................................................................................................................. 7
  Congress Approves and Proposes the Equal Rights Amendment, 1970-1972 ..................................... 10
    First Vote in the House, 91st Congress—1970 ................................................................................... 11
    Passage and Proposal by Congress, 92nd Congress—1971-1972 ....................................................... 12
    Congress Sets a Seven-Year Ratification Deadline ............................................................................. 13
  Ratification Efforts in the States ............................................................................................................. 14
  Ratification Is Extended in 1978, but Expires in 1982 ............................................................................ 15
  Rescission: A Legal Challenge to the Ratification Process ..................................................................... 16
Renewed Legislative and Constitutional Proposals, 1982 to the Present ................................................. 16
  “Fresh Start” Proposals ......................................................................................................................... 17
  “Three-State” Proposals ......................................................................................................................... 17
Contemporary Viability of the Equal Rights Amendment ........................................................................... 18
  Article V: Congressional Authority over the Amendment Process ....................................................... 18
  The Madison Amendment (the Twenty-Seventh Amendment): A Dormant Proposal ......................... 20
    Revived and Ratified .......................................................................................................................... 20
  Ratification of the Madison Amendment: A Model for the Proposed Equal Rights Amendment? ....... 22
  The Role of the Supreme Court Decisions in Dillon v. Gloss and Coleman v. Miller ......................... 24
Ancillary Issues ............................................................................................................................................ 26
  Origins of the Seven-Year Ratification Deadline ................................................................................. 26
  Rescission ................................................................................................................................................ 26
  Congressional Promulgation of Amendments ....................................................................................... 27
  The Proposed District of Columbia Voting Rights (Congressional Representation) Amendment—Congress Places a Ratification Deadline in the Body of the Amendment .................................................. 28
Concluding Observations .......................................................................................................................... 30

Contacts

Author Contact Information ....................................................................................................................... 31
Introduction

On July 20, 1923, the National Woman’s Party (NWP) met in Seneca Falls, New York, to commemorate the 75th anniversary of the historic Seneca Falls Convention and celebrate the 1920 ratification of the Nineteenth Amendment, by which women won the right to vote. At the meeting, NWP leader Alice Paul announced her next project would be to develop and promote a new constitutional amendment, guaranteeing equal rights and equality under the law in the United States to women and men. Paul, a prominent suffragist, noted the recent ratification of the Nineteenth Amendment, which established the right of women to vote. She characterized an “equal rights” amendment as the next logical step for the women’s movement. The proposed amendment was first introduced six months later, in December 1923, in the 68th Congress. Originally named “the Lucretia Mott Amendment,” in honor of the prominent 19th century abolitionist, women’s rights activist, and social reformer, the draft amendment stated that, “men and women shall have equal rights throughout the United States and every place subject to its jurisdiction.”

Nearly half a century passed before the Mott Amendment, as amended and ultimately renamed the Alice Paul Amendment, was approved by Congress and proposed to the states for ratification in 1972. In common with the Eighteenth and Twentieth through Twenty-Sixth Amendments, the proposed ERA included a seven-year deadline for ratification; in this case the deadline was included in the proposing clause, or preamble, that preceded the text of the amendment. After considerable early progress in the states, ratifications slowed, and the process ultimately stalled at 35 states in 1977, 3 short of the 38 approvals (three-quarters of the states) required by the Constitution. As the 1979 deadline approached, however, ERA supporters capitalized on the fact that the seven-year time limit was incorporated in the amendment’s proposing clause, rather than in the body of the amendment. Concluding that the amendment itself was, therefore, not time-limited, Congress extended the ratification period by 38 months, through 1982. No further states added their approval during the extension, however, and the proposed ERA appeared to expire in 1982.

Since the proposed ERA’s extended ratification period expired in 1982, Senators and Representatives have continued to introduce new versions of the amendment, beginning in the 97th Congress. More recently, new analyses emerged that led ERA supporters to assert that the amendment remains viable, and that the period for its ratification could be extended indefinitely by congressional action. Resolutions embracing this thesis have been introduced beginning in the 112th Congress. Their stated purpose is that of “[r]emoving the deadline for ratification of the Equal Rights Amendment.” If enacted, these measures would eliminate the 1979 and 1982 deadlines; reopen the proposed ERA for state ratification at the present count of 37 states; and extend the period for state ratification indefinitely.

This report examines the legislative history of the various proposals that ultimately emerged as the proposed Equal Rights Amendment. It identifies and provides an analysis of current

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3 The amendment is referred to hereinafter as “the proposed Equal Rights Amendment,” or “the proposed ERA.”
4 See H.J. Res. 192 et al. and S.J. Res. 213, 92nd Congress.
6 Nevada became the 36th state to ratify the ERA when its legislature voted to ratify the amendment on March 22, 2017, and Illinois became the 37th, when its legislature ratified on May 30, 2018.
The Proposed Equal Rights Amendment: Contemporary Ratification Issues

legislative proposals and reviews contemporary factors that may bear on its present and future viability.

Most Recent Developments

115th Congress Proposals

As the 115th Congress convened, resolutions were introduced in both the House and Senate that embraced two approaches to the Equal Rights Amendment. These include “fresh start” proposals that proposed a new constitutional amendment, separate from the amendment proposed by Congress in 1972 (H.J. Res. 208, 92nd Congress), and proposals designed to reopen the ratification process by removing the deadline included in the resolution proposing the original ERA.

Fresh Start Proposals

Perhaps the most basic means of restarting an equal rights amendment would be by introduction of a new joint resolution, a “fresh start.” In 1982, even as the extended ratification deadline for the proposed ERA approached, resolutions proposing a new equal rights amendment were introduced in the 97th Congress. New versions of the ERA have continued to be introduced in the House and Senate in each succeeding Congress. All have shared language identical or similar to the original proposed by Congress in 1982. Two fresh start amendments have been introduced to date in the 115th Congress, as detailed below.

S.J.Res. 6

The first fresh start ERA proposal to be offered in the 115th Congress was S.J.Res. 6, introduced by Senator Bob Menendez of New Jersey on January 20, 2017. To date, Senator Menendez has been joined by 15 cosponsors.7 Senator Menendez’s proposal incorporates the language of the original ERA, as proposed in the 92nd Congress:

Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Section 3. This article shall take effect 2 years after the date of ratification.

S.J.Res. 6 has been referred to the Senate Committee on the Judiciary.

H.J.Res. 33

H.J.Res. 33 was introduced in the House of Representatives by Representative Carolyn Maloney of New York on January 24, 2017. To date, Representative Maloney has been joined by 169 cosponsors.8 This measure is also a fresh start resolution, proposing a new ERA:

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The Proposed Equal Rights Amendment: Contemporary Ratification Issues

Section 1. Women shall have equal rights in the United States and every place subject to its jurisdiction. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

Section 2. Congress and the several States shall have the power to enforce, by appropriate legislation, the provisions of this article.

Section 3. This amendment shall take effect two years after the date of ratification.

This version of the amendment includes Section 1 language that differs from the version of the ERA proposed by Congress in 1972. The new wording appeared initially in H.J.Res. 56 in the 113th Congress. Specifically, Section 1 was amended by the addition of the following clause at its beginning: “Women shall have equal rights in the United States and every place subject to its jurisdiction.” In a press release issued at the time, Representative Maloney described this as a new and improved Equal Rights Amendment.... Today’s ERA would prohibit gender discrimination and for the first time, would explicitly mandate equal rights for women.... This ERA is different ... it’s designed for the 21st Century. This ERA expressly puts women in the Constitution for the first time.9

It may also be noted that this language recalls the wording of the first version of the ERA, as drafted by suffragist Alice Paul in 1923 and introduced in the 68th Congress in 1923:

Men and women shall have equal rights throughout the United States and every place subject to its jurisdiction.

Congress shall have power to enforce this article by appropriate legislation.10

Further, the resolution expands enforcement authority for the amendment “by appropriate legislation,” extending it from Congress to include “the several States.”

H.J.Res. 33 has been referred to the Subcommittee on the Constitution and Civil Justice of the House Committee on the Judiciary.

Discussion

As joint resolutions proposing an amendment to the Constitution, S.J.Res. 6 and H.J.Res. 33 would require approval in identical form by two-thirds of the Members present and voting in both chambers of Congress. Unlike a standard joint resolution that has the force of law, the President’s approval is not necessary for joint resolutions that propose amendments.11 Both resolutions prescribe that the proposed amendment would be submitted to the legislatures of the states for ratification.12

Neither S.J.Res. 6 nor H.J.Res. 33 includes a time limit for ratification, either in their preambles, or in the body of the amendment. While a ratification deadline has been included in either the

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10 S.J. Res. 21, 68th Congress, 1st session, introduced on December 10, 1923, by Senator Charles Curtis of Kansas, and H.J. Res. 75, introduced on December 13 by Representative Daniel Read Anthony, also of Kansas. Representative Anthony was a nephew of women’s rights pioneer Susan B. Anthony.


12 Article V of the Constitution authorizes Congress to choose the mode of ratification, by either the legislatures of the several states, or by conventions called for the purpose of considering the proposed amendment.
preamble or the text of the 18th and 20th through 26th Amendments, it is a tradition dating to the early 20th century, rather than a constitutional requirement. If Congress were to propose either of these resolutions to the states as a constitutional amendment, they would arguably be eligible for ratification indefinitely. In not setting a ratification deadline, these measures thus avoid the expiration issues associated with the original proposed Equal Rights Amendment. They also arguably embrace the assumption under which the 27th Amendment was ratified in 1992, some 203 years after Congress sent it to the states for approval: proposed amendments remain constitutionally valid and eligible for ratification unless a deadline is specifically prescribed when the amendment is proposed. Opponents, however, might argue that the seven-year ratification deadline first included in the 18th Amendment should not be lightly discarded. The inclusion of a “sunset” provision on proposed amendments, they might argue, is necessary to ensure that a contemporaneous majority of the people, and through them the state legislatures, favors the measure. This issue is examined at greater length later in this report.

Removing the ERA Ratification Deadline: The “Three-State Strategy”

Two resolutions introduced in the 115th Congress, one each in the House and Senate, are designed to reopen the ratification process for H.J. Res. 208, the Equal Rights Amendment proposed by the 92nd Congress in 1972, and extend it indefinitely by removing the deadline set in the preamble to the proposed ERA. Both these measures are based on the “three-state” argument that (1) Congress has the constitutional authority to propose, alter, or terminate any limits on the ratification of amendments pending before the states; (2) all existing ratifications remain in effect and viable; and (3) rescissions of ratification passed by some states are invalid. The three-state argument is examined in detail later in this report.

S.J.Res. 5

This resolution, designed to reopen the ERA ratification process, was introduced by Senator Ben Cardin of Maryland on January 17, 2017. To date, Senator Cardin has been joined by 36 cosponsors. The purpose of the resolution, as stated in its title is “[r]emoving the deadline for ratification of the equal rights amendment.” The text of the resolution states:

][that notwithstanding any time limit contained in House Joint Resolution 208, 92d Congress, as agreed to in the Senate on March 22, 1972, the article of amendment proposed to the States in that joint resolution shall be valid to all intents and purposes as part of the Constitution whenever ratified by the legislatures of three-fourths of the several States.

S.J.Res. 5 has been referred to the Senate Judiciary Committee.

13 The 27th Amendment (the Madison Amendment) is examined later in this report.
14 Although the Equal Rights Amendment has now been ratified by 37 states, this report will generally refer to proposals to repeal the ERA ratification deadline by its original name, the “three state” process or solution.
15 See under “Three-State Proposals.”
H.J.Res. 53

This resolution was introduced by Representative Jackie Speier of California on January 31, 2017. To date, Representative Speier has been joined by 166 co-sponsors. The text of H.J.Res. 53 is identical to that of S.J.Res. 5.

H.J.Res. 53 has been referred to the Subcommittee on the Constitution and Civil Justice of the House Committee on the Judiciary.

Discussion

Many ERA proponents claim that because the amendment as originally proposed by Congress in 1972 did not include a ratification deadline within the amendment text, it remains potentially viable and eligible for ratification indefinitely. They maintain that Congress possesses the authority both to remove the original 1979 ratification deadline and its 1982 extension, and to restart the ratification clock at the then-current 36-state level, with or without a future ratification deadline. In support, they assert that Article V of the Constitution gives Congress uniquely broad authority over the amendment process. They further cite the Supreme Court’s decisions in Dillon v. Gloss and Coleman v. Miller in support of their position. They also note the precedent of the Twenty-Seventh “Madison” Amendment, which was ratified in 1992, 203 years after Congress proposed it to the states. These issues are examined more fully later in this report.

Recent Activity in the State Legislatures: Nevada and Illinois

Although the ratification deadline for the proposed ERA expired in 1982, its proponents have continued to press for action in the legislatures of states that either failed to ratify it, or had previously rejected the amendment. Recent notable developments in the states include action by Nevada in 2017 and Illinois in 2018 to ratify the amendment. Also in 2018, however, proposals to ratify the ERA failed to reach the floor of state legislatures in both Arizona and Virginia, although supporters in the North Carolina Legislature assert the amendment may come to a vote in that state’s legislature during the current session.

Nevada and Illinois Ratify the Equal Rights Amendment

The most widely-publicized recent ERA developments in the states occurred in March 2017, and May 2018, when Nevada and Illinois ratified the proposed amendment. Their actions raised the number of state ratifications to 37.

On March 22, 2017, the Nevada Legislature completed action on a resolution approving the ERA as proposed by H.J.Res. 208 in the 92nd Congress. With this action, Nevada became the 36th state to ratify the ERA, and the first state to do so since 1977. The ratification measure, introduced on

February 17 as Senate Joint Resolution 2, (SJR2), passed the Nevada Senate on March 1 and the Nevada House of Representatives on March 20. The Senate’s concurrence with a House amendment on March 22 completed the ratification process. The choice of dates had historical significance: H.J.Res. 208 was proposed by Congress on March 22, 1972, exactly 45 years earlier. Press accounts of the action noted that the ratification marked a reversal of earlier actions in Nevada. Efforts to secure ERA ratification in the legislature failed three times in the 1970s and failed once when placed on the ballot as an advisory ballot issue in 1978. With Nevada’s ratification, the three-state strategy arguably changed to a “two-state strategy,” and the legislature’s action was reported as “being read by [ERA] supporters as an encouraging sign,” while the Eagle Forum, an advocacy group historically opposed to ERA, restated its criticism of the amendment, noting the deadline for ratification had been passed in 1982.

On May 30, 2018, the Illinois legislature completed action on a resolution approving the ERA as proposed by H.J.Res. 208 in the 92nd Congress. With this action Illinois became the 37th state to ratify the amendment. The ratification measure, introduced as SJRCA (Senate Joint Resolution Constitutional Amendment 0004) on February 7, 2018, was adopted by the Senate as originally introduced on April 11 and in its final form by the Senate and House of Representatives on May 30. The governor’s approval was not required.

Contemporary Public Attitudes toward the Equal Rights Amendment

Public opinion polls showed support through the 1990s for an equal rights amendment. The first recorded survey on support for the proposal was a CBS News telephone poll conducted in September 1970, in which 56% of respondents approved of an equal rights amendment. Favorable attitudes remained steady in the 1970s and throughout the subsequent ratification period, during which time levels of support as reported by the Gallup Poll never dropped below

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23 Ibid.


The Proposed Equal Rights Amendment: Contemporary Ratification Issues

57%. A later ERA-specific survey conducted by CBS News in 1999 reported that 74% of respondents supported the proposed ERA, while 10% were opposed.30

The ERA’s expiration as a pending constitutional amendment was eventually followed by corresponding fall-off in related polling; there is little evidence of related activity by major survey research organizations after 1999, a development that is arguably due to the fact that the ERA was presumed to be a closed issue.

More recently, in 2017, the Harris Survey conducted a poll on women’s status in American society. While it did not include a specific question concerning the ERA, the Harris Survey included the following query: “There has been much talk recently about changing women’s status in society today. On the whole, do you favor or oppose most of the efforts to strengthen and change women’s status in society?” Sixty-six percent of respondents favored strengthening and changing women’s status in society, 7% were opposed, and 27% were not sure.31

An Equal Rights Amendment: Legislative and Ratification History, 1923-1972

Despite the efforts of women’s rights advocates in every Congress, nearly 50 years passed between the time when the Mott Amendment was first introduced in 1923 and the Equal Rights Amendment was approved by Congress and proposed to the states in 1972.

Five Decades of Effort: Building Support for an Equal Rights Amendment in Congress, 1923-1970

The first proposal for an equal rights amendment, drafted by Alice Paul, was introduced in the 68th Congress in 1923.32 In its original form, the text of the amendment read as follows:

   Men and women shall have equal rights throughout the United States and every place subject to its jurisdiction.

   Congress shall have power to enforce this article by appropriate legislation.33

Although Alice Paul characterized the then-Lucretia Mott Amendment as a logical and necessary next step in the campaign for women’s rights following the Nineteenth Amendment, the proposal made little progress in Congress over the course of more than two decades. During the years

30 Major survey research firms regularly conducted surveys of public attitudes toward the Equal Rights Amendment between the 1970s and the 1990s. Their findings reflected consistent support for the proposed amendment throughout the ratification period. For instance, an early Gallup Poll, conducted in March 1975, showed 58% of respondents favored the proposed ERA, while 24% opposed it, and 18% expressed no opinion. These levels of support changed little during the time when the ERA was pending before the states, never dropping below a 57% approval rate. Source: The Gallup Poll, Public Opinion, 1982 (Wilmington, DE: Scholarly Resources Inc., 1982), p. 140. In ensuing years, public support rose. One later survey, conducted by the CBS News Poll in 1999, reported that 74% of respondents supported the proposed ERA, while 10% were opposed. Source: CBS News Poll, “Slow Progress for Women,” conducted December 13-16, 1999, at http://www.cbsnews.com/news/poll-slow-progress-for-women/.


32 S.J. Res. 21, 68th Congress, 1st session, introduced on December 10, 1923, by Senator Charles Curtis of Kansas, and H.J. Res. 75, introduced on December 13 by Representative Daniel Read Anthony, also of Kansas. Representative Anthony was a nephew of women’s rights pioneer Susan B. Anthony.

33 Ibid.
following its first introduction, an equal rights amendment was the subject of hearings in either the House or Senate in almost every Congress. According to one study, the proposal was the subject of committee action, primarily hearings, on 32 occasions between 1923 and 1946, but it came to the floor for the first time—in the Senate—only in the latter year.\textsuperscript{34} During this period, however, the proposal continued to evolve. In 1943, for instance, the Senate Judiciary Committee reported a version of an equal rights amendment incorporating revised language that remained unchanged until 1971:

Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

Congress and the several states shall have power, within their respective jurisdictions, to enforce this article by appropriate legislation.\textsuperscript{35}

Throughout this period, amendment proponents faced opposition from traditionalists, organized labor, and some leaders of the women’s movement. According to one study of the amendment’s long pendency in Congress, “[t]he most persistent and most compelling trouble that crippled prospects for an ERA from its introduction in 1923 until a year after Congress initially passed it on to the states was opposition from most of organized labor during a period of ascending labor strength.”\textsuperscript{36} A principal objection raised by organized labor and women’s organizations that opposed the amendment was concern that the ERA might lead to the loss of protective legislation for women, particularly with respect to wages, hours, and working conditions.\textsuperscript{37} One historian notes that:

Through the years of the New Deal and the Truman administration, however, protective legislation for women held a firm place in organized labor’s list of policy favorites. Since an ERA threatened protective laws, it and its supporters qualified as the enemy.\textsuperscript{38}

The nature of opposition from women’s groups was illustrated by a 1946 statement issued by 10 prominent figures, including former Secretary of Labor Frances Perkins and former First Lady Eleanor Roosevelt, which asserted that an equal rights amendment would “make it possible to wipe out the legislation which has been enacted in many states for the special needs of women in industry.”\textsuperscript{39}

These attitudes toward the proposal persisted, even as women in great numbers entered the civilian workforce and the uniformed services during the four years of U.S. involvement in World War II (1941-1945), taking jobs in government, industry, and the service sector that had previously been filled largely by men. Congressional support for an equal rights amendment grew slowly in the late 1940s, but a proposal eventually came to the Senate floor, where it was the subject of debate and a vote in July 1946. Although the 39-35 vote to approve fell short of the

\textsuperscript{35} S.J. Res. 25, 78\textsuperscript{th} Congress, introduced by Senator Guy Gillette of Iowa.
\textsuperscript{37} Kathryn Kish Sklar, “Why Were Most Politically Active Women Opposed to the ERA in the 1920s?” in Rights of Passage, pp. 25-28. Opponents included the League of Women Voters and the General Federation of Women’s Clubs. Steiner, Constitutional Inequality, pp. 7-10.
\textsuperscript{38} Steiner, Constitutional Inequality, p 10
\textsuperscript{39} Ibid., p. 52.
two-thirds of Senators present and voting required by the Constitution, it was a symbolic first step.\textsuperscript{40}

The so-called Hayden rider, named for its author, Senator Carl Hayden of Arizona, was perhaps emblematic of the arguments ERA advocates faced during the early post-war era. First introduced during the Senate’s 1950 debate, this proposal stated that:

\begin{quote}
The provisions of this article shall not be construed to impair any rights, benefits, or exemptions conferred by law upon persons of the female sex.\textsuperscript{41}
\end{quote}

Although the rider’s ostensible purpose was to safeguard protective legislation, one source suggested an ulterior motive: “Hayden deliberately added the riders in order to divide the amendment’s supporters, and these tactics delayed serious consideration of the unamended version of the Equal Rights Amendment.”\textsuperscript{42} Whatever the rider’s intent, it was not welcomed by ERA supporters,\textsuperscript{43} and was opposed on the floor by Senator Margaret Chase Smith of Maine, at that time the only woman Senator.\textsuperscript{44}

The Senate ultimately passed an equal rights amendment resolution that included the Hayden rider twice in the 1950s. In the 81\textsuperscript{st} Congress, S.J. Res. 25, introduced by Senator Guy Gillette of Iowa and numerous co-sponsors, was approved by a vote of 63-19 on January 25, 1950, a margin that comfortably surpassed the two-thirds of Members present and voting required by the Constitution.\textsuperscript{45} An amendment came before the Senate again in the 83\textsuperscript{rd} Congress, when Senator John M. Butler of Maryland and co-sponsors introduced S.J. Res. 49. The resolution, as amended by the Hayden rider, passed by a vote of 73-11 on July 16, 1953.\textsuperscript{46} Over the next 16 years, the Senate considered various equal rights amendment resolutions in committee almost every session, but no proposal was considered on the floor during this period. By 1964, however, the Hayden rider had lost support in the Senate as perceptions of the equal rights amendment concept continued to evolve. In the 88\textsuperscript{th} Congress, the Senate Judiciary Committee effectively removed it from future consideration when it stated in its report:

\begin{quote}
Your committee has considered carefully the amendment which was added to this proposal on the floor of the Senate.... Its effect was to preserve “rights, benefits, or exemptions” conferred by law upon persons of the female sex. This qualification is not acceptable to women who want equal rights under the law. It is under the guise of so-called “rights” or
\end{quote}


\textsuperscript{41} See S.J. Res. 25, as amended, 81\textsuperscript{st} Congress.


\textsuperscript{43} In oral history interviews conducted between November 1972 and March 1973, Alice Paul recalled that Senator Hayden’s intentions in introducing the rider were sincere, and that he was dismayed when she told him it made the amendment unacceptable to many ERA activists. See “Conversations with Alice Paul: Women’s Suffrage and the Equal Rights Amendment,” Suffragists Oral History Project, U. of California, Calisphere, c. 1976, at http://content.cdlib.org/view?docId=kt6f59n89e&brand=calisphere&doc.view=entire_text.

\textsuperscript{44} While she voted against the rider, Senator Smith voted yes on final passage of the resolution as amended, which included the rider. Senate debate, \textit{Congressional Record}, vol. 96, pt. 1 (January 25, 1950), p. 870. See also, \textit{Congressional Quarterly Almanac}, 1950, p. 420.


\textsuperscript{46} As with her vote in 1950, Senator Smith opposed the rider, but voted yes on final passage of the resolution in 1953. Senate debate, \textit{Congressional Record}, vol. 99, pt. 7 (July 16, 1953), p. 8974.
“benefits” that women have been treated unequally and denied opportunities which are available to men.47

Between 1948 and 1970, however, the House of Representatives took no action on an equal rights amendment. Throughout this period, Representative Emanuel Celler of New York had blocked consideration of the amendment in the Judiciary Committee, which he chaired from 1949 to 1953 and again from 1955 to 1973. A Member of the House since 1923, Chairman Celler had been a champion of New Deal social legislation, immigration reform, civil rights legislation, and related measures throughout his career, but his strong connections with organized labor, which, as noted earlier, opposed an equal rights amendment during this period, may have influenced his attitudes toward the proposal.48

Congress Approves and Proposes the Equal Rights Amendment, 1970-1972

Although proposals for an equal rights constitutional amendment continued to be introduced in every Congress, there was no floor consideration of any proposal by either chamber for almost two decades following the Senate’s 1953 action. By the early 1970s, however, the concept had gained increasing visibility as one of the signature issues of the emerging women’s movement in the United States. As one eyewitness participant later recounted:

The 1960s brought a revival of the women’s rights movement and more insistence on changed social and legal rights and responsibilities. The fact of women’s involvement in the civil rights movement and the anti-war movement and their changed role in the economy created a social context in which many women became active supporters of enhanced legislation for themselves.49

By the time the concept of an equal rights amendment emerged as a national issue, it had also won popular support, as measured by public opinion polling. As noted earlier in this report, the first recorded survey on support for the proposal was a CBS News telephone poll conducted in September 1970, in which 56% of respondents favored an equal rights amendment.50 Favorable attitudes remained consistent during the 1970s and throughout the subsequent ratification period.51 Labor opposition also began to fade, and in April 1970, one of the nation’s largest and most influential unions, the United Auto Workers, voted to endorse the concept of an equal rights amendment.52

In actions that perhaps reflected changing public attitudes, Congress had also moved during the 1960s on several related fronts to address women’s equality issues. The Equal Pay Act of 1963 “prohibited discrimination on account of sex in payment of wages,”53 while the Civil Rights Act of 1964 banned discrimination in employment on the basis of race, color, religion, sex, or national

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48 Steiner, Constitutional Inequality, pp. 14-15.
51 See above at footnote 30.
52 Mansbridge, Why We Lost the ERA, p. 12.
origin [emphasis added]. Although it remained pending, but unacted upon in Congress, proposals for an equal rights amendment had gained support in other areas. The Republican Party had endorsed an earlier version of the amendment in its presidential platform as early as 1940, followed by the Democratic Party in 1944. Both parties continued to include endorsements in their subsequent quadrennial platforms, and, by 1970, Presidents Eisenhower, Kennedy, Lyndon Johnson, and Nixon were all on record as having endorsed an equal rights amendment.

First Vote in the House, 91st Congress—1970

Representative Martha Griffiths of Michigan is widely credited with breaking the legislative stalemate that had blocked congressional action on a series of equal rights amendment proposals for more than two decades. Against the background of incremental change outside Congress, Representative Griffiths moved to end the impasse in House consideration of the amendment. On January 16, 1969, she introduced H.J. Res. 264, proposing an equal rights amendment, in the House of Representatives. The resolution was referred to the Judiciary Committee where, as had been expected, no further action was taken. On June 11, 1970, however, Representative Griffiths took the unusual step of filing a discharge petition to bring the proposed amendment to the floor. A discharge petition “allows a measure to come to the floor for consideration, even if the committee of referral does not report it and the leadership does not schedule it.” In order for a House committee to be discharged from further consideration of a measure, a majority of Representatives (218, if there are no vacancies) must sign the petition. As reported at the time, the use of the discharge petition had seldom been invoked successfully, having gained the necessary support only 24 times since the procedure had been established by the House of Representatives in 1910, and Representative Griffiths’ filing in 1970. By June 20, Representative Griffiths announced that she had obtained the necessary 218 Member signatures for the petition. Although the Judiciary Committee had neither scheduled hearings nor issued a report, the resolution was brought to the House floor on August 10. The House approved the motion to discharge by a vote of 332 to 22, and approved the amendment itself by a vote of 334 to 26.

The Senate had begun to act on a resolution proposing an equal rights amendment in the 91st Congress in 1970, before the amendment came to the House floor. In May, the Judiciary Committee’s Subcommittee on Constitutional Amendments held hearings on S.J.Res. 61, the Senate version of an amendment. These hearings were followed by hearings in the full committee in September, and consideration on the Senate floor in early October. Floor debate was dominated by consideration and adoption of two amendments that would have (1) exempted women from

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61 Ibid.
compulsory military service, and (2) permitted non-denominational prayer in public schools; and a final amendment that provided alternative language for the resolution. Thus encumbered, the Senate resolution was unacceptable to ERA supporters, but, in any event, the Senate adjourned on October 14 without a vote on the resolution as amended, and failed to bring it to the floor for final action in the subsequent lame-duck session.\(^{63}\)

**Passage and Proposal by Congress, 92nd Congress—1971-1972**

In the 92\(^{nd}\) Congress, Representative Griffiths began the process anew in the House of Representatives when she introduced H.J.Res. 208, proposing an equal rights amendment. Chairman Celler continued to oppose it, but no longer blocked committee action. After subcommittee and full committee hearings, the House Judiciary Committee reported an amendment on July 14, but the resolution as reported included amendments concerning citizenship, labor standards, and the exemption of women from selective service that were unacceptable to ERA supporters. When H.J.Res. 208 came to the floor in early October, however, the House stripped out the committee amendments, and, on October 12, it approved the resolution by a bipartisan vote of 354 to 24.\(^ {64}\)

The Senate took up the House-passed amendment during the second session of the 92\(^{nd}\) Congress, in March 1972. On March 14, the Judiciary Committee reported a clean version of H.J. Res. 208 after rejecting several amendments, including one adopted by the Subcommittee on the Constitution, and several others offered in the full committee. The resolution was called up on March 15, and immediately set aside. The Senate began debate on the amendment on March 17, with Senator Birch Bayh of Indiana, a longtime ERA supporter, as floor manager. On the same day, President Richard Nixon released a letter to Senate Republican Leader Hugh Scott of Pennsylvania reaffirming his endorsement of the Equal Rights Amendment.\(^ {65}\) After two days in which the Members debated the proposal, Senator Sam Ervin of North Carolina offered a series of amendments that, among other things, would have exempted women from compulsory military service and service in combat units in the U.S. Armed Forces, and preserved existing gender-specific state and federal legislation that extended special exemptions or protections to women. Over the course of two days, Senator Ervin’s amendments were serially considered and rejected, generally by wide margins. On March 22, the Senate approved the House version of the amendment, H.J. Res. 208, by a vote of 84 to 8, with strong bipartisan support.\(^ {66}\)

The text of H.J. Res. 208—the Equal Rights Amendment as proposed by the 92\(^{nd}\) Congress—follows:

House Joint Resolution 208

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\(^ {65}\) In his letter, President Nixon noted that he had co-sponsored the ERA as a freshman Senator in 1951, and that he remained committed to the amendment. “Letter to the Senate Minority Leader About the Proposed Constitutional Amendment on Equal Rights for Men and Women,” U.S. President, *Public Papers of the Presidents of the United States, Richard Nixon*, 1972 (Washington, DC: GPO, 1972), p. 444.

Proposing an amendment to the Constitution of the United States relative to equal rights for men and women.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each house concurring therein), That

The following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years of its submission by the Congress:

“Section 1. Equality of rights under the law shall not be denied or abridged by the United States or any State on account of sex.

“Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

“Section 3. This amendment shall take effect two years after the date of ratification.”

The action of the two chambers in approving H.J. Res. 208 by two-thirds majorities of Members present and voting (91.3% in the Senate and 93.4% in the House) had the effect of formally proposing the amendment to the states for ratification.

Congress Sets a Seven-Year Ratification Deadline

When it proposed the Equal Rights Amendment, Congress stipulated in the preamble of the joint resolution that the ERA was to be ratified by the constitutionally requisite number of state legislatures (38 then as now) within seven years of the time it was proposed, in order to become a valid part of the Constitution. A time limit for ratification was first instituted with the Eighteenth Amendment, proposed in 1917, and, with the exception of the Nineteenth Amendment and the Child Labor Amendment, all subsequent proposed amendments have included a ratification deadline of seven years.

With respect to the Child Labor Amendment, Congress did not incorporate a ratification deadline when it proposed the amendment in 1924. It was ultimately ratified by 28 states through 1937, 8 short of the 36 required by the Constitution at that time, the Union then comprising 48 states. Although the amendment arguably remains technically viable because it lacked a deadline when proposed, the Supreme Court in 1941 upheld federal authority to regulate child labor as incorporated in the Fair Labor Standards Act of 1938 (52 Stat. 1060) in the case of United States v. Darby Lumber Company (312 U.S. 100 (1941)). In this case, the Court reversed its earlier decision in Hammer v. Dagenhart (24 U.S. 251 (1918)), which ruled that the Keating-Owen Child Labor Act of 1916 (39 Stat. 675) was unconstitutional. The amendment is thus widely regarded as having been rendered moot by the Court’s 1941 decision.

In the case of the Eighteenth, Twentieth, Twenty-First, and Twenty-Second Amendments, the “sunset” ratification provision was incorporated in the body of the amendment itself. For subsequent amendments, however, Congress determined that inclusion of the time limit within its body “cluttered up” the proposal. Consequently, all but one of the subsequently proposed amendments—the Twenty-Third, Twenty-Fourth, Twenty-Fifth and Twenty-Sixth, and the

67 The origins of and rationale for the seven-year ratification deadline are examined in greater detail later in this report.


69 Only the proposed District of Columbia Voting Rights (Congressional Representation) Amendment included a ratification deadline within the body of the amendment. This exception is examined later in this report.
ERA—placed the limit in the preamble or authorizing resolution, rather than in the body of the amendment itself. This decision, seemingly uncontroversial at the time, was later to have profound implications for the question of extending the ratification window for the ERA.

**Ratification Efforts in the States**

States initially responded quickly once Congress proposed the Equal Rights Amendment for their consideration. Hawaii was the first state to ratify, on March 22, 1972, the same day the Senate completed action on H.J. Res. 208. By the end of 1972, 22 states had ratified the amendment, and it seemed well on its way to adoption. Opposition to the amendment, however, began to coalesce around organizations like “STOP ERA,” which revived many of the arguments addressed during congressional debate. Opponents also broadly asserted that ratification of the amendment would set aside existing state and local laws providing workplace and other protections for women and would lead to other, unanticipated negative social and economic effects. In 1976, ERA supporters established a counter-organization, “ERAmerica,” as an umbrella association to coordinate the efforts of pro-amendment groups and serve as a high-profile national advocate for the amendment.

Opposition to the proposed Equal Rights Amendment continued to gain strength, although, as noted earlier in this report, public approval of the amendment never dropped below 54% during the ratification period. Following the first 22 state approvals, 8 additional states ratified in 1973, 3 more in 1974, and 1 each in 1975 and 1977, for an ultimate total of 35, 3 short of the constitutional requirement of 38 state ratifications. At the same time, however, ERA opponents in the states promoted measures in a number of legislatures to repeal or rescind their previous ratifications. Although the constitutionality of such actions has long been questioned, by 1979, five states had passed rescission measures. The question of rescission will be addressed in detail later in this report.

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73 Ibid., pp. 412-413. Berry, *Why ERA Failed*, p. 69. ERAmerica drew support from such organizations as the League of Women Voters, American Association of University Women, Federation of Business and Professional Women’s Clubs, and other pro-ERA organizations.

74 Mansbridge, *Why We Lost the ERA*, pp. 206-209.


Ratification Is Extended in 1978, but Expires in 1982

By the late 1970s, the ratification process had clearly stalled, and the deadline for ratification as specified in the preamble to H.J. Res. 208 was approaching. Reacting to the impending “sunset” date of March 22, 1979, ERA supporters developed a novel strategy to extend the deadline by congressional resolution. The vehicle chosen by congressional supporters was a House joint resolution, H.J.Res. 638, introduced in the 95th Congress on October 26, 1977, by Representative Elizabeth Holtzmann of New York and others. In its original form, the resolution proposed to extend the deadline an additional seven years, thus doubling the original ratification period.

During hearings in the House Judiciary Committee’s Subcommittee on Civil and Constitutional Rights, legal scholars debated questions on the authority of Congress to extend the deadline; whether an extension vote should be by a simple majority or a supermajority of two-thirds of the Members present and voting; and if state rescissions of their ratifications were lawful. The full Judiciary Committee also addressed these issues during its deliberations in 1978. Continuing controversy in the committee and opposition to extending the ratification period a full seven years led to a compromise amendment to the resolution that reduced the proposed extension to three years, three months, and eight days. ERA supporters accepted the shorter period as necessary to assure committee approval of the extension. Two other changes, one that would have recognized the right of states to rescind their ratifications, and a second requiring passage of the extension in the full House by a two-thirds super majority, were both rejected by the committee when it reported the resolution to the House on July 30.

The full House debated the resolution during summer 1978, rejecting an amendment that proposed to recognize states’ efforts to rescind their instruments of ratification. Another amendment rejected on the floor would have required votes on the ERA deadline extension to pass by the same two-thirds vote necessary for original actions proposing constitutional amendments. The House adopted the resolution by a vote of 233 to 189 on August 15, 1978. The Senate took up H.J.Res. 638 in October; during its deliberations it rejected amendments similar to those offered in the House and joined the House in adopting the resolution, in this case by a vote of 60 to 36 on October 6. In an unusual expression of support, President Jimmy Carter signed the joint resolution on October 20, even though the procedure of proposing an amendment to the states is solely a congressional prerogative under the Constitution.

During the extended ratification period, ERA supporters sought unsuccessfully to secure the three necessary ratifications for the amendment, while opponents pursued rescission in the states with similarly unsuccessful results. A Gallup Poll reported in August 1981 that 63% of respondents supported the amendment, a higher percentage than in any previous survey, but, as one observer noted, “The positive poll results were really negative, because additional ratifications needed to

77 Representative Holtzman had defeated Representative Emanuel Celler (q.v.) for renomination in the Democratic primary in 1992.
79 Ibid.
80 Ibid., pp. 775-776.
81 Ibid., p. 773.
come from the states in which support was identified as weakest.”

On June 30, 1982, the Equal Rights Amendment deadline expired with the number of state ratifications at 35, not counting rescissions.

**Rescission: A Legal Challenge to the Ratification Process**

As noted earlier, while ratification of the proposed Equal Rights Amendment was pending, a number of states passed resolutions that sought to rescind their earlier ratifications. By the time the amendment’s extended ratification deadline passed in 1982, the legislatures of more than 17 states had considered rescission, and 5 passed these resolutions.

Throughout the period, however, legal opinion as to the constitutionality of rescission remained divided.

On May 9, 1979, the state of Idaho, joined by the state of Arizona and individual members of the Washington legislature, brought legal action in the U.S. District Court for the District of Idaho, asserting that states did have the right to rescind their instruments of ratification. The plaintiffs further asked that the extension enacted by Congress be declared null and void.

On December 23, 1981, District Court Judge Marion Callister ruled (1) that Congress had exceeded its power by extending the deadline from March 22, 1979, to June 30, 1982; and (2) that states had the authority to rescind their instruments of ratification, provided they took this action before an amendment was declared to be an operative part of the Constitution.

The National Organization for Women (NOW), the largest ERA advocacy organization, and the General Services Administration (GSA) appealed this decision directly to the Supreme Court, which, on January 25, 1982, consolidated four appeals and agreed to hear the cases. In its order, the High Court also stayed the judgment of the Idaho District Court. On June 30, as noted earlier, the extended ratification deadline expired, so that when the Supreme Court convened for its term on October 4, it dismissed the appeals as moot, and vacated the district court decision.

**Renewed Legislative and Constitutional Proposals, 1982 to the Present**

Interest in the proposed Equal Rights Amendment did not end when its extended ratification deadline expired on June 30, 1982. Since that time, there have been regular efforts to introduce the concept as a “fresh start” in Congress, while additional approaches have emerged that would revive H.J. Res. 208, the amendment as originally proposed by the 92nd Congress.

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83 Berry, *Why ERA Failed*, p. 79.
84 Kyvig, *Explicit and Authentic Acts*, p. 415. For state rescissions, see above at footnote 75.
85 However, neither the Idaho nor the Arizona legislature had passed a resolution of rescission.
88 GSA became involved in 1982 because it was at that time the parent agency of the National Archives and Records Service, now the National Archives and Records Administration, which, then, as now, received and recorded state ratifications for proposed constitutional amendments.
“Fresh Start” Proposals

One potential means of restarting an equal rights amendment would be by introduction of a new joint resolution, a “fresh start.” Even as the June 30, 1982, extended ratification deadline approached, resolutions proposing an equal rights amendment were introduced in the 97th Congress. New versions of an ERA have continued to be introduced in the House and Senate in each succeeding Congress. For many years, Senator Edward Kennedy of Massachusetts customarily introduced an equal rights amendment early in the first session of a newly convened Congress; since the 111th Congress, Senator Robert Menendez of New Jersey has introduced Senate fresh start proposals. In the House of Representatives, Representative Carolyn Maloney of New York introduced a fresh start equal rights amendment in the 105th and all succeeding Congresses. Fresh start amendments introduced in the 115th Congress, S.J.Res. 6 and H.J.Res. 33, were discussed earlier in this report, under “Most Recent Developments.”

“Three-State” Proposals

In addition to “fresh start” proposals, alternative approaches to the ratification question have also emerged over the years. In 1994, Representative Robert E. Andrews of New Jersey introduced H.Res. 432 in the 103rd Congress. His proposal sought to require the House of Representatives to “take any legislative action necessary to verify the ratification of the Equal Rights Amendment as part of the Constitution when the legislatures of an additional 3 states ratify the Equal Rights Amendment.” This resolution was a response to the three-state strategy proposed by a pro-ERA volunteer organization “ERA Summit” in the 1990s, which was called following adoption of the Twenty-Seventh Amendment, the Madison Amendment, in 1992. The rationale for H.Res. 432, and a succession of identical resolutions offered by Representative Andrews in subsequent Congresses, was that, following the precedent of the Madison Amendment, the ERA remained a valid proposal and the ratification process was still open. Representative Andrews further asserted that the action of Congress in extending the ERA deadline in 1978 provided a precedent by which “subsequent sessions of Congress may adjust time limits placed in proposing clauses by their predecessors. These adjustments may include extensions of time, reductions, or elimination of the deadline altogether.” The influence of the Madison Amendment is examined at greater length later in this report.

The year 2012 marked the 30th anniversary of the expiration of the proposed Equal Rights Amendment’s extended ratification deadline. During that period, new analyses emerged that examined the question of whether the amendment proposed in 1972 remains constitutionally viable. As noted later in this report, one of the most influential developments opening new lines of analysis occurred when the Twenty-Seventh Amendment, originally proposed in 1789 as part of a package that included the Bill of Rights, was taken up in the states after more than two centuries and ultimately ratified in 1992. This action, and Congress’s subsequent

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90 As noted elsewhere in this report, the “three-state” argument maintains that (1) Congress has the constitutional authority to propose, alter, or terminate any limits on the ratification of amendments pending before the states; (2) all existing ratifications remain in effect and viable; and (3) rescissions of ratification passed by some states are invalid.

91 The Equal Rights Amendment website, a project of the Alice Paul Institute, in collaboration with the ERA Task Force of the National Council of Women’s Organizations, at http://www.equalrightsamendment.org.

92 Most recently, H.Res. 794 in the 112th Congress.

acknowledgment of the amendment’s viability, bear directly on the issue of the current status of the proposed Equal Rights Amendment, and are examined later in this report.

In the 112th Congress, for the first time since the proposed ERA’s deadline expired, resolutions were introduced in both the House and Senate that sought specifically to (1) repeal, or eliminate entirely, the deadlines set in 1972 and 1978; (2) reopen the proposed ERA for state ratification at the then-current count of 35 states; and (3) extend the period for state ratification indefinitely. Current legislation proposing the three state/two state strategy in the 115th Congress, S.J.Res. 5 and H.J.Res. 53 were discussed earlier in this report, under “Most Recent Developments.”

Contemporary Viability of the Equal Rights Amendment

Supporters of the ERA, and particularly the three-state strategy—now, arguably, the one-state strategy, assuming the validity of ratifications by Nevada and Illinois—identify a number of sources that they claim support their contention that the proposed Equal Rights Amendment remains constitutionally viable. Other scholars and observers, however, have raised concerns about, or objections to, these assertions.

Article V: Congressional Authority over the Amendment Process

Proponents of the proposed Equal Rights Amendment cite the exceptionally broad authority over the constitutional amendment process granted to Congress by Article V of the Constitution as a principal argument for their case. The article’s language states that “[t]he Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution ... which ... shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States or by Conventions in three fourths thereof.” While the Constitution is economical with words when spelling out the authority extended to the three branches of the federal government, it does speak specifically when it places limits on these powers. In this instance, the founders placed no time limits or other conditions on congressional authority to propose amendments, so long as they are approved by the requisite two-thirds majority of Senators and Representatives present and voting.

In a 1992 opinion for the Counsel to the President concerning ratification of the Twenty-Seventh Amendment, Acting Assistant Attorney General Timothy Flanigan took note of the absence of time limits in Article V, and drew a comparison with their presence in other parts of the Constitution:

... [t]he rest of the Constitution strengthens the presumption that when time periods are part of a constitutional rule, they are specified. For example, Representatives are elected every second year ... and a census must be taken within every ten year period following the first census, which was required to be taken within three years of the first meeting of Congress..... Neither House of Congress may adjourn for more than three days without the consent of the other ... and the President has ten days (Sundays excepted) within which to sign or veto a bill that has been presented to him.... The Twentieth Amendment refers to certain specific dates, January 3rd and 20th. Again, if the Framers had intended there to be

94 H.J.Res. 47, Representative Baldwin and others; S.J.Res. 38I, Senator Cardin and others. Aside from routine committee referral, no action was taken on these resolutions.
a time limit for the ratification process, we would expect that they would have so provided in Article V. 95

Further, Article V empowers Congress to specify either of two modes of ratification: by the state legislatures, or by ad hoc state conventions. Neither the President nor the federal judiciary is allocated any obvious constitutional role in the amendment process. To those who might suggest the Constitutional Convention did not intend to grant such wide authority to Congress, ERA supporters can counter by noting that the founders provided a second mode of amendment, through a convention summoned by Congress at the request of the legislatures of two-thirds of the states. 96 The suggestion here is that the founders deliberately provided Congress with plenary authority over the amendment process, while simultaneously checking it through the super-majority requirement, and balancing it with the Article V Convention alternative. 97 In the case of the proposed Equal Rights Amendment, it has been inferred by ERA supporters that since neither ratification deadlines nor contemporaneity requirements for amendments appear anywhere in Article V, Congress is free to propose, alter, or terminate such ratification provisions at its discretion. 98

Advocates of congressional authority over the amendment process might also note the fact that Congress has acted on several occasions in the course of, or after, the ratification process by the states to assert its preeminent authority under Article V in determining ratification procedures. 99 For instance, on July 21, 1868, Congress passed a resolution that declared the Fourteenth Amendment to have been duly ratified and directed Secretary of State William Seward to promulgate it as such. Congress had previously received a message from the Secretary reporting that 28 of 37 states then in the Union had ratified the amendment, but that 2 of the 28 ratifying states had subsequently passed resolutions purporting to rescind their ratifications, and the legislatures of 3 others had approved the amendment only after previously rejecting earlier ratification resolutions. Congress considered these issues but proceeded to declare the ratification

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96 The founders were concerned that Congress might resist the proposal of necessary amendments. As a result, they included the Article V Convention process as an alternative to congressional proposal of amendments. Alexander Hamilton explained the origins of the Article V Convention process in The Federalist: “The intrinsic difficulty of governing thirteen states ... will, in my opinion, constantly impose on the national rulers the necessity of a spirit of accommodation to the reasonable expectations of their constituents. But there is yet a further consideration.... It is this, that the national rulers, whenever nine States concur, will have no option on the subject. By the first article of the plan, the Congress will be obliged to call a convention for proposing amendments.... The words of this article are peremptory. The Congress ‘shall call a convention.’ Nothing in this particular is left to the discretion of that body.” See Alexander Hamilton, “Conclusion,” in The Federalist, Number 85 (Cambridge, MA: The Belknap Press of the Harvard University Press, 1961), p. 546.


99 While these are precedents that Congress could follow, or at least look to for guidance, it should be recalled that one Congress may not bind succeeding Congresses in expression of their decision making. See, for example, William Holmes Brown, Charles W. Johnson, and John V. Sullivan, House Practice: A Guide to the Rules, Precedents, and Procedures of the House (Washington, DC: GPO, 2011), p. 158: “The Constitution gives each House the power to determine the rules of its proceedings.... This power cannot be restricted by the rules or statutory enactments of a preceding House.”
The Proposed Equal Rights Amendment: Contemporary Ratification Issues

Congress similarly exercised its authority over the process less than two years later when it confirmed the ratification of the Fifteenth Amendment by resolution passed on March 30, 1870. Congress exercised its authority over the amendment process again in 1992 when it declared the Twenty-Seventh Amendment, the so-called “Madison Amendment,” to have been ratified, an event examined in the next section of this report.

Opponents of ERA extension, while not questioning the plenary authority of Congress over the amending process, raise questions on general grounds of constitutional restraint and fair play. Some reject it on fundamental principle; Grover Rees III, writing in *The Texas Law Review*, asserted that

... extension is unconstitutional insofar as it rests on the unsubstantiated assumption that states which ratified the ERA with a seven-year time limit also would have ratified with a longer time limit, and insofar as it attempts to force those states into an artificial consensus regardless of their actual intentions.

ERA supporter Mary Frances Berry noted a similar argument raised by the amendment’s opponents:

... some scholars pointed out that legally an offer and agreed-upon terms is required before any contract is valid. ERA ratification, according to this view, was a contract. Therefore, states could not be regarded as contracting not in the agreed upon terms. The agreed upon terms included a seven-year time limit. When seven years passed, all pre-existing ratifications expired.

Writing in *Constitutional Commentary*, authors Brannon P. Denning and John R. Vile offered additional criticisms of efforts to revive the proposed Equal Rights Amendment, noting that ample time had been provided for ratification between 1972 and 1982. They further suggested that elimination of ratification deadlines would reopen the question of purported state rescissions of acts of ratification; that progress in women’s equality in law and society may have “seemed to render ERA superfluous”; and that allowing the proposed amendment “a third bite at the apple would suggest that no amendment to the U.S. Constitution ever proposed ... could ever be regarded as rejected.”

The Madison Amendment (the Twenty-Seventh Amendment): A Dormant Proposal Revived and Ratified

Supporters of the proposed Equal Rights Amendment cite another source in support of their argument for the proposed amendment’s viability: the Twenty-Seventh Amendment to the Constitution, also known as the Madison Amendment, which originated during the first year of government under the Constitution, but fell into obscurity, and became the object of renewed

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100 15 Stat. 709. The reconstructed legislatures of North Carolina, South Carolina, and Georgia reversed rejections by earlier unreconstructed state legislatures. Ohio and New Jersey had passed resolutions purporting to rescind their earlier ratifications of the amendment. For further information, see *The Constitution Annotated*, “Article V, Ratification.”

101 16 Stat. 1131. Here again, Congress refused to acknowledge the act of the New York legislature purporting to rescind its previous instrument of ratification.


public interest only in the late 20th century. In 1789, Congress proposed a group of 12 amendments to the states for ratification. Articles III through XII of the proposals became the Bill of Rights, the first 10 amendments to the Constitution. They were ratified quickly, and were declared adopted on December 15, 1791. Articles I and II, however, were not ratified along with the Bill of Rights; Article II, which required that no change in Members’ pay could take effect until after an election for the House of Representatives had taken place, was ratified by six states between 1789 and 1791 (the ratification threshold was 10 states in 1789), after which it was largely forgotten.\(^{105}\)

After nearly two centuries, the Madison Amendment was rediscovered in 1978, when the Wyoming legislature was informed that as no deadline for ratification had been established, the measure was arguably still viable. Seizing on the opportunity to signal its disapproval of a March 3, 1978, vote by Congress to increase compensation for Representatives and Senators, the legislature passed a resolution approving the proposed amendment. In its resolution of ratification, the legislature cited the congressional vote to increase Member compensation, noting that:

... the percentage increase in direct compensation and benefits [to Members of Congress] was at such a high level, as to set a bad example to the general population at a time when there is a prospect of a renewal of double-digit inflation; and ... increases in compensation and benefits to most citizens of the United States are far behind these increases to their elected Representatives.... \(^{106}\)

The Wyoming legislature’s action went almost unreported, however, until 1983, when Gregory D. Watson, a University of Texas undergraduate student, studied the amendment and concluded that it was still viable and eligible for ratification. Watson began a one-person campaign, circulating letters that drew attention to the proposal to state legislatures across the country.\(^{107}\) This grassroots effort developed into a nationwide movement, leading ultimately to 31 additional state ratifications of the amendment between 1983 and 1992.

In 1991, as the number of state ratifications of the Madison Amendment neared the requisite threshold of 38, Representative John Boehner of Ohio introduced H.Con.Res. 194 in the 102nd Congress. The resolution noted that, “this amendment to the Constitution was proposed without a deadline for ratification and is therefore still pending before the States.” The resolution went on to state “the sense of the Congress that at least 3 of the remaining 15 States should ratify the proposed 2nd amendment to the Constitution, which would delay the effect of any law which varies the compensation of Members of Congress until after the next election of Representatives.”\(^{108}\) Although no further action was taken on the resolution, its findings anticipated Congress’s response to the amendment.

On May 7, 1992, the Michigan and New Jersey legislatures both voted to ratify the “Madison Amendment,” becoming the 38th and 39th states to approve it. As required by law,\(^{109}\) the Archivist

\(^{105}\) In 1873, Ohio provided the only additional ratification to the pay amendment. For the record, Article I proposed regulating the size of the House of Representatives so that it eventually would include “not less than two hundred Representatives, nor more than one Representative for every fifty thousand persons.”


\(^{109}\) 1 U.S.C. §106.
of the United States certified the ratification on May 18, and the following day an announcement that the amendment had become part of the Constitution was published in the Federal Register. Although the Archivist was specifically authorized by the U.S. Code to publish the act of adoption and issue a certificate declaring the amendment to be adopted, many in Congress believed that, in light of the unusual circumstances surrounding the ratification, positive action by both houses was necessary to confirm the Madison Amendment’s legitimacy. In response, the House adopted H.Con.Res. 320 on May 20, and the Senate adopted S.Con.Res. 120 and S.Res. 298 on the same day. All three resolutions declared the amendment to be duly ratified and part of the Constitution.

By providing a recent example of a proposed amendment that had been inactive for more than a century, the Twenty-Seventh Amendment suggests to ERA supporters an attainable model for renewed consideration of the proposed Equal Rights Amendment.

**Ratification of the Madison Amendment: A Model for the Proposed Equal Rights Amendment?**

The example of the Madison Amendment contributed to the emergence of a body of advocacy scholarship that asserts the proposed Equal Rights Amendment has never lost its constitutional viability. One of the earliest expressions of this viewpoint was offered in an article that appeared in the William and Mary Journal of Women and the Law in 1997. The authors reasoned that adoption of the Twenty-Seventh Amendment challenged many of the assumptions about ratification generated during the 20th century. Acceptance of the Madison Amendment by the Archivist and the Administrator of General Services, as advised by the Justice Department and ultimately validated by Congress, was said to confirm that there is no requirement that ratifications of proposed amendments must be roughly contemporaneous.

The authors went on to examine the history of the seven-year time limit, concluding after a review of legal scholarship on the subject that this device was a matter of procedure, rather than of substance (i.e., part of the body of the amendment itself). As such it was “separate from the amendment itself, and therefore...

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113 S.Con.Res. 120, 102nd Congress, sponsored by Senator Robert Byrd and others.


115 S.Con.Res. 120 and S.Res. 298, Congressional Record, vol. 138, pt. 9 (May 20, 1992), p. 11869; H.Con.Res. 320, Congressional Record, vol. 138, pt. 9 (May 20, 1992), p. 12051. Senator Robert Byrd of West Virginia also introduced S.Con.Res. 121 on May 19, 1992, to declare that the ratification periods for four other pending amendments had lapsed, and that they were no longer viable. He did not, however, include the Equal Rights Amendment among them. The resolution was referred to the Senate Judiciary Committee, but no further action was taken.


it can be treated as flexible.” By extending the original ERA deadline, Congress based its action on the broad authority over the amendment process conferred on it by Article V.\(^{118}\)

Finally, the authors asserted, relying on the precedent of the Twenty-Seventh Amendment, that “even if the seven-year limit was a reasonable legislative procedure, a ratification after the time limit expired can still be reviewed and accepted by the current Congress....”\(^{119}\) In their view, even if one Congress failed to extend or remove the ratification deadline, states could still ratify, and a later Congress could ultimately validate their ratifications.\(^{120}\)

Other observers question the value of the Madison Amendment as precedent. Writing in *Constitutional Commentary*, Denning and Vile asserted that the Twenty-Seventh Amendment presented a poor model for ERA supporters. Examining the amendment’s origins, they suggested that “the courts and most members of Congress have tended to treat the 27th as a ‘demi-amendment,’ lacking the full authority of the 26 that preceded it.”\(^{121}\) Reviewing what they characterized as unfavorable interpretations of the Madison Amendment in various legal cases, the authors asked whether what they referred to as the “jury rigged ratification of the ERA might result in its similar evisceration by the judiciary that will be called upon to interpret it.”\(^{122}\)

Similarly, a commentary in *National Law Journal* asserted that, by blocking its own cost of living salary increases, Congress itself has also persistently failed to observe the Madison Amendment’s requirements that “[n]o law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.”\(^{123}\)

On the other hand, supporters of the proposed ERA might claim that such criticism of the Twenty-Seventh Amendment refers more to what they might characterize as the flawed application of the amendment, rather than the intrinsic integrity of the amendment itself.

Constitutional scholar Michael Stokes Paulsen further questioned use of the Twenty-Seventh Amendment as an example in the case of the proposed Equal Rights Amendment. He returned to the contemporaneity issue, suggesting that the amending process

... should be *occasions*, not long, drawn-out processes. To permit ratification over a period of two centuries is to erode, if not erase the ideal of overwhelming popular agreement.... There is no assurance that the Twenty-seventh Amendment ever commanded, at *any one time*, popular assent corresponding to the support of two-thirds of the members of both houses of Congress and three-fourths of the state legislatures.\(^{124}\) (Emphases in the original.)

It could be further argued by opponents of proposed Equal Rights Amendment extension that, whatever the precedent set by Congress in declaring the Twenty-Seventh Amendment to have been regularly adopted, there is no precedent for Congress promulgating an amendment based on state ratifications adopted after two ratification deadlines have expired.

\(^{118}\) Ibid., pp. 129-130.

\(^{119}\) Ibid., p. 131.

\(^{120}\) This would arguably apply to Nevada’s 2017 ratification of ERA.

\(^{121}\) Denning and Vile, “Necromancing the Equal Rights Amendment,” p. 598. See also the discussion of the unique circumstances of the 27th Amendment in *The Constitution Annotated*, “Article V, Amendment.”

\(^{122}\) Ibid., p. 599.


The Role of the Supreme Court Decisions in *Dillon v. Gloss* and *Coleman v. Miller*

By some measures, the action of the Archivist of the United States in announcing ratification of the Twenty-Seventh Amendment, followed by congressional confirmation of its viability, superseded a body of constitutional principle that had prevailed since the 1920s and 1930s. This body of theory and political consideration arguably originated with the Supreme Court’s 1921 decision in *Dillon v. Gloss*, the case in which the Court first enunciated the principle that conditions of ratification for proposed constitutional amendments could be determined by Congress, and that the conditions should be roughly contemporaneous.\(^{125}\) The Court concluded that, relying on the broad grant of authority contained in Article V, Congress had the power, “keeping within reasonable limits, to fix a definite period for the ratification....”\(^{126}\)

At the same time, the Court noted that nothing in the nation’s founding documents touched on the question of time limits for ratification of a duly proposed constitutional amendment, and asked whether ratification would be valid at any time

> ... within a few years, a century or even a longer period, or that it must be had within some reasonable period which Congress is left free to define? Neither the debates in the federal convention which framed the Constitution nor those in the state conventions which ratified it shed any light on the questions.\(^{127}\)

Ultimately, however, the Court concluded that proposal of an amendment by Congress and ratification in the states are both steps in a single process, and that amendments

> ... are to be considered and disposed of presently.... [A] ratification is but the expression of the approbation of the people and is to be effective when had in three-fourths of the states, there is a fair implication that it must be sufficiently contemporaneous in that number of states to reflect the will of the people in all sections at relatively the same period, which of course ratification scattered through a long series of years would not do.\(^{128}\)

The need for contemporaneity was also discussed by the Court with regard to the congressional apportionment amendment and the Madison Amendment, both of which were pending in 1921. The Court maintained that the ratification of these amendments so long after they were first proposed would be “untenable.”\(^{129}\) Some scholars dispute the Court’s position in *Dillon*, however; Mason Kalfus, writing in *The University of Chicago Law Review*, claimed that

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\(^{125}\) *Dillon v. Gloss*, 256 U.S. 368 (1921). Dillon, arrested on a violation of the Volstead Act, asserted, among other things, that the 18th Amendment was unconstitutional because Congress had included a ratification deadline in the body of the amendment, an action for which no authority appeared in the Constitution.

\(^{126}\) Ibid.

\(^{127}\) Ibid.

\(^{128}\) Ibid.

\(^{129}\) Ibid. Justice Van Devanter, delivering the majority opinion, asserted: “That this is the better conclusion [constitutional amendments lacking contemporaneou sness ought to be considered waived] becomes even more manifest when what is comprehended in the other view is considered; for, according to it, four amendments proposed long ago—two in 1789, one in 1810 and one in 1861—are still pending and in a situation where their ratification in some of the States many years since by representatives of generations now largely forgotten may be effectively supplemented in enough more States to make three-fourths by representatives of the present or some future generation. To that view few would be able to subscribe, and in our opinion it is quite untenable.”
reference to the contemporaneity doctrine is to be found neither in the text of Article V nor in the deliberations of the Philadelphia Convention.\textsuperscript{130}

In \textit{Coleman v. Miller},\textsuperscript{131} the Supreme Court explicitly held that Congress had the sole power to determine whether an amendment is sufficiently contemporaneous, and thus valid, or whether, “the amendment ha[s] lost its vitality through the lapse of time.”\textsuperscript{132} In \textit{Coleman}, the High Court refined its holdings in \textit{Dillon}, ruling that when it proposes a constitutional amendment:

- Congress may fix a reasonable time for ratification;
- there was no provision in Article V that suggested a proposed amendment would be open for ratification forever;
- since constitutional amendments were deemed to be prompted by some type of necessity, they should be dealt with “presently”;
- it could be reasonably implied that ratification by the states under Article V should be sufficiently contemporaneous so as to reflect a nationwide consensus of public approval in relatively the same period of time; and
- ratification of a proposed amendment must occur within some reasonable time after proposal.\textsuperscript{133}

The Court additionally ruled, however, that if Congress were not to specify a reasonable time period for ratification of a proposed amendment, it would not be the responsibility of the Court to decide what constitutes such a period. The Court viewed such questions as essentially political and, hence, nonjusticiable, believing that the questions were committed to, and must be decided by, Congress in exercise of its constitutional authority to propose an amendment or to specify the ratification procedures for an amendment.\textsuperscript{134}

This “political question” interpretation of the contemporaneity issue is arguably an additional element supporting the fundamental constitutional doctrine of continued viability claimed by ERA advocates.

Another observer suggests, however, that the constitutional foundation of the Supreme Court’s ruling in \textit{Coleman v. Miller}, and hence the political question doctrine, may have been affected by the contemporary political situation. According to this theory, the Court in 1939 may have been influenced by, and overreacted to, the negative opinion generated by its political struggles with President Franklin Roosevelt over the constitutionality of New Deal legislation: “A later court, bruised by its politically unpopular New Deal rulings, retreated somewhat from a dogmatic defense of ratification time limits (as enunciated in \textit{Dillon v. Gloss}).”\textsuperscript{135} Michael Stokes Paulsen also questioned the Supreme Court’s decision in \textit{Coleman v. Miller}, suggesting that the “political


\textsuperscript{131} \textit{Coleman v. Miller}, 307 U.S. 433 (1939). This case concerned the Child Labor Amendment, and arose from a dispute in the Kansas Senate over ratification procedure. This amendment was examined at greater length earlier in this report, under “Congress Sets a Seven-Year Ratification Deadline.”

\textsuperscript{132} Ibid.

\textsuperscript{133} Ibid.

\textsuperscript{134} Ibid. Note, however, that in advising the Archivist on certifying ratification of the 27th Amendment, the Office of Legal Counsel took the view that there was no role for Congress in promulgation of an amendment. See “Congressional Pay Amendment,” \textit{Memorandum Opinion for the Counsel to the President}.

\textsuperscript{135} Kyvig, \textit{Explicit and Authentic Acts}, p. 468.
“question” doctrine could be interpreted to assert a degree of unchecked congressional authority over the ratification process that is arguably anti-constitutional.\textsuperscript{136}

Ancillary Issues

A range of subsidiary issues could also come under Congress’s purview should it consider revival of the proposed Equal Rights Amendment or a signal to the states that it would consider additional ratifications beyond the expired ratification deadline in the congressional resolutions.

Origins of the Seven-Year Ratification Deadline

One historical issue related to consideration of the proposed Equal Rights Amendment concerns the background of the seven-year deadline for ratification that originated with the Eighteenth Amendment (Prohibition). The amendment was proposed in 1917, proceeded rapidly through the state ratification process, and was declared to be adopted in 1919. During Senate consideration of the proposal, Senator and, later, President Warren Harding of Ohio is claimed to have originated the idea of a ratification deadline for the amendment as a political expedient, one that would “permit him and others to vote for the amendment, thus avoiding the wrath of the ‘Drys’ (prohibition advocates), yet ensure that it would fail of ratification.”\textsuperscript{137} As it happened, the law of unintended consequences intervened, as “[s]tate ratification proceeded at a pace that surprised even the Anti-Saloon League, not to mention the calculating Warren Harding.”\textsuperscript{138} Proposed on December 18, 1917, the amendment was declared to have been adopted just 13 months later, on January 29, 1919.

ERA supporters might cite this explanation of the origins of the seven-year ratification deadline in addition to their central assertions of the amendment’s viability. They could claim that, far from being an immutable historical element in the amendment process, bearing with it the wisdom of the founders, the ratification time limit is actually the product of a failed political maneuver, and is, moreover, of comparatively recent origin.

Opponents of extension might argue, however, that, whatever its origins, the seven-year ratification deadline has become a standard element of nearly all subsequent proposed amendments.\textsuperscript{139} They might further note that if ratification deadlines were purely political, Congress would not have continued to incorporate them in nine subsequent proposed amendments.\textsuperscript{140} In their judgment, these time limits not only ensure that proposed constitutional amendments enjoy both broad and contemporaneous support in the states, but they also arguably constitute an important element in the checks and balances attendant to the amendment process.

Rescission

In addition to this question, the constitutional issue of rescission would almost certainly recur in a contemporary revival of the proposed Equal Rights Amendment. As noted earlier in this report,

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{136} Paulsen, “A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment,” pp. 706-707, 718-721. See also the discussion of congressional authority in The Constitution Annotated, Article V.
\item \textsuperscript{137} Kyvig, Explicit and Authentic Acts, p. 225.
\item \textsuperscript{138} Ibid., p. 224.
\item \textsuperscript{139} The 19\textsuperscript{th} Amendment, providing for women’s suffrage, and the unratified Child Labor Amendment, were the last to be proposed by Congress without a ratification deadline.
\item \textsuperscript{140} The nine proposals are the 20\textsuperscript{th}, 21\textsuperscript{st}, 22\textsuperscript{nd}, 23\textsuperscript{rd}, 24\textsuperscript{th}, 25\textsuperscript{th}, and 26\textsuperscript{th} Amendments, and the proposed Equal Rights and District of Columbia Voting Rights (Congressional Representation) Amendments.
\end{itemize}
\end{footnotesize}
five states enacted resolutions purporting to rescind their previously adopted ratifications of the proposed amendment. The U.S. District Court for the District of Idaho ruled in 1981 that states had the option to rescind their instruments of ratification any time in the process prior to the promulgation or certification of the proposed amendment, a decision that was controversial at the time.

The Supreme Court agreed to hear appeals from the decision, but after the extended ERA ratification deadline expired on June 30, 1982, the High Court in its autumn term vacated the lower court decision and remanded the decision to the District Court with instructions to dismiss the case.

It may be noted by ERA supporters, however, that since the Supreme Court ruled in Coleman v. Miller that Congress has plenary power in providing for the ratification process, it may be inferred from this holding that Congress also possesses dispositive authority over the question as to the validity of rescission. Moreover, they might also note that its 1868 action directing Secretary of State William Seward to declare the Fourteenth Amendment to be ratified, notwithstanding two state rescissions, further confirms Congress’s broad authority over the amendment process.

Speculation on potential future court action on this question is beyond the scope of this report, but rescission arguably remains a potentially viable constitutional issue that could arise in response to a revival of the proposed Equal Rights Amendment.

Congressional Promulgation of Amendments

Some observers have noted that, while Congress passed resolutions declaring the Fourteenth, Fifteenth, and Twenty-Seventh Amendments to be valid, congressional promulgation of amendments that have been duly ratified is not necessary, and has no specific constitutional foundation. In his 1992 Memorandum for the Counsel to the President concerning the Twenty-Seventh Amendment, Acting Assistant Attorney General Timothy Flanigan, wrote that

Article V clearly delimits Congress’s role in the amendment process. It authorizes Congress to propose amendments and specify their mode of ratification, and requires Congress, on the application of the legislatures of two-thirds of the States, to call a convention for the proposing of amendments. Nothing in Article V suggests that Congress has any further role. Indeed, the language of Article V strongly suggests the opposite: it provides that, once proposed, amendments “shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by” three-fourths of the States. (Emphasis original in the memorandum, but not in Article V.)

The same viewpoint has been advanced by constitutional scholar Walter Dellinger. Addressing the question shortly after the Twenty-Seventh Amendment was declared to have been ratified, he noted

An amendment is valid when ratified. There is no further step. The text requires no additional action by Congress or anyone else after ratification by the final state. The

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141 Kyvig, Explicit and Authentic Acts, pp. 451-416.
143 See earlier in this report under “Article V: Congressional Authority over the Amendment Process.”
creation of a “third step”—promulgation by Congress—has no foundation in the text of the Constitution.\textsuperscript{145}

Supporters of the proposed Equal Rights Amendment, however, might refer again to the Supreme Court’s ruling in \textit{Coleman v. Miller}. If plenary authority over the amendment process rests with Congress, advocates might ask, does it also presumably extend to other issues that arise, including provision for such routine procedures as promulgation of an amendment?

**The Proposed District of Columbia Voting Rights (Congressional Representation) Amendment—Congess Places a Ratification Deadline in the Body of the Amendment**

Congress has proposed one constitutional amendment to the states since the proposed Equal Rights Amendment began the ratification process in 1972, the District of Columbia Voting Rights (Congressional Representation) Amendment. For this amendment, Congress returned to the earlier practice of placing a deadline for ratification directly in the body of the proposal itself. According to contemporary accounts, this decision was influenced by the nearly concurrent congressional debate over the ERA deadline extension.\textsuperscript{146}

The District of Columbia is a unique jurisdiction, part of the Union, but not a state, and subject to “exclusive Legislation in all Cases whatsoever ... by Congress.”\textsuperscript{147} Congress has exercised its authority over the nation’s capital with varying degrees of attention and control, and through a succession of different governing bodies, beginning in 1800. By the 1950s, the long-disenfranchised citizens of Washington, DC, began to acquire certain rights. The Twenty-Third Amendment, ratified in 1961, established their right to vote in presidential elections. In 1967, President Lyndon Johnson used his reorganization authority to establish an appointed mayor and a city council, also presidentially appointed.\textsuperscript{148} In 1970, Congress provided by law for a non-voting District of Columbia Delegate to Congress, who was seated in the House of Representatives.\textsuperscript{149} In 1973, President Richard Nixon signed legislation that established an elected mayor and council, while reserving ultimate authority over legislation to Congress.\textsuperscript{150}

After more than a decade of change, proponents asserted that voting representation in Congress proportionate to that of a state would be an important step in the progress toward full self-government by the District of Columbia. In 1977, Representative Don Edwards of California, chairman of the House Judiciary Committee’s Subcommittee on Civil and Constitutional Rights, introduced H.J.Res. 554 (95\textsuperscript{th} Congress). The resolution, as introduced, comprised the following text:

> Resolved by the Senate and the House of Representatives of the United States of America in Congress assembled (two thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the


\textsuperscript{147} U.S. Constitution, Article I, Section 8, clause 17.

\textsuperscript{148} U.S. President, Lyndon B. Johnson, Reorganization Plan Number 3 of 1967, 81 Stat. 948.

\textsuperscript{149} The District of Columbia Delegate Act, 84 Stat. 845.

\textsuperscript{150} The District of Columbia Self Government and Government Reorganization Act, 87 Stat. 774.
The Proposed Equal Rights Amendment: Contemporary Ratification Issues

legislatures of three fourths of the several states within seven years of the date of its submission by the Congress:

Article—

Section 1. For purpose of representation in the Congress, election of the President, and Article V of this Constitution, the District constituting the seat of government of the United States shall be treated as though it were a state.

Section 2. The exercise of the rights and powers conferred under this article shall be by the people of the District constituting the seat of government, and as shall be provided by the Congress.

Section 3. The twenty-third article of amendment to the Constitution of the United States is hereby repealed.

Extensive hearings were held in the subcommittee in 1977, and on February 15, 1978, the full Judiciary Committee reported the measure to the House. The committee, however, adopted an amendment offered by Representative M. Caldwell Butler of Virginia that incorporated the seven-year ratification deadline directly in the body of the resolution, rather than in the preamble. Congressional Quarterly reported that this provision... was intended to ensure that the deadline could not be extended by a simple majority vote of Congress. The Justice Department has said in the case of the Equal Rights Amendment that Congress could extend the deadline for ratification by a simple majority vote because the time limit was contained in the resolving clause rather than in the body of that amendment.151

Similarly, writing in Fordham Urban Law Journal during the same period, Senator Orrin Hatch of Utah noted that:

Section 4 of the D.C. Amendment requires that ratification of the necessary three-fourths of the states must occur within seven years of the date of its submission to the states. The inclusion of this provision within the body of the resolution will avoid a similar controversy to that which has arisen with respect to the time limit for ratification of the proposed “Equal Rights Amendment.”152

During consideration of H.J.Res. 554 in the full House, language setting the ratification deadline was deleted from the authorizing resolution, and the Butler amendment was incorporated in the body of the proposal by voice vote as a new section:

Section 4. This article shall be inoperative, unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the States within seven years from the date of its submission.153

The amendment passed the House on March 2, 1978, by a margin of 289 to 127, 11 votes more than the two-thirds constitutional requirement.154 The Senate took up the House-passed resolution on August 16, 1978. During four days of debate, it rejected a wide range of amendments, voting


154 Ibid., pp. 5272-5273.
to adopt H.J.Res. 554 on August 22 by a margin of 67 to 32, one vote more than the constitutional requirement.\(^{155}\)

The District of Columbia Congressional Representation Amendment expired on August 2, 1985, seven years after it was proposed by Congress. It was ultimately ratified by 16 states.\(^{156}\) 22 short of the constitutionally mandated requirement that it be approved by three-fourths, or 38, of the states.

**Concluding Observations**

The arguments and constitutional principles relied on by ERA supporters to justify the revival of the proposed Equal Rights Amendment include, but may not be limited to, the following:

- Article V, they assert, grants exceptionally broad discretion and authority over the constitutional amendment process to Congress.
- In their interpretation, the example of the Twenty-Seventh Amendment suggests that there is no requirement of contemporaneity in the ratification process for proposed constitutional changes.
- ERA proponents claim that the Supreme Court’s decision in *Coleman v. Miller* gives Congress wide discretion in setting conditions for the ratification process.
- Far from being sacrosanct and an element in the founders’ “original intent,” the seven-year deadline for amendments has its origins in a political maneuver by opponents of the Eighteenth Amendment authorizing Prohibition.
- The decision of one Congress in setting a deadline for ratification of an amendment does not constrain a later Congress from rescinding the deadline and reviving or acceding to the ratification of a proposed amendment.

Against these statements of support may be weighed the cautions of other observers who may argue as follows:

- The Twenty-Seventh Amendment is a questionable model for efforts to revive the proposed Equal Rights Amendment; unlike the proposed amendment, it was not encumbered by two expired ratification deadlines. Moreover, it is argued that Congress has generally ignored its provisions since ratification.\(^{157}\)
- Even though the proposed Equal Rights Amendment received an extension, supporters were unable to gain approval by three-fourths of the states. Opponents suggest that a “third bite of the apple” is arguably unfair and, if not unconstitutional, at least contrary to the founders’ intentions.
- Revivification opponents caution ERA supporters against an overly broad interpretation of *Coleman v. Miller*, which, they argue, may have been a politically influenced decision.


Congress implicitly recognized its misjudgment on the ratification deadline for the proposed Equal Rights Amendment when it incorporated such a requirement in the text of the proposed District of Columbia Voting Rights (Congressional Representation) Amendment.

The rescission issue was not conclusively decided in the 1980s and remains potentially open to congressional or judicial action if the proposed Equal Rights Amendment is reopened for further ratifications.

Congress could revisit the contending points raised by different analysts if it gives active consideration to legislation that would seek specifically to revive the proposed Equal Rights Amendment, or to accept the additional state ratifications.

In recent years, some supporters of the proposed ERA have embraced the three-state strategy, which maintains that Congress has the authority to effectively repeal the ratification deadlines provided in H.J. Res. 208, 92nd Congress and H.J.Res. 638, 95th Congress. In the 115th Congress, S.J.Res. 5 and H.J.Res. 53 incorporate this approach, which could be more accurately described as a “one-state strategy” following ratification by Nevada in 2017 and Illinois in 2018. Alternatively, Congress could propose a “fresh start” equal rights amendment; such proposals have been introduced regularly since the original ERA time limit expired in 1982. This approach might avoid the controversies that have been associated with repeal of the deadlines for the 1972 ERA, but starting over would present a fresh constitutional amendment with the stringent requirements provided in Article V: approval by two-thirds majorities in both houses of Congress, and ratification by three-fourths of the states. It would, however, be possible to draft the proposal without a time limit, as is the case with S.J.Res. 6 and H.J.Res. 33 in the 115th Congress. If approved by Congress in this form, the proposed amendment would, as was the case with the Madison Amendment, remain current, viable, and thus eligible for ratification, for an indefinite period.

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Amendment XXV

Section 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

Section 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

Section 3. Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

Section 4. Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.
REDUCTION OF VOTING AGE

TWENTY-SIXTH AMENDMENT

SECTION 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

THE EIGHTEEN-YEAR-OLD VOTE

In extending the Voting Rights Act of 1965 in 1970 Congress included a provision lowering the age qualification to vote in all elections, federal, state, and local, to 18. In a divided decision, the Supreme Court held that Congress was empowered to lower the age qualification in federal elections, but voided the application of the provision in all other elections as beyond congressional power. Confronted thus with the possibility that they might have to maintain two sets of registration books and go to the expense of running separate election systems for federal elections and for all other elections, the States were receptive to the proposing of an Amendment by Congress to establish a minimum age qualification at 18 for all elections, and ratified it promptly.

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The Bipartisan Bayh Amendment: Republican Contributions to the Twenty-Fifth Amendment

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THE BIPARTISAN BAYH AMENDMENT:
REPUBLICAN CONTRIBUTIONS TO THE
TWENTY-FIFTH AMENDMENT

Joel K. Goldstein*

It is appropriate that Senator Birch Bayh has been widely recognized as
the author and person most responsible for the Twenty-Fifth Amendment.
His work was indispensable, and he was helped by other Democrats and
nonpartisan actors including the American Bar Association and John D.
Feerick, among others. Yet the Amendment was also the product of
bipartisan cooperation. Important provisions were based on work done
during the administration of President Dwight D. Eisenhower, and
Eisenhower and his Attorney General, Herbert Brownell, played important
roles in supporting Bayh’s proposal as did other Republicans in and out of
Congress. Republicans like Representative Richard Poff pushed ideas and
provisions that found their way into the Amendment, helped create important
legislative history, and contributed in the legislative process. Bayh’s
legislative contribution included the inclusive manner in which he operated,
and many Republicans deserve credit for participating constructively in a
process they could not direct.

In describing the bipartisan character of the Bayh Amendment, this Article
seeks to fill a void in scholarly writing since no prior work has this focus. It
also uses the Twenty-Fifth Amendment as a case study of the sort of
bipartisan effort on which any constitutional amendment depends. And it
suggests that the dispositions that produced the Twenty-Fifth Amendment—
in particular, communal problem solving based on a recognition of the need
for interested parties to build from areas of agreement—would contribute to
addressing other social problems.

* Vincent C. Immel Professor of Law, Saint Louis University School of Law. I am grateful
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Continuity in the Presidency: Gaps and Solutions held at Fordham University School of Law.
For an overview of the symposium, see Matthew Diller, Foreword: Continuity in the
INTRODUCTION .................................................................................................................. 1138

I.  THE LEGAL AND POLITICAL CONTEXT OF THE TWENTY-FIFTH AMENDMENT .......................................................... 1140
   A.  The Original Succession Clause and Eisenhower’s Proposal ........................................... 1140
   B.  Incorporating Eisenhower’s Proposal ............................................................................ 1146

II.  REPUBLICAN CONTRIBUTIONS .................................................................................. 1149
   A.  Incorporating a Republican Proposal .......................................................................... 1149
   B.  Early Prominent Republican Supporters ..................................................................... 1149
      1.  Herbert Brownell ........................................................................................................ 1150
      2.  Dwight D. Eisenhower ................................................................................................ 1152
      3.  Richard M. Nixon ........................................................................................................ 1154
   C.  Creating a Climate for a Cooperative Effort ................................................................. 1154
   D.  Legislative Efforts ......................................................................................................... 1157
      1.  1964 Republican Collaboration: The Senate ............................................................... 1157
      2.  Winning Celler’s Support: Calling on Brownell Again ................................................. 1158
      3.  1965 Republican Collaboration: The Senate ............................................................... 1159
      4.  1965 Republican Collaboration: The House ............................................................... 1162
      5.  Collaboration: The Conference and Adoption ........................................................... 1166

III.  LESSONS FROM A BIPARTISAN ACCOMPLISHMENT ............................................. 1168

IV.  PARTISANSHIP (AND BIPARTISANSHIP) IN A BROADER CONTEXT ... 1171

INTRODUCTION

Senator Birch Bayh, deservedly, is recognized as the person most responsible for the Twenty-Fifth Amendment to the U.S. Constitution, which addresses presidential succession and inability and vice presidential vacancy. The young, first-term Democratic Senator’s skill, commitment, and leadership were indispensable to the development, proposal, and ratification of the Amendment during the mid-1960s. Democratic Representative Emanuel Celler (New York) has also received credit for what was sometimes referred to as the “Bayh-Celler Amendment.” He performed important work on presidential inability during the 1950s and helped steer the Amendment through the House of Representatives in 1965.

1. U.S. Const. amend. XXV.
Lyndon B. Johnson’s support helped too, as did the testimony of Nicholas Katzenbach, Johnson’s Deputy Attorney General and later Attorney General. Crucial nonpartisan contributions came from the American Bar Association (ABA), Lewis F. Powell Jr., then one of its leaders, and John D. Feerick, who played an extraordinary and diverse role as a scholar, activist, and citizen.

Republicans also contributed significantly to the Twenty-Fifth Amendment. They helped conceive, promote, and advance the Amendment to its ultimate ratification. Former Attorney General Herbert Brownell, former President Dwight D. Eisenhower, former Vice President Richard M. Nixon, and Republican Representatives William McCulloch (Ohio) and Richard H. Poff (Virginia) were among those who played critical roles.

Although earlier works have discussed the steps leading to the Amendment, no scholarly work has focused on the roles Republicans played in the achievement. Without detracting from the credit appropriately given Bayh, other Democrats, and nonpartisan actors, it is important to focus on Republican contributions as well. The Twenty-Fifth Amendment was the product of bipartisan cooperation. Absent that quality, it would not have become part of the Constitution.


7. See 111 CONG. REC. 7940 (1965) (statement of Rep. Poff) (stating that no one is “more deserving” than the ABA for the proposal of the Twenty-Fifth Amendment); 110 CONG. REC. 22,983 (1964) (statement of Sen. Bayh) (giving “particular credit” to the ABA for doing “more than any single group” to help advance the amendment).


10. Birch Bayh, One Heartbeat Away: Presidential Disability and Succession 112 (1968) (describing Brownell as a “great help”); id. at 162 (noting that Brownell was “invaluable”).

11. Id. at 75–76 (praising Eisenhower for his support).

12. Id. at 73 (stating that Nixon’s “experiences and opinions” were “valuable”); id. at 77 (describing Nixon’s thoughts on succession and disability as “essential”).

13. Id. at 297 (noting that McCulloch was “very helpful”).


15. See, e.g., Feerick, supra note 6, at 105–07; Goldstein, supra note 2, at 998–1012. See generally Bayh, supra note 10.

16. Feerick, supra note 4, at 203 (“The proposed twenty-fifth amendment has been made possible because of the willingness of Democrats and Republicans alike to compromise in the best interests of the Nation.”).

17. Id.
Far from diminishing the legislative achievement of Bayh and the other architects of the Amendment, its bipartisan nature is another significant reason to admire their work. Bipartisanship did not just happen on the Twenty-Fifth Amendment. It was deliberately sought and carefully cultivated by people on both sides of the aisle. The proponents understood the bipartisan requisite, and their successful efforts to practice an inclusive brand of problem-solving were an aspect of their accomplishment.

This discussion does not simply supplement historical understanding of the events that led to Congress proposing the Twenty-Fifth Amendment in the summer of 1965, although that is part of its intended contribution. It also furnishes an instructive case study regarding formal constitutional amendment and bipartisan legislative collaboration generally. Constitutional arithmetic makes bipartisanship a likely prerequisite to any constitutional amendment. Moreover, the factors that produced legislative bipartisanship for the Twenty-Fifth Amendment offer lessons not only for cross-party cooperation but also for common action in a variety of contexts.

This Article focuses on the bipartisan nature of the Twenty-Fifth Amendment by discussing events culminating with Congress’s proposal of the Amendment to the states in July 1965. It is not a complete study of bipartisanship in connection with the Amendment because it does not discuss the ratification process in the states. Its account of the legislative process is also incomplete because it omits many contributions by Democratic figures. These have been recognized elsewhere and are outside the scope of this Article. Rather, this Article focuses on the contributions of Republican figures in the legislative process that culminated in Congress proposing the Twenty-Fifth Amendment to the states in July 1965.

Part I sketches the legal and political context in which the legislative deliberations occurred. Part II describes the different ways in which various Republicans contributed to the proposed Twenty-Fifth Amendment. Part III extracts some lessons from their contributions and the deliberations in general, especially the importance of bipartisanship during the legislative process. Finally, Part IV puts bipartisanship in a larger context.

I. THE LEGAL AND POLITICAL CONTEXT OF THE TWENTY-FIFTH AMENDMENT

A. The Original Succession Clause and Eisenhower’s Proposal

The text of the Constitution as it existed in the early 1960s suggested that presidential inability—like presidential death, resignation, or removal—triggered some transfer of presidential power to the vice president. 18 Yet
whereas law or practice made the existence and operation of the other three contingencies clear, presidential inability was characterized by ambiguity. The Constitution did not define inability or indicate how it was determined. Unlike the other three contingencies, the existence of which tends to be evident, inability can be controversial. And whereas presidential death, resignation, or removal are inherently final events that separate the chief executive permanently from office, a presidential inability can be transitory, of indefinite duration, long lasting, or permanent. The first three contingencies create an automatic vacancy in fact; whether the fourth also does turns partly on the legal consequence attached to presidential inability.

Vice President John Tyler’s claim that William Henry Harrison’s death in April 1841 made him President, not simply Vice President acting as President, was probably wrong, but little turned on it since Harrison’s death ended his claim to the office. But, the text of the Constitution suggested that whatever devolved on the Vice President following death also devolved following inability. That textual symmetry created apprehensions that since the Vice President became President upon his predecessor’s death under the Tyler precedent, he might also do so during a presidential inability even if the inability proved transient. That concern was one factor that inhibited a transfer of power to Vice Presidents like Chester A. Arthur and Thomas Marshall during the incapacities of James Garfield and Woodrow Wilson, respectively.

Eisenhower, who suffered three presidential incapacities between September 1955 and late November 1957, focused on ensuring that presidential illness would not impede effective presidential leadership, an increasingly serious problem during the Cold War and nuclear age. Although some thought Congress could address the issue by statute, most thought a constitutional amendment was necessary to address presidential
deciding what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.""

deed to the Constitution suggested that whatever devolved on the Vice President following death also devolved following inability. That textual symmetry created apprehensions that since the Vice President became President upon his predecessor’s death under the Tyler precedent, he might also do so during a presidential inability even if the inability proved transient. That concern was one factor that inhibited a transfer of power to Vice Presidents like Chester A. Arthur and Thomas Marshall during the incapacities of James Garfield and Woodrow Wilson, respectively.

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20. See FEERICK, supra note 4, at 50 (stating that original-intent evidence shows that the Vice President “was merely intended to discharge the powers and duties of the President temporarily”); Joel K. Goldstein, History and Constitutional Interpretation: Some Lessons from the Vice Presidency, 69 ARK. L. REV. 647, 668–74 (2016) (“Original history seemed to suggest that the Vice President would simply act as, but not become, President . . . .”)


23. FEERICK, supra note 4, at 135–36, 170–72; Joel K. Goldstein, Vice-Presidential Behavior in a Disability Crisis: The Case of Thomas R. Marshall, POL. & LIFE SCI., Fall 2014, at 37, 46–47.


inability. Speaking through Attorney General Brownell, the Eisenhower administration proposed a constitutional amendment in April 1957 which distinguished presidential inability from cases of death, resignation, or removal.

In the latter three, consistent with the Tyler precedent, the Vice President became President; in the former, he simply exercised presidential powers and duties during the inability. The proposed amendment allowed the President to declare his inability in writing, at which point the Vice President acted as President. If the President failed or was unable to declare his inability, the Vice President upon written approval “of a majority of the heads of executive departments who are members of the President’s Cabinet” could declare the President’s disability. In either event, the President’s written statement of his ability would allow him to resume presidential functions. The Eisenhower proposal kept decision-making within the executive branch and rejected any role for a presidential inability commission. The proposal was criticized for not providing sufficient protection should a disabled President assert his capacity to act; as a result, other proposals were offered. Ultimately, no legislative action followed.

The following year, Brownell’s successor, William P. Rogers, endorsed Brownell’s proposed amendment with an added provision. The modification stated that if the Vice President and Cabinet disagreed with the President’s assertion of ability to resume the discharge of the powers and duties of his office, Congress must resolve the dispute. In March 1958, a bipartisan group of Senators introduced a revised form of this approach, which provided that if the Vice President and Cabinet disagreed with the President’s declaration of his capacity, Congress would decide the issue. A two-thirds vote in both houses was needed to sustain the Vice President’s claim. Even so, the President could later resume the discharge of his

26. The Constitution empowered Congress to provide by statute “for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.” U.S. Const. art. II, § 1, cl. 6. The grant of power to address a dual vacancy was interpreted to preclude Congress from addressing simply presidential inability. See Ruth C. Silva, Presidential Succession and Disability, 21 L. & Contemp. Probs. 646, 662 (1956).


28. Id. at 7.
29. Id.
30. Id.
31. Id. at 8.
32. Id.; Brownell, supra note 25, at 197.
34. Feerick, supra note 4, at 181.
35. Id.
36. Brownell, supra note 25, at 201.
37. Id. at 201–02.
38. Id. at 207; see S.J. Res. 161, 85th Cong. (1958).
powers and duties by agreement of the “Acting President” or by a majority vote in each house. 40 Although the Senate Subcommittee on Constitutional Amendments endorsed the Eisenhower-Brownell-Rogers amendment, 41 Congress took no action in 1958 or the following years. 42

With no sign that Congress would act, Eisenhower entered into a letter agreement with Vice President Nixon as a stopgap measure. 43 It provided that either Eisenhower or Nixon could determine that Eisenhower was disabled, thereby transferring presidential powers and duties to Nixon until Eisenhower concluded that he was able to resume their discharge, at which point he would do so. 44 Eisenhower rejected the formalistic conclusion that the Constitution’s textual symmetry extended the Tyler precedent to presidential inability. 45 Instead, he preferred the common-sense idea that the Constitution should allow a temporary transfer of presidential powers and duties to handle what might be a transient inability, even if custom dictated a permanent succession to the office when the triggering event produced an inherently enduring vacancy due to death, resignation, or removal. 46 Eisenhower established the idea that either the President or Vice President could trigger the transfer, but the President could reclaim power. 47 Finally, Eisenhower wrote to Nixon privately that if “any group of distinguished medical authorities” Nixon assembled concluded that the President had a permanent disability, Eisenhower would resign; however, if he did not, Nixon should assume the presidency nonetheless. 48 The Eisenhower-Nixon agreement was made public in part 49 and largely followed by President John F. Kennedy and Vice President Lyndon B. Johnson; 50 President Johnson and Speaker of the House of Representatives, John McCormack; 51 and President Johnson and Vice President Hubert H. Humphrey. 52

Senator Estes Kefauver, Chairman of the Senate Subcommittee on Constitutional Amendments, had previously introduced Senate Joint

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41. Feerick, supra note 4, at 182.
42. Feerick, supra note 6, at 53.
43. Agreement Between the President and the Vice President as to Procedures in the Event of Presidential Disability, PUB. PAPERS 196 (Mar. 3, 1958).
44. Id.
45. Goldstein, supra note 20, at 677–78.
46. Id.
47. Id. at 676 & n.199.
49. See Agreement Between the President and the Vice President as to Procedures in the Event of Presidential Disability, supra note 43.
51. Feerick, supra note 6, at 320–37 (providing the original agreements between Johnson and McCormack).
Resolution 161 ("S.J. Res. 161") in 1958 and Senate Joint Resolution 28 ("S.J. Res. 28") in 1963, both of which essentially followed the Eisenhower-Brownell-Rogers approach. However, he subsequently joined with Senator Kenneth Keating, the ranking minority member of the Senate Subcommittee on Constitutional Amendments, in introducing Senate Joint Resolution 35 ("S.J. Res. 35") in 1963. This resolution provided that in the event of a presidential inability, the Vice President would simply discharge the powers and duties of the office without assuming the office, but also authorized Congress to provide by statute how and by whom the beginning and end of presidential inability would be determined. The ABA supported this congressional-enabling approach, Deputy Attorney General Nicholas deB. Katzenbach testified in favor of it for the Kennedy administration, and the Subcommittee on Constitutional Amendments reported it to the Senate Judiciary Committee on June 25, 1963. Kefauver, however, died on August 10, 1963, before further action occurred.

In autumn of 1963, Congress seemed unlikely to address presidential inability. The title of John D. Feerick’s first article on the subject, “The Problem of Presidential Inability—Will Congress Ever Solve It?,” suggested pessimism. His letter of November 8, 1963, which the New York Times published nine days later, observed that “Congress has consistently failed the American people by not acting” to address problems regarding presidential inability.

President Kennedy’s assassination on November 22, 1963, created renewed interest in the subject of presidential continuity. The Cold War was near its height in the nuclear age with the Cuban Missile Crisis occurring only thirteen months earlier, which added urgency to the question of presidential leadership. The then-existing Presidential Succession Act of

53. S.J. Res. 161, 85th Cong. (1958). Joining Kefauver were Democrats Thomas Hennings (Missouri) and Olin D. Johnston (South Carolina) and Republicans Everett Dirksen (Illinois), Roman Hruska (Nebraska), William Langer (North Dakota), Arthur Watkins (Utah), William Jenner (Indiana), and John M. Butler (Maryland).


55. BAYH, supra note 10, at 26–28.


57. S.J. Res. 35.


59. Id. at 32 (statement of Nicholas deB. Katzenbach, Deputy Att’y Gen.).


61. Feerick, supra note 4, at 183; see JOSEPH BRUCE GORMAN, KEFAUVER: A POLITICAL BIOGRAPHY 367 (1971).


64. Goldstein, supra note 2, at 965.

65. See id. at 964.
1947 placed the Speaker of the House and Senate President pro tempore immediately after the Vice President in the line of presidential succession and then extended the line through the Cabinet. Concern was magnified by the fact that Johnson suffered a serious heart attack in 1955 and those next in line of succession, Speaker John McCormack and Senate President pro tempore Carl Hayden, were elderly and not regarded as presidential timber.

These circumstances focused attention on the line of succession following the Vice President in addition to presidential inability. Legislative and Cabinet succession each had proponents and critics, and the recent rise of the vice presidency beginning with Nixon’s term prompted a belief that filling a vice presidential vacancy presented the best means to deal with presidential succession and one which would also reduce the importance of the rest of the line.

Bayh, having succeeded Kefauver as chairman of the Senate Subcommittee in late September 1963, seized the opportunity to use the national tragedy to galvanize Congress to act. The first step was to formulate a proposal. Congress had offered two bipartisan options for addressing presidential inability: the Eisenhower-Brownell-Rogers approach, which Kefauver had initially supported and which specified procedures for transferring presidential powers voluntarily or involuntarily, and the Keating-Kefauver congressional-enabling approach (Senate Joint Resolution 35), which Katzenbach and the ABA had endorsed. Two days after

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67. 3 U.S.C. § 19(a)–(b).
68. Feerick, supra note 4, at 6; Goldstein, supra note 2, at 965.
70. See James Reston, The Problem of Succession to the Presidency, N.Y. TIMES, Dec. 6, 1963, at 33 (discussing McCormack’s unsuitability for presidency); The Succession, CHI. TRIB., Dec. 10, 1963, at 20 (referring to Johnson’s heart attack and the advanced age of his potential successors); see also Robert E. Gilbert, The Genius of the Twenty-Fifth Amendment: Guarding Against Presidential Disability but Safeguarding the Presidency, in MANAGING CRISIS: PRESIDENTIAL DISABILITY AND THE 25TH AMENDMENT, supra note 19, at 25, 30; Goldstein, supra note 2, at 965.
74. Bayh, supra note 10, at 29.
76. Id.
77. 1963 Senate Hearings, supra note 58, at 32 (statement of Nicholas deB. Katzenbach, Deputy Att’y Gen.).
78. Id. at 15–16 (statement of Lewis F. Powell Jr., President-Elect Nominee, American Bar Association); see S.J. Res. 84, 88th Cong. (1963). Senate Joint Resolution 84 was proposed by Senators Roman Hruska and John McClellan. See S.J. Res. 84, 88th Cong. (1963). It resembled S.J. Res. 35, but required that congressionally mandated procedures be consistent with separation of powers and the system of checks and balances. Id. § 2.
Kennedy’s assassination, the New York Times called for Congress to adopt the Keating approach.79

B. Incorporating Eisenhower’s Proposal

Bayh determined that he preferred the Eisenhower-Kefauver “specific procedural constitutional amendment” to the Keating-Katzenbach congressional-enabling approach.80 Bayh thought that S.J. Res. 35 insufficiently protected the President’s position, doubted that state legislatures would give Congress a blank check, and worried that the proposal’s failure to prescribe procedures might result in Congress deferring indefinitely the task of coming up with some.81 Bayh thought that Congress needed to develop procedures promptly while the trauma of Kennedy’s assassination still provided an incentive to act, not simply to obtain power to legislate in the future.82 He also thought that filling a vice presidential vacancy was the most pressing problem83 and proposed to remedy that deficiency by allowing the President to nominate a Vice President to be confirmed by Congress.84 Such an innovation would diminish the importance of who followed the Vice President in the line of succession, but Bayh also favored replacing the legislative leaders with the Cabinet to keep succession within the executive branch.85

Within three weeks of Kennedy’s assassination, Bayh had introduced Senate Joint Resolution 139 (“S.J. Res. 139”), a proposed constitutional amendment addressing presidential succession, vice presidential vacancy, and presidential inability, and he announced that his Subcommittee would conduct hearings early in 1964.86 In crafting S.J. Res. 139, Bayh took the basic provisions regarding presidential inability from the Eisenhower-Brownell-Rogers proposal with some changes, while adding a new section to fill vice presidential vacancies by presidential nomination subject to confirmation by both houses of Congress.87 As modified during the next nineteen months, S.J. Res. 139 formed the basis for the Twenty-Fifth Amendment, which Congress proposed in the summer of 1965 and which received the required three-fourths ratification of the states by February 10, 1967.

Although the Kennedy assassination focused attention on the subject, it did not produce an immediate consensus regarding a solution. The following period produced many suggested reforms regarding presidential succession.

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80. BAYH, supra note 10, at 32, 34–35.
81. Id. at 30, 32, 34–35.
82. See id. at 34–35.
83. Id. at 32.
84. Id.
85. See S.J. Res. 139, 88th Cong. § 6 (1963).
87. BAYH, supra note 10, at 35; FEERICK, supra note 4, at 244.
and inability and vice presidential vacancy. Eisenhower, for instance, initially proposed changing the line of succession to run through the Cabinet whereas McCormack and former President Harry S. Truman endorsed the existing line beginning with legislative leaders. Additionally, whereas Bayh thought a constitutional amendment was required, some thought the issues of succession and inability could be addressed by statute. Those who favored some constitutional amendment were nonetheless divided among a variety of ways to fill a vice presidential vacancy and address inability. The proposals included holding a special presidential election following a succession during the first half of a presidential term, selecting two Vice Presidents, allowing one or both houses to elect a Vice President without a presidential nomination or from a list of prospective nominees, or reconvening the Electoral College, as well as several other options. Regarding presidential inability, some, like Keating, favored an enabling amendment whereas others suggested an “inability commission.”

A constitutional amendment as Bayh proposed would, of course, impose a heavy burden. Article V of the Constitution, which governs constitutional amendment, requires common action by the House of Representatives, the Senate, and the states, and it imposes a daunting supermajority requirement at each stage. The House and Senate must propose an amendment by a two-thirds vote and three-fourths of the states must ratify it for it to become part of the Constitution. That extraordinary level of consensus makes constitutional amendments difficult and, accordingly, rare. Democrats held

89. Presidential Inability and Vacancies in the Office of Vice President: Hearings on S.J. Res. 13 et al. Before the Subcomm. on Constitutional Amendments of the S. Comm. on the Judiciary, 88th Cong. 3 (1964) [hereinafter 1964 Senate Hearings] (statement of Sen. Birch Bayh, Chairman, Subcomm. on Constitutional Amendments of the S. Comm. on the Judiciary) (“These questions can be solved by amending the Constitution. Some say they could best be solved by statute. Frankly, I disagree. Many distinguished lawyers disagree. What most lawyers agree upon is that if there exists a reasonable constitutional doubt, the best method to eradicate any doubt is to amend the Constitution.”).
90. Id.; FEERICK, supra note 6, at 58 (noting that several “proponents felt that Congress had the power to legislate procedures” to resolve the questions of presidential inability and succession).
91. FEERICK, supra note 6, at 59–71.
94. H.R.J. Res. 818, 88th Cong. (1963) (proposing a constitutional amendment whereby the Senate would elect a Vice President).
96. 1964 Senate Hearings, supra note 89, at 79–80 (statement of Sen. Frank Church).
97. Id. at 237 (statement of Richard M. Nixon, former Vice President).
98. See FEERICK, supra note 6, at 64–71; GOLDSTEIN, supra note 72, at 233–39 (presenting various plans regarding vice presidential vacancy); Feerick, supra note 71, at 487–89 & nn.168–77.
100. FEERICK, supra note 6, at 62.
101. U.S. CONST. art. V.
102. Id.
sixty-six of 100 seats in the Senate and 258 of 435 in the House between 1963 and 1964—not enough to reach the two-thirds threshold in either house even assuming perfect party discipline. Substantial opposition in either house would likely encourage resistance elsewhere. Any successful amendment would require bipartisan cooperation.

Yet issues regarding presidential succession and inability often sparked partisan conflict, not cooperation. In the early 1790s, when Congress first sought to create a line of succession behind the Vice President, Alexander Hamilton and his Federalist allies had favored a legislative line in part to avoid placing Secretary of State Thomas Jefferson second in line to the presidency, whereas Jeffersonians, like James Madison, had argued for Cabinet succession. In 1919 and 1920, Republicans seemed disinclined to contribute to a resolution of Woodrow Wilson’s disability, concluding that it hurt the Democrats. In 1947, Republicans seemed more enthusiastic about placing legislative leaders after the Vice President, perhaps because Republican Joe Martin was Speaker of the House rather than Democrat Senator Sam Rayburn, who held the position the year prior. Although the House voted on a bipartisan basis to elevate the speaker, the Senate voted along party lines in support of the measure, which placed two Republican legislators, not a Democratic Secretary of State, next in line. Democratic congressional leaders reportedly balked at addressing inability issues during Eisenhower’s second term for fear that a resolution would elevate Nixon’s standing and suggest that Eisenhower was more ill than known.

The questions about McCormack’s fitness to be next in line introduced a further complication. They added urgency to reform efforts but also impeded them. Since some members of the House feared that action might seem to impugn McCormack’s fitness, they resisted moving forward. Bayh’s original proposal, which would have placed Cabinet members rather than legislative leaders after the Vice President, probably exacerbated the problem. Even when Bayh dropped that provision, McCormack was reportedly cool to the measure. It became clear that the House of

103. Feerick, supra note 4, at 60–61.
106. Feerick, supra note 71, at 481–83, 482 nn.156–57. The bill, which made the Speaker, followed by the President pro tempore, next in the line of succession behind the Vice President, passed in the House by a vote of 365 to 11. Id. at 482. Only ten Democrats and one Republican opposed the bill. Id. at 482 n.157. In the Senate, the bill passed by a vote of 50 to 35. Id. at 482. Forty-seven Republicans and three Democrats voted in favor of the bill and thirty-five Democrats voted against it. Id. at 482 n.156.
108. Feerick, supra note 4, at 186 n.55.
Representatives would not address presidential succession until after a new President and Vice President were inaugurated in January 1965.\(^\text{111}\) Ironically, the House’s delay allowed the Senate to claim the initiative and largely define the basic shape of the proposal.

II. REPUBLICAN CONTRIBUTIONS

In this promising but uncertain environment, the actions of Republicans, as well as Democrats, helped produce the Twenty-Fifth Amendment. Bayh’s proposal ultimately defined the basic terms of the Amendment, but Republicans made crucial contributions to the shape and legislative success of the Twenty-Fifth Amendment. Many of these contributions were interrelated and some Republicans contributed in diverse ways.

A. Incorporating a Republican Proposal

The first way in which Republicans contributed to the Twenty-Fifth Amendment has already been mentioned—S.J. Res. 139 and its successor regarding presidential succession and inability largely followed the Eisenhower-Brownell-Rogers approach. Although Bayh’s proposal differed in some particulars, like Eisenhower-Brownell-Rogers, it embraced the Tyler precedent for presidential death, resignation, and removal (but not inability), provided for the voluntary transfer of presidential powers and duties by the President on a temporary basis and the involuntary transfer of presidential powers and duties by the Vice President with Cabinet support, and specified that Congress would resolve a dispute regarding the President’s subsequent ability to exercise presidential powers and duties.\(^\text{112}\) Bayh acknowledged,\(^\text{113}\) and perceptive Republicans\(^\text{114}\) and observers\(^\text{115}\) noticed, the Republican connection to these ideas.

B. Early Prominent Republican Supporters

If Bayh had constructed a wish list of coveted Republican supporters, Eisenhower, Nixon, and Brownell would have likely been at or near the top. Eisenhower was the beloved, former two-term President who had experienced and taken responsible action to address presidential inability. Nixon, the 1960 Republican presidential candidate, was Vice President

\(^{111}\) B AYH, supra note 10, at 92–93, 95.

\(^{112}\) Id. at 35–36.

\(^{113}\) Id. at 35 (stating that former Attorney General Brownell’s first proposal, as modified by Rogers and Kefauver, “came closest to achieving the goals we believed to be important” and became the “basis for our constitutional amendment”).

\(^{114}\) See, e.g., Presidential Inability: Hearings on H.R. 836 et al. Before the H. Comm. on the Judiciary, 89th Cong. 72 (1965) [hereinafter 1965 House Hearings] (statement of Rep. John V. Lindsay) (suggesting that the Bayh-Celler plan was “an almost exact restatement of the original Brownell proposal” made to the eighty-fifth Congress); see also 111 CONG. REC. 7948 (1965) (statement of Rep. Lindsay) (making same observation); BROWNELL, supra note 107, at 278 (describing the Eisenhower provisions as providing the “nucleus” of the Twenty-Fifth Amendment).

\(^{115}\) Feerick, supra note 4, at 184 (noting that Bayh’s “provisions were essentially the same as those embodied in the revised Eisenhower Administration approach”).
during both the office’s migration to the executive branch and Eisenhower’s incapacities. Brownell had studied the issue as Eisenhower’s Attorney General during his disabilities and enjoyed great prestige. Within a few months, all three had endorsed most of S.J. 139 and played important roles in enhancing its prospects for success.

1. Herbert Brownell

Brownell played multiple roles and his multifaceted contributions were critical to the Amendment’s success.116 His past activities and conclusions made his early support of Bayh’s approach unsurprising. He was a key participant in a blue-ribbon ABA group that met in January 1964 to consider the subject117 and formulated principles consistent with Bayh’s proposal, which the ABA endorsed on February 17, 1964,118 thereby switching its support from Keating’s to Bayh’s approach. The ABA’s support made an enormous difference in achieving the success of the proposal and the ratification of the Amendment.119

Brownell provided important support for Bayh’s proposal as a witness when Bayh’s Subcommittee on Constitutional Amendments held hearings on February 25, 1964.120 In his testimony, Brownell agreed that a constitutional amendment was needed121 and endorsed the presidential inability122 and vice presidential vacancy123 provisions of S.J. Res. 139. Brownell explained that the participants at the ABA conference the prior month had overcome their “widely” divergent views to achieve consensus because “they all agreed that the dire necessities of promptly solving the problems outweighed their individual preferences.”124 Brownell was a persuasive advocate for Bayh’s proposal with enormous credibility. He was able to contradict Keating’s view that state legislators would be more likely to support an enabling amendment rather than one detailing procedures;125 Brownell’s experience of five terms in the New York State Assembly no doubt added weight to his

116. See Bayh, supra note 10, at 162 (stating that Brownell had become “invaluable” by December 1964).
117. Id. at 49 (describing Brownell as part of a “nucleus” in the ABA meeting favoring Bayh’s approach).
118. See Feerick, supra note 4, at 185.
120. Marjorie Hunter, Presidential Succession Plan Given, N.Y. Times, Feb. 26, 1964, at 16 (reporting that Brownell’s testimony was consistent with Bayh plan).
121. 1964 Senate Hearings, supra note 89, at 135 (statement of Herbert Brownell, former Att’y Gen.).
122. Id. at 136.
123. Id. at 137.
124. Id. at 138.
125. Id. at 141–42.
opinion126 and reinforced Bayh’s own analysis based on his service in the Indiana General Assembly.127

When the ABA hosted the National Forum on Presidential Inability and Vice Presidential Vacancy in Washington, D.C., on May 25, 1964, to educate more than 500 leaders from around the country, Brownell was part of the featured panel along with Bayh, Celler, and Edward L. Wright, chair of the ABA House of Delegates.128 Brownell presented the history of the problem and explained the need for a constitutional amendment to address presidential inability.129 As shown below, however, Brownell’s contributions that day went well beyond his public comments.

Brownell chaired the ABA’s Committee on Presidential Inability and Vice-Presidential Vacancy and in that capacity testified before Bayh’s Subcommittee again on January 29, 1965, as a main witness during the single-day hearing.130 Brownell again supported Bayh’s proposal,131 now Senate Joint Resolution 1 (“S.J. Res. 1”),132 and responded to arguments and questions advanced by various Republicans.133 Brownell supported Bayh’s approach to hold separate votes of the House and Senate to confirm a vice presidential nominee134 and to allow either the Cabinet or Vice President to initiate a disability determination,135 and he supported the approach of S.J. Res. 1 generally on disability.136 Brownell also testified before the House Committee on the Judiciary on February 17, 1965,137 where he again emphasized the importance of Congress addressing the problem, supported the Bayh-Celler proposal, and responded to extensive questions, especially from Republican members.138

Brownell’s influence was further reflected by the extent to which some of his ideas helped shape the defense of the proposals that became the Twenty-Fifth Amendment. For instance, in testifying before the Senate

126. BROWNELL, supra note 107, at 23–31.
127. BAYH, supra note 10, at 34–35.
128. ABA National Forum on Presidential Inability and Vice Presidential Vacancy (May 25, 1964) (transcript available at the Fordham University School of Law Maloney Library).
131. Id. at 64, 67.
133. See, e.g., 1965 Senate Hearing, supra note 130, at 63–64, 71 (responding to Folsom’s preference for a joint session of Congress to confirm a vice presidential nominee); id. at 64 (responding to Senator Miller’s view that the amendment should specify that the vice presidential nominee needed to be from the President’s party); id. at 64–65 (responding to Senator Hruska’s concerns regarding separation of powers); id. at 65 (responding to Folsom’s concerns regarding the Vice President initiating disability determination); id. at 71–73 (responding to Senator Hruska’s concerns).
134. Id. at 63–64.
135. Id. at 65–66.
136. Id. at 66–67.
137. 1965 House Hearings, supra note 114, at 238.
138. Id. at 238–58.
Subcommittee on Constitutional Amendments in 1964, Brownell had repeated an idea from his 1958 *Yale Law Journal* article—“ultimately the operation of any constitutional arrangement depends on public opinion and . . . ‘constitutional morality’” rather than procedural guarantees and that “[n]o mechanical or procedural solution will provide a complete answer if one assumes hypothetical cases in which most of the parties are rogues and in which no popular sense of constitutional propriety exists.” Brownell went on to endorse the combination of the Vice President and Cabinet as the “the most feasible formula” consistent with constitutional principles. Brownell’s formulation was incorporated without attribution in the Senate and House reports that accompanied S.J. Res. 139 and House of Representatives Joint Resolution 1 (“H.R.J. Res. 1”), and the idea echoed in important discussions during congressional deliberations.

Brownell’s skill, leadership, credibility, and commitment to the principles and procedures that led to the Twenty-Fifth Amendment played an important role in its eventual success. He was a compelling witness but also played an important role in securing ABA support for Bayh’s proposal and in other behind-the-scenes roles described below.

2. Dwight D. Eisenhower

Eisenhower provided important support for S.J. Res. 139 even while disagreeing on some particulars. In a letter dated March 2, 1964, which Bayh made public on March 4, 1964 Eisenhower agreed that a constitutional amendment was necessary and endorsed Bayh’s proposal to fill a vice presidential vacancy. He thought the President should announce his own disability “[w]herever possible,” but if “circumstances made this impossible,” the Vice President should announce the disability and assume
presidential powers “with the concurrence of a majority of the Cabinet.”

In either case, Eisenhower strongly agreed that the Vice President was simply acting as president temporarily. The one instance where Eisenhower departed from Bayh’s approach regarding presidential inability was in his suggestion that a dispute between the president and vice president should be resolved by a disability commission consisting of some Cabinet members, legislative leaders, and medical professionals.

Eisenhower was the featured speaker at the ABA’s National Forum in May 1964. Brownell had recruited Eisenhower for that assignment and lobbied him to abandon his support for a disability commission. Brownell and Bayh approached Eisenhower during the reception before his speech to argue against the commission proposed in his March 1964 letter. In his speech, Eisenhower unequivocally supported section 2 of Bayh’s proposal and praised the vice presidency as a vehicle for succession. Regarding inability, Eisenhower argued that presidential inability needed to be solved “now” through a constitutional amendment and supporting legislation. Eisenhower thought the Vice President should make the decision, assuming the President did not initiate the transfer himself. Although his remarks were ambiguous regarding how much the amendment should detail and how much should be left to statute, he made no reference to a commission and was open to Cabinet participation with Congress as an umpire of an intraexecutive branch dispute, thus bringing his position close to Bayh’s proposal.

Eisenhower’s impact went beyond the immediate audience to the millions of those who read accounts of his speech across the country. His unique stature guaranteed coverage and his popularity made his support significant. “Truly we had made great progress that day,” Bayh wrote later. Bayh thought that Eisenhower “had fired the audience, and through the press the country at large, with the urgency of working out a solution to the problems of Presidential succession and disability.” Eisenhower had provided “a real boost.”

148. Id.
149. Id.
150. Id.; Bayh, supra note 10, at 76.
151. Bayh, supra note 10, at 119–20; Beck, supra note 9, at 95.
154. Id. at 26.
155. Id. at 25.
156. Id. at 25–26.
157. Bayh, supra note 10, at 124 (referring to the media coverage of Eisenhower’s remarks); Beck, supra note 9, at 96 (stating that “[t]he press turned out in droves”).
158. Bayh, supra note 10, at 123.
159. Id. at 124.
160. Id.; see also 1965 House Hearings, supra note 114, at 224 (statement of Lewis F. Powell Jr., President, American Bar Association) (referring to Eisenhower’s comments as “quite a dramatic demonstration of the need for action”).
3. Richard M. Nixon

Former Vice President Nixon was a third Republican luminary who provided important support for S.J. Res. 139. His testimony highlighted the final day of the first round of Senate hearings on March 5, 1964.\(^\text{161}\) Nixon had previously proposed that a vice presidential vacancy be filled by a presidential nomination confirmed by the presidential electors from the most recent presidential election, and he adhered to that preference during his testimony.\(^\text{162}\) However, Nixon backed the disability approach of S.J. Res. 139 and specifically criticized Eisenhower's then-recent disability commission proposal; he believed that Congress should resolve an intraexecutive branch dispute as Bayh's proposal provided.\(^\text{163}\) Nixon also agreed that a constitutional amendment was needed.\(^\text{164}\) He elaborated on the importance of the vice presidency, predicted its further growth, and opposed Keating's two-vice presidents proposal as likely to diminish the office,\(^\text{165}\) all of which had particular credibility because of Nixon's own contributions to the growth of the vice presidency.\(^\text{166}\) Nixon agreed with Bayh that a vice presidential vacancy needed to be filled.\(^\text{167}\)

Bayh later described Nixon as "an exceptional witness" and his statement as "the most effective of our entire series of hearings."\(^\text{168}\) Nixon's appearance attracted wide media coverage.\(^\text{169}\) Bayh thought that Nixon's contribution "was of inestimable inherent value,"\(^\text{170}\) not only for the positions recounted above but also for reasons discussed below.

The three Republican luminaries clearly had an impact. The Washington Post began its editorial of March 9, 1964, supporting a constitutional amendment by referencing the calls of Eisenhower and Nixon for action on presidential inability.\(^\text{171}\) Their vocal support no doubt encouraged others to follow.\(^\text{172}\)

C. Creating a Climate for a Cooperative Effort

Nixon's primary contribution was not, however, in his support for most of Bayh's approach but in his eloquent insistence that interested parties put

\(^{161}\) 1964 Senate Hearings, supra note 89, at 234–50 (statement of Richard M. Nixon, former Vice President).

\(^{162}\) Id. at 235–37, 249–50.

\(^{163}\) Id. at 241.

\(^{164}\) Id. at 242.

\(^{165}\) Id. at 245–46.


\(^{167}\) 1964 Senate Hearings, supra note 89, at 250.

\(^{168}\) Bayh, supra note 10, at 83; id. at 89 (describing Nixon as an “excellent witness”).

\(^{169}\) Id. at 89 (stating that Nixon brought the media “in droves” and attracted “greatly needed publicity” for the issue).

\(^{170}\) Id.

\(^{171}\) Editorial, To Narrow the Risk, WASH. POST, Mar. 9, 1964, at A14; see also Bayh, supra note 10, at 182 (referring to the importance of support from Eisenhower and Nixon).

\(^{172}\) See Part II.C.
aside their differences and reach consensus. Nixon modeled that behavior in his testimony given extemporaneously for about thirty minutes.\footnote{173 Russell Baker, \textit{Nixon, in Capitol, Essays 2 Roles}, N.Y. TIMES, Mar. 6, 1964, at 15.} Nixon began, and ended, his direct testimony by underlining the importance of Bayh’s work, calling Bayh’s hearings the “most important hearings”\footnote{174 \textit{1964 Senate Hearings}, \textit{supra} note 89, at 234.} being conducted in Washington because they involved “the future of the United States as no other hearings perhaps in recent years have.”\footnote{175 Id.; \textit{id.} at 242–43 (“[T]here is no decision that is more vital to the future of this country . . . .”).}

Nixon had “strong convictions”\footnote{176 Id. at 234.} that his proposals were “the best approach”\footnote{177 Id.} but did not insist that they were “the only way to handle the problem.”\footnote{178 Id. at 238.} He stated, “what is important is not that this committee adopt my proposals, what is important is that this committee make a recommendation to the Congress, to the Senate, and to the Nation which will get action on these two problems, the problem of succession and the problem of disability.”\footnote{179 Id. at 234.} Nixon thought that “the time ha[d] come” for Bayh’s Subcommittee to identify “a united proposal” and to act while the sense of urgency from the Kennedy assassination remained.\footnote{180 Id. at 241.} It was “imperative that this problem [of disability] be dealt with and dealt with now.”\footnote{181 Id. at 244.} When asked whether he would prefer an amendment specifying a procedure or enabling Congress to take further action, Nixon replied, “[t]he approach I would prefer is the one that this committee finally concludes has the best chance to success.”\footnote{182 Id.} Nixon emphasized, “all of the nit-picking arguments” between approaches “make very little impression on me” and “our major concern . . . is to find a solution that will be least controversial but will get at the major problem.”\footnote{183 Id.} In his view, the Subcommittee should collect ideas and adopt “the best idea in [its] opinion, and [] get the public support and go forward with it.”\footnote{184 Id.} Nixon would support the Subcommittee’s judgment because “the important thing is to get action and get it fast.”\footnote{185 Id.}

Nixon’s promise set a powerful example; the most recent Republican presidential nominee was basically giving a blank check to a subcommittee with a Democratic chair.

Other Republicans showed dispositions consistent with Nixon’s guidance. Republican Senator Jacob Javits (New York), for instance, had previously amended his Senate Joint Resolution 138 (“S.J. Res. 138”) to bring it closer
to S.J. Res. 139, which he later agreed to cosponsor. Keating, though still preferring his two-Vice Presidents-and-enabling approach, suggested in late March 1964 that he would support S.J. Res. 139 if the Senate preferred it to his proposal.

When House Democrats subjected Bayh to aggressive and skeptical questioning as he testified before the House Judiciary Committee on February 7, 1965, Poff modeled behavior consistent with Nixon’s urging. Poff urged that all should “recognize candidly what hasn’t yet been articulated”—that the Bayh-Celler proposal “is the end result, the precipitant of a long process of distillation and filtration in which many hands have played a part.” Poff emphasized that it was “not a carelessly drawn measure” because he was “anxious” that Congress take “expeditious action . . . on this vitally important matter.” Poff disclaimed any intent to “unduly” probe Bayh’s proposal, telling Bayh, “I want to see this thing done as expeditiously as possible and I am willing to compromise.” Later during the hearings, Poff expressed disagreement with allowing the Cabinet (as opposed to just the Vice President) to initiate a presidential disability determination, but indicated that he was “prepared to make a compromise, if necessary, to get something done,” because he “want[ed] to see something done promptly.”

Some independent witnesses who promoted different proposals also called for cooperation. Marion B. Folsom, Eisenhower’s former Secretary of Health, Education, and Welfare, testified on behalf of the Committee on Economic Development and suggested an approach that differed somewhat from Bayh’s proposal. Nonetheless he said that Senators should

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186. Id. at 53 (statement of Sen. Jacob K. Javits) (announcing an amendment to S.J. Res. 138 that would require Congress to elect a Vice President in a joint session “by and with the advice and consent” of the President). The change would grant the President the “authority to reject a nominee who is unsuitable to him.” Id.
187. BAYH, supra note 10, at 135–36.
188. Id. at 99–101.
190. Id. at 45–63.
191. Id. at 63.
192. Id.
193. Id. at 86.
194. Id. at 167.
196. See id. at 48 (favoring the confirmation of the Vice President by a joint session of Congress and the initiation of an inability determination by Cabinet rather than the Vice President); id. at 49 (opposing the use of Congress as the decider of a disagreement between the President and Vice President regarding presidential inability and suggesting that the Cabinet is better suited for that role).
pass Bayh’s proposal without changes if they thought it most likely to win approval.197

D. Legislative Efforts

Republicans also played crucial roles at virtually every stage of the legislative efforts that resulted in the passage by the House and Senate of the proposed Twenty-Fifth Amendment in summer 1965.

1. 1964 Republican Collaboration: The Senate

Although Bayh initially introduced S.J. Res 139 with only the cosponsorship of Democratic Senator Edward V. Long (Missouri), Republican Senators James Pearson (Kansas) and Hiram Fong (Hawaii) joined as cosponsors in March198 and April199 of 1964. By the time the Senate considered S.J. Res. 139, ten of the thirty cosponsors were Republicans.200

Republicans, including Fong and Keating, worked with Bayh to refine S.J. Res. 139 in May 1964 before reporting it to the Senate Judiciary Committee with the understanding that Keating would seek to amend it with his proposal on the floor.201 Although the Republican Minority Leader, Senator Everett Dirksen (Illinois), was not yet prepared to support the measure202 and Keating preferred his own approach, the Subcommittee voted unanimously to report S.J. Res. 139 to the full Committee203 on May 27, 1964.204 In early August 1964, the full Judiciary Committee unanimously reported S.J. Res. 139 to the Senate with the understanding that amendments could be offered to it including by Committee members.205

When Senate Majority Leader Mike Mansfield advised Bayh on September 28, 1964, that the Senate could consider S.J. Res. 139 that very afternoon,206 both Keating and Senator Roman Hruska, who wanted to propose changes, were out of town.207 Both Republicans agreed to release

197. Id. at 50; see 1965 House Hearings, supra note 114, at 166 (statement of Marion B. Folsom, Chairman, Committee for Improvement of Management in Government, Committee for Economic Development) (“That is why we think you ought to have this amendment, one way or the other. Whether you go along with the Bayh amendment or not, we think it is necessary that something be done.”).
198. 1964 Senate Hearings, supra note 89, at 250–52.
199. BAYH, supra note 10, at 101–02.
200. The Republican cosponsors were Senators Clifford Case (New Jersey), John Sherman Cooper (Kentucky), Peter Dominick (Colorado), Jacob Javits (New York), Thomas Kuchel (California), James Pearson (Kansas), Leverett Saltonstall (Maine), Hugh Scott (Pennsylvania), Milward Simpson (Wyoming), and Hiram Fong (Hawaii). See S.J. Res. 139, 88th Cong. (1964).
202. Id. at 106–07, 127.
203. Id. at 128.
205. BAYH, supra note 10, at 130–33; see also S. REP. NO. 88-1382, at 1 (1964).
206. BAYH, supra note 10, at 138.
207. Id. at 140.
Bayh from the understanding that they would have the opportunity to offer amendments so he could proceed in their absence.208

Four209 of the eleven Senators who spoke in favor of S.J. Res. 139 that day were Republicans.210 The measure carried on a voice vote.211 After Democratic Senator John Stennis (Mississippi) objected the following day that a proposed constitutional amendment should require a recorded vote,212 the Senate passed the measure by a vote of 65 to 0 with Republicans providing 21 of the aye votes, including those of Minority Leader Dirksen and Republican Whip Thomas Kuchel, respectively.213 Some nine of the absent thirteen Republican Senators were recorded as supporting S.J. Res. 139.214 Accordingly, thirty of the thirty-four Republican Senators, or 88 percent, supported the measure.215

The House of Representatives predictably took no action in 1964.216 The November 1964 election of Senator Hubert H. Humphrey as Johnson’s Vice President and his inauguration on January 20, 1965, mitigated the appearance that section 2 was directed against McCormack.217 Johnson’s landslide election had coattails that produced a new Senate in which Democrats held sixty-eight (of 100 seats) and a House in which they held 295 (of 435) seats. Keating, the leading proponent of the congressional-enabling approach, lost his seat to Robert F. Kennedy.218

2. Winning Celler’s Support: Calling on Brownell Again

Bayh reintroduced his proposal in the new Congress as S.J. Res. 1. He hoped to have Celler, the House Judiciary Committee chair, offer the identical measure in the House given his position, long association with the issue, and standing in the House.219 Celler had served in Congress since 1923, forty years more than Bayh, and worked on presidential inability for a decade,220 so understandably might not have been disposed to defer to a

208. Id.
210. In addition to the four Republican Senators, seven Democratic Senators spoke in favor of S.J. Res. 139. Id. at 22,983, 22,986–88 (statement of Sen. Bayh); id. at 22,988–92 (statement of Sen. Ervin); id. at 22,990–92 (statement of Sen. Monroney); id. at 22,994 (statement of Sen. Bible); id. at 22,997–99 (statement of Sen. Church); id. at 23,000 (statement of Sen. Hart); id. at 23,001 (statement of Sen. Mansfield).
211. Id. at 23,000–01.
212. Id. at 23,056.
213. Id. at 23,061.
214. Id.
215. Id.
216. BAYH, supra note 10, at 159–60.
217. Id. at 161–62.
218. Id. at 181.
219. Id. at 162–63.
newcomer. In 1958, he had introduced legislation calling for the establishment of a commission on presidential inability composed of members of the executive and legislative branches to determine the beginning and end of a presidential inability.221 At the ABA’s National Forum in May 1964, Celler proposed incorporating Cabinet succession such that the Secretary of State would become Vice President rather than Bayh’s method for filling a vice presidential vacancy.222

Soliciting Celler’s support for Bayh’s proposal required someone of uncommon skill and stature. Bayh and ABA officials decided that “the obvious person” to handle the delicate assignment was Brownell, who had already been “invaluable” in advancing Bayh’s proposal.223 Brownell went to see Celler and successfully persuaded him.224

3. 1965 Republican Collaboration: The Senate

Because the Senate held extensive hearings in 1964 (and approved S.J. Res. 139 unanimously)225 and because S.J. Res. 1 had seventy-six cosponsors,226 Bayh held only a single day of hearings on January 29, 1965, to consider S.J. Res 1 and four other proposals.227 He announced that the hearings would “emphasize . . . views from those who differ in part or entirely from the consensus which has developed over the past year on this issue.”228 Nonetheless, during the 1965 Senate hearing, Fong supported S.J. Res. 1,229 as did Republican Senators Pearson,230 Javits,231 Leverett Saltonstall (Massachusetts),232 Karl Mundt (South Dakota),233 and Strom Thurmond (South Carolina), although Thurmond preferred to use the most recent presidential electors to fill a vice presidential vacancy.234

After Bayh’s Subcommittee unanimously sent S.J. Res. 1 to the full Judiciary Committee in early February 1965,235 even Republicans with misgivings about the proposal worked to advance it. Hruska acceded to a request by James Eastland, chairman of the Senate Judiciary Committee, to

(proposing that the President or Vice President have the power to declare the President disabled).

221. H.R. 10880, 85th Cong. § 3 (1958).
222. Emanuel Celler, The Legislative History, Remarks at the ABA National Forum on Presidential Inability and Vice Presidential Vacancy, supra note 128, at 9; Discussion, ABA National Forum on Presidential Inability and Vice Presidential Vacancy, supra note 128, at 16.
223. BAYH, supra note 10, at 162.
224. Id. at 162–63.
225. See supra note 213 and accompanying text (noting that the Senate passed S.J. Res. 139 by a vote of 65 to 0).
226. 1965 Senate Hearing, supra note 130, at 6 (statement of Sen. Birch Bayh).
227. Id. at 1–5.
228. Id. at 5–6.
229. Id. at 30–32.
230. Id. at 101–02.
231. Id. at 105.
232. Id. at 103.
233. Id. at 106–07.
234. Id. at 105–06.
235. BAYH, supra note 10, at 202–03.
expedite consideration of the proposal rather than deploy procedural tactics to delay action since Senate floor time was most available early in the session. Dirksen accepted sections 1 and 2 but proposed amendments to other portions. For instance, he pointed out that section 3 did not specify to whom the President’s disability declaration should go. Discussion between Senators Dirksen, Javits, Hruska, and Samuel Ervin produced a formulation contemplating a presidential declaration to the President of the Senate and Speaker of the House, which was adopted with Bayh’s approval. Some other relatively cosmetic changes were made. Although Hruska objected to Congress playing an umpire role on separation of powers grounds, and he and Dirksen favored an enabling amendment similar to the one Keating had introduced in the prior Congress, the Committee unanimously reported S.J. Res. 1 as amended.

When the Senate considered S.J. Res. 1 on February 19, 1965, its advocates included Republican Senators Milward Simpson (Wyoming), Fong, Saltonstall, Frank Carlson (Kansas), and ultimately, Hruska in addition to Bayh and Ervin. Some Democratic Senators seemed critical or questioning of provisions of S.J. Res. 1, and the debate between Bayh and various Democrats was characterized as “heated” and “hot and acrimonious.” When Bayh was on the verge of accepting a change that

236. Id. at 206–07.
237. Id. at 209.
238. Id. at 208–09.
239. Id. at 210.
240. Id. at 210–11.
241. Id. at 212 (providing that other disability notifications by the President or Vice President would go to the Speaker and President of the Senate and replacing “immediately decide the issue” with “immediately proceed to decide the issue” in the section regarding Congress’s role in resolving an intraexecutive branch dispute).
243. BAYH, supra note 10, at 212–13; see also S.J. Res. 6, 89th Cong. (1965); S. REP. NO. 89-66, at 17–21 (1965) (providing the individual views of Senator Everett Dirksen); id. at 22–24 (providing the individual views of Senator Roman L. Hruska).
244. BAYH, supra note 10, at 213; Feerick, supra note 4, at 187.
246. Id. at 3261–63.
247. Id. at 3262–63.
248. Id. at 3265.
249. Id. at 3285.
250. See, e.g., id. at 3253–54 (statement of Sen. Ellender) (suggesting that Congress could legislatively address presidential inability); id. at 3256–57 (questioning a provision allowing Congress to create another body to act regarding presidential inability); id. at 3275, 3281 (statement of Sen. Bass) (questioning the propriety of allowing congressmen from an opposing party to vote on vice presidential confirmation and suggesting a time limit for section 2); id. at 3275–76, 3278–79 (statement of Sen. Pastore) (calling for a time limit for Congress to act on presidential inability); id. at 3277 (statement of Sen. Harris) (calling for a time limit in section 2); id. at 3279 (statement of Sen. Hart) (suggesting a time limit for Congress to act on presidential inability).
would have introduced procedural complications, the more experienced Hruska and Ervin dissuaded him. Bayh later recognized that Hruska had helped in the February 1965 debate.252

When Dirksen moved to substitute an enabling amendment for S.J. Res. 1, Republicans Simpson, Fong, Carlson, and Saltonstall were among those who spoke in favor of S.J. Res. 1 or against Dirksen’s proposal.253 The Dirksen substitute was defeated by a vote of 60 to 12.254 Although twelve Republicans voted for their leader’s proposal255 and five absent Republican Senators expressed support,256 thirteen Republican Senators voted against the Dirksen substitute and the absent Javits opposed it.257

Although some like Republican Senator Hugh Scott (Pennsylvania) preferred the Dirksen substitute, they supported S.J. Res. 1 in order to adopt a “workable proposal.”258 S.J. Res. 1 carried 72 to 0, with 24 of the votes coming from Republicans. The eight absent Republicans all were recorded as supporting the proposed amendment.259 In other words, 100 percent of Republican Senators were ultimately recorded as supporting S.J. Res. 1 on February 19, 1965.

In addition to their votes and their voices, Republicans contributed in other ways during the Senate debate on S.J. Res. 1. Hruska’s amendment to increase from two to seven days the time the Vice President and Cabinet would have to contest the President’s declaration of his capacity260 was accepted. Some Republicans helped shape important legislative history. Saltonstall established that a Vice President acting as President would lose the ability to preside over the Senate.261 Senator Gordon Allott helped Bayh to establish legislative history supporting the view that the Vice President would continue to act as President during the period in which the Vice President and Cabinet could contest the President’s declaration.262

253. Id. at 253–260; see 111 CONG. REC. 3257–58 (1965) (statement of Sen. Simpson); id. at 3261–63 (statement of Sen. Fong); id. at 3265 (statement of Sen. Carlson); id. at 3271 (statement of Sen. Saltonstall).
254. 111 CONG. REC. 3272 (1965). It had been reported that Democratic Senator Eugene McCarthy (Minnesota) opposed a constitutional amendment and would support Dirksen’s enabling amendment rather than S.J. Res. 1. C.P. Trussell, McCarthy Fights Disability Plan, N.Y. TIMES, Feb. 16, 1965, at 20. McCarthy did not vote on the Dirksen substitute but was paired as supporting it. 111 CONG. REC. 3272 (1965).
255. 111 CONG. REC. 3272 (1965). Those voting for the Dirksen substitute were Senators Bennett, Boggs, Case, Cotton, Dirksen, Hickenlooper, Prouty, Scott, Smith, Thurmond, Tower, and Williams. Id.
256. Id. Senators Dominick, Miller, Morton, Jordan, and Kuchel, though absent, also preferred Dirksen’s substitute as did Democratic Senators Eugene McCarthy and Quentin Burdick. Id.
257. Id.
258. Id. at 3263.
259. Id. at 3285–86.
260. Id. at 3274, 3276.
261. Id. at 3270.
262. Id. at 3285.
4. 1965 Republican Collaboration: The House

If anything, Republicans played an even more active role in the House of Representatives. While Celler introduced H.R.J. Res. 1,263 which was identical to Bayh's original S.J. Res. 1, McCulloch, the ranking minority member on the Judiciary Committee, and Poff each introduced amendments that largely tracked the Bayh-Celler proposal with an important difference. H.R.J. Res. 1 provided that if the Vice President and Cabinet contested the President's declaration of capacity, Congress must “immediately decide the issue.”264 By contrast, S.J. Res. 1, as amended by the Senate Judiciary Committee, provided that Congress must “immediately proceed to decide the issue.”265 Unlike the Bayh and Celler proposals, McCulloch266 and Poff267 each imposed a ten-day time limit for Congress to resolve such an intraexecutive branch disagreement. However, their proposals differed slightly in that McCulloch's ten-day period ran from the transmittal of the President's declaration of fitness268 whereas Poff gave Congress ten days from receipt of the Vice President's letter challenging the President's declaration.269

The House began four days of hearings on February 9, 1965, ten days before the Senate passed S.J. Res. 1.270 In his opening statement, McCulloch spoke of the urgency of the issues that the Bayh-Celler amendment addressed; however, he expressed unease at the “speed” with which the proposal was progressing since “[u]ndue haste could lead to oversight, imperfection, and regret.”271 He explained that in most respects, his proposal was identical to H.R.J. Res. 1,272 but that he thought that “a definite time period should be established”273 for Congress to resolve an executive branch dispute regarding presidential inability, even though he was “not wedded to a particular time period.”274 McCulloch viewed the concept of immediate action in the Bayh-Celler proposal as too indefinite.275

Republican members of the House Judiciary Committee participated actively in its 1965 hearings. Representatives Arch Moore, Charles Mathias,
and McCulloch questioned Bayh regarding the meaning of “principal officers of the executive departments” in the disability provisions of S.J. Res. 1.276 Moore asked whether someone other than the President or Vice President should be able to initiate an inability determination.277 He and other Republicans raised concerns regarding forcing Congress to resolve an intraexecutive dispute quickly.278 Mathias discussed the use of impeachment against a Vice President who refused to relinquish power to the President,279 challenged the vice presidential vacancy provision,280 and questioned the impact of allowing Congress to umpire an intraexecutive branch dispute on presidential inability.281 During Bayh’s testimony, Moore observed that “it is fair to determine from the manner of the questions and the questions themselves that we are interested in this. We want to see the problem and it is a very severe problem as far as the administration of our Government is concerned, solved.”282 Later Poff, McCulloch, Mathias, Moore, and Lindsay engaged intensively with Katzenbach.283

No Republican worked harder to improve the amendment than did Poff. During Bayh’s House testimony, Poff made numerous suggestions that reflected the careful attention he had given the Bayh-Celler proposal.284 Poff and McCulloch pressed Bayh about the need for a specific time limit for Congress to decide an intrabranch dispute285 and Poff repeatedly advocated a time limit on congressional action during hearings.286 Bayh resisted the idea, owing to the sensitivity of time limits for some Senators and because a more flexible approach would allow handling different situations differently.

Although the discussion of the time limit signaled a difference between the Bayh-Celler and McCulloch-Poff approaches, Poff helped Bayh in other respects. When a number of predominantly Democratic representatives

276. Id. at 59–60 (statements of Reps. Arch Moore, Charles Mathias, and William M. McCulloch).
277. Id. at 79–81 (statement of Arch Moore).
278. Id. at 85–86.
279. Id. at 88–89 (statement of Charles Mathias).
280. Id. at 89–92.
281. Id. at 92–93.
282. Id. at 85.
283. Id. at 97–98, 100–02, 104 (statements of Reps. Richard Poff, William M. McCulloch, Charles Mathias, Arch Moore, and John Lindsay).
284. See id. at 64–65 (statement of Rep. Richard Poff) (suggesting that the Acting President “discharge” rather than “assume” the presidential powers and duties as Acting President); id. at 66 (requiring the President to “promptly” nominate a Vice President); id. at 78 (discussing the merits of allowing the “person next in line of presidential succession” to initiate a disability action in absence of a Vice President); id. at 81–84 (discussing the merits of allowing the Cabinet to initiate a disability determination); id. at 85 (arguing that only the Vice President, not the Cabinet or other body created by Congress, should be able to initiate proceedings); id. at 86–87 (proposing language to address vice presidential and presidential inability in the absence of a Vice President). Poff was helped by a letter from John D. Feerick outlining areas of inquiry. See Letter from John D. Feerick to Richard Poff (Feb. 7, 1965), http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1031&coconte=twentyfifth_amendment_correspondence [https://perma.cc/8RH9-5RCT].
posed critical questions at the outset of the hearing.\textsuperscript{287} Poff interjected to point out the care and deliberation that had gone into the Bayh-Celler proposal.\textsuperscript{288} Poff defended the provisions of H.R.J. Res. 1 during hearings.\textsuperscript{289} Poff also helped Bayh to craft important legislative history on a number of points.\textsuperscript{290} In fact, when Bayh misstated one conclusion, Poff interjected to indicate that Bayh had misunderstood the question, thus allowing Bayh to correct his testimony.\textsuperscript{291}

When the House Committee on the Judiciary reported H.R.J. Res. 1 to the House on March 24, 1965, two facts suggested the Republican influence. First, ranking member McCulloch, not Committee chair and H.R.J. Res. 1 author Celler, presented the report.\textsuperscript{292} Second, the reported version of H.R.J. Res. 1 had been amended to include a ten-day time limit for congressional action measured from receipt of the written declaration of the Vice President and Cabinet contesting the President’s declaration of fitness.\textsuperscript{293} H.R.J. Res. 1 was still Bayh-Celler, but in this respect, it was also Poff-McCulloch.

When H.R.J. Res. 1 came to the floor on April 13, 1965, Celler began his opening remarks by noting that the measure had “bipartisan support” and singling out for praise “particularly” McCulloch and Poff, “who participated in the fashioning and polishing of this resolution. They did so most wisely and painstakingly. They immersed themselves into the intricacies of the legislation. Their help was immeasurable.”\textsuperscript{294} Celler went on to praise “the constructive work done by most of the members of our committee, Democrats, and Republicans alike,” and specifically mentioned Republicans John V. Lindsay (New York) and William C. Cramer (Florida), along with six Democrats.\textsuperscript{295}

When Republican Representative Durward Hall (Missouri), a physician, questioned the lack of medical testimony during the hearings and inquired whether medical personnel would be consulted in a disability determination,\textsuperscript{296} Poff came to Celler’s aid.\textsuperscript{297} Poff pointed out that Brownell had relied on medical opinions in advising Nixon and the Cabinet that no

\textsuperscript{287} See id. at 45–63 (statements of various Reps.)
\textsuperscript{288} Id. at 63–64 (statement of Rep Richard Poff).
\textsuperscript{289} See id. at 206–07 (defending the provision for filling a vice presidential vacancy).
\textsuperscript{290} Id. at 87 (establishing that presidential inability or vice presidential inability did not create a vacancy and that the Vice President, as Acting President during a presidential inability, need not take the presidential oath); id. at 94 (interrupting after Bayh initially, and mistakenly, suggested that the President could not reassert ability after an unfavorable congressional decision); see id. at 196 (discussing the meaning of a vice presidential vacancy); id. at 246 (establishing, with Brownell, that a vice presidential disability is not a “vacancy”).
\textsuperscript{291} Id. at 94 (establishing that the President could reassert the ability to discharge the powers and duties of his office after an adverse decision by Congress).
\textsuperscript{292} See H.R. REP. NO. 89-203, at 1 (1965).
\textsuperscript{293} Id. at 2–3.
\textsuperscript{295} Id.
\textsuperscript{296} Id. at 7938–39 (statement of Rep. Hall).
\textsuperscript{297} Id. at 7939.
formal transfer was needed and suggested that future decision-makers would surely consult medical professionals, a point Republican Representative Clark McGregor (Minnesota) reinforced.

Poff described H.R.J. Res. 1 as involving “some degree of compromise,” praised Celler as “an impartial, fair-minded arbiter” who “stood firm when firmness was necessary but has yielded when logic dictated,” and said no “partisan consideration was advanced” in the Committee’s deliberations. Poff provided a scholarly justification for H.R.J. Res. 1, which explained and justified the changes made during the Committee’s deliberation. In particular, H.R.J. Res. 1 as amended made clear that a President who voluntarily transferred power could resume powers immediately upon his written declaration of his fitness, required Congress to assemble if not in session, and added a time limit for Congress to act within ten days. McCulloch largely echoed Poff’s defense. Other Republicans, including Representatives Frank Horton (New York), Willard S. Curtin (Pennsylvania), Robert Stafford (Vermont), Robert McClory (Illinois), James Battin (Montana), Lindsay, William Cahill (New Jersey), Seymour Halpern (New York), and F. Bradford Morse (Massachusetts), also filed statements supporting H.R.J. Res. 1.

Poff, McCulloch, and other Republicans helped defend H.R.J. Res. 1 from amendments on the House floor (some proposed by other Republicans). When Democratic Representative Roman Pucinski (Illinois) sought to strike section 2, Poff argued that his premise was wrong in thinking that section 2 would repeal the 1947 succession law which placed the Speaker after the President and Vice President. Lindsay offered other passionate arguments in opposition. When Republican Representative Charles Jonas (North Carolina) suggested that the Vice President’s appointment be temporary pending a special election, McCulloch pointed out that a special election would be costly and might produce a Vice President from the opposing party. When Moore proposed amending H.R.J. Res. 1 so that the President would exercise powers while Congress resolved a dispute over his

298. Id.
299. Id.
300. Id. at 7940 (statement of Rep. Poff).
301. Id. at 7941.
302. Id. at 7942–43.
303. Id. at 7943–44.
304. Id. at 7945.
305. Id.
306. Id. at 7946–47.
307. Id. at 7947.
308. Id. at 7947–48.
309. Id. at 7951.
310. Id. at 7951–52.
311. Id. at 7952.
312. Id. at 7960.
313. Id. at 7961–62.
314. Id. at 7962.
315. Id.
capacity. McClory was among those who objected that Moore’s amendment would contribute to instability.

Poff, at McCormack’s request, offered the one floor amendment that was accepted. It required Congress to reassemble within forty-eight hours if not in session in response to the Vice President’s challenge to a President’s assertion of his ability to resume his powers and duties. Poff’s willingness to accommodate the Speaker was further evidence of the bipartisan spirit that pervaded the treatment of H.R.J. Res. 1.

Just as he had during hearings, Poff helped make important legislative history through his comments during debate. Of the 140 Republicans, 122 voted for H.R.J. Res. 1 and only eight opposed it on April 13, 1965.

5. Collaboration: The Conference and Adoption

To resolve the differences between the House and Senate regarding the content of the proposed amendment, a conference committee was appointed. The committee included, from each body, three Democrats—Senators Eastland, Ervin, and Bayh, and Representatives Celler, Byron G. Rogers (Colorado), and James C. Corman (California). The committee also contained two Republicans from each body—Senators Dirksen and Hruska, and Representatives McCulloch and Poff. The conferees ultimately resolved the differences, the major one being a compromise between the House’s ten-day McCulloch-Poff limit for Congress to resolve an intraexecutive branch dispute and the Senate formulation that encouraged “immediate” action without any time limit. McCulloch was, apparently, reluctant to move from the House’s position. Although the Democratic majority would have allowed the conference committee to complete its work on a partisan basis, Bayh and Celler were anxious to reach a bipartisan and unanimous agreement. After two months of meetings, both sides agreed to a twenty-one day period. Quicker agreement was reached on other

316. Id. at 7963–64.
317. Id. at 7966.
318. Feerick, supra note 4, at 192 n.103.
320. Id. at 7946 (statement of Rep. Poff) (stating that a vote for Vice President required action in each house separately, not in a joint session); id. at 7951 (establishing that the proposed amendment would not supplant Article II’s language that allowed Congress to provide for death, resignation, removal, or inability of both the President and Vice President); id. at 7963 (stating that absent a Vice President, sections 3 and 4 are inapplicable, but noting that Congress could deal with the issue of double vacancy or inability by statute).
321. Id. at 7968–69.
322. Feerick, supra note 4, at 193.
323. Id. at 193 n.107.
324. Id.
325. Id. at 193.
326. BAYH, supra note 10, at 296–97, 303.
327. Id. at 303–04.
328. Feerick, supra note 4, at 193; see also BAYH, supra note 10, at 282–304 (describing the events leading to the compromise).
matters. The House version of section 3 was adopted, which allowed a President who had voluntarily transferred power to reclaim it based on a similar declaration. The conferees compromised between the two- and seven-day limits for the Vice President and Cabinet to respond to the President’s declaration by agreeing to a four-day period. Poff’s amendment that required Congress to convene within forty-eight hours was accepted. In addition, at Hruska’s urging, language in section 4 was modified to make clear that even if Congress created some “other body” to replace the Cabinet, the Vice President would remain a necessary actor.

Although the House quickly agreed to the conference report on June 30, 1965, Senate proceedings provided more drama. Bayh presented and explained the conference report and thanked all who had contributed, “especially” Hruska, and Hruska called for approval of the report. The discussion became contentious as Democratic Senators Eugene McCarthy (Minnesota) and Al Gore Sr. (Tennessee) began to criticize the amendment. Gore, in particular, suggested that the language of section 4 allowed Congress to supplement the Cabinet by creating an “other body” that could allow the Vice President to shop between the Cabinet or that “other body” for an agreeable partner to oust the President. Gore’s point was directed at language added during the conference at Hruska’s insistence to clarify that the Vice President was a necessary participant in a determination of presidential inability even if Congress created “[an]other body” to replace the Cabinet.

Once again, Republicans came to Bayh’s aid to help address arguments advanced by Democrats. John Sherman Cooper (Kentucky) engaged in a colloquy with Bayh to establish legislative intent that creation of “[an]other body” to act with the Vice President would supplant, not supplement, the Cabinet and that the vice president would be a necessary party to the decision in any case. After Gore persisted, another Republican, Javits, came to Bayh’s aid to argue that Congress could specify that an “other body” would be exclusive but that in any event he did not think the language was ambiguous.

329. Feerick, supra note 4, at 193.
331. Id.
332. Feerick, supra note 4, at 194.
334. Id. at 15,378–79.
335. Id. at 15,379–80.
336. Id. at 15,382–83.
337. Feerick, supra note 6, at 101, 364 n.118.
339. Id.
340. Id. at 15,385–86.
When the Senate returned to the matter on July 6, 1965, Javits promptly reaffirmed his support.\footnote{Id. at 15,584.} Although Ervin assumed the burden of replying to Gore, so, too, did Dirksen,\footnote{Id. at 15,591–93.} Javits,\footnote{Id. at 15,595.} and Cooper.\footnote{Id.}

Ultimately, the conference report passed sixty-eight to five, with the opponents consisting of four Democrats and one Republican.\footnote{Id. at 15,596.} Twenty-one Republicans voted for the proposed amendment and eight of the ten absent Republicans announced their support.\footnote{Id.}

### III. Lessons From a Bipartisan Accomplishment

The Twenty-Fifth Amendment is properly called the Bayh Amendment in recognition of Bayh’s able and indispensable leadership. Yet the proposed amendment went to the states covered with Republican fingerprints. Sections 1, 3, and 4 followed the basic approach of the Eisenhower-Brownell-Rogers proposal from 1958. Hruska added the seven-day challenge period for the Vice President under section 4\footnote{111 CONG. REC. 3274, 3276 (1965).} (later compromised to four days)\footnote{H.R. REP. NO. 89-564, at 4 (1965) (Conf. Rep.).} and language to clarify that the Vice President was a necessary party to a section 4 determination.\footnote{FEERICK, supra note 6, at 101.} Poff added the requirement that Congress reconvene in response to the Vice President and Cabinet challenging a presidential declaration.\footnote{111 CONG. REC. 7966–67 (1965).} The twenty-one-day time period for Congress to resolve an intraexecutive branch conflict was a compromise forced by the McCulloch-Poff ten-day limit.\footnote{H.R. REP. NO. 89-564, at 72.} Eisenhower, Brownell, and Nixon helped shape the public and congressional disposition to find a solution; McCulloch, Poff, Hruska, Dirksen, Javits, Cooper, and others made helpful floor statements; Poff and others helped create important legislative history; and many Republicans and Democrats compromised and supported a product different from the one they would have preferred.\footnote{See Feerick, supra note 4, at 203 (“The proposed twenty-fifth amendment has been made possible because of the willingness of Democrats and Republicans alike to compromise in the best interests of the Nation.”).}

The bipartisan character of the effort was celebrated. During the September 1964 Senate debate, Mansfield expressed pleasure that S.J. Res. 139 commanded support “on both sides of the aisle.”\footnote{110 CONG. REC. 23,001 (1964).} President Johnson’s message to Congress on January 28, 1965, supporting S.J. Res. 1 and H.R.J. Res. 1 acknowledged a “consensus of an overwhelming”
congressional majority “without thought of partisanship” committed to prompt action.\textsuperscript{354}

Some unique factors invited bipartisan behavior. The onerous and multiple supermajority requirements associated with constitutional amendment provided special incentive for bipartisanship. Even the Johnson 1964 landslide, which gave Democrats 68 percent of each house of Congress, did not render bipartisanship unnecessary. While some Democrats, like Gore and McCarthy, were vocal Senate critics,\textsuperscript{355} and twenty-one House Democrats voted against H.R.J. Res. 1 in April 1965,\textsuperscript{356} several Republicans, like Poff, McCulloch, Dirksen, Hruska, Cooper, and Javits, advocated for Bayh-Celler. House Republicans supported H.R.J. Res. 1 at roughly the same rate as Democrats. Bayh recognized that the two-thirds requirement cautioned against making the issue partisan.\textsuperscript{357} When Dirksen stated at a 1965 markup that something was agreeable to “the Minority,” Bayh’s antennae went up for fear that the issue would become partisan.\textsuperscript{358}

The fact that presidential succession and inability and Vice Presidential vacancy were not campaign issues mitigated partisan pressures. Since a legislator’s position on Bayh-Celler would affect few, if any, election votes, lawmakers felt free to act based on their perception of the public interest with limited regard to partisan considerations. The Amendment did not favor one party or the other (and, ironically, the first six applications of the Twenty-Fifth Amendment have been in Republican administrations).\textsuperscript{359} Interest groups were not heavily engaged and the ABA was an independent and respected nonpartisan endorser.

Finally, the two parties were not as ideologically aligned in the mid-1960s as they later became. Republican liberals and moderates held seats in industrial states and in New England, and Democratic conservatives still dominated the South. Although ideology did not drive behavior on the Twenty-Fifth Amendment, the nonideological nature of the parties made bipartisan cooperation more the norm than the exception. Many other measures in the mid-1960s—such as the Civil Rights Act of 1964, the Gulf of Tonkin Resolution, and the Voting Rights Act of 1965—had bipartisan support.

Yet bipartisanship did not simply happen. Bayh and others contributed to the bipartisan quality of the Twenty-Fifth Amendment by structuring the proposal and proceedings to encourage Republican participation. By incorporating the Eisenhower-Brownell-Rogers 1958 amendment as the

\begin{itemize}
  \item \textsuperscript{354} 1965 Senate Hearing, supra note 130, at 13 (reprinting Johnson’s message).
  \item \textsuperscript{355} See 111 Cong. Rec. 15,381–86 (1965).
  \item \textsuperscript{356} Id. at 7969.
  \item \textsuperscript{357} Bayh, supra note 10, at 209.
  \item \textsuperscript{358} Id.
  \item \textsuperscript{359} Gerald R. Ford and Nelson Rockefeller became Vice President under Section 2. Goldstein, supra note 72, at 239–46. Ford became President under Section 1. Goldstein, supra note 2, at 969. Presidents Ronald Reagan and George W. Bush (twice) briefly transferred powers to their Vice Presidents under Section 3. Goldstein, supra note 166, at 255–57, 259.
\end{itemize}
framework for the disability provisions of his resolution, Bayh made it more likely that Eisenhower Republicans would support his proposal.

Bayh and his ABA allies adopted an inclusive approach. They consciously included Republicans like Brownell and Eisenhower in visible roles and were solicitous to Republican legislators. They made a point to work closely with Republicans including Dirksen and his staff, and with McCulloch and Poff, knowing that their support would be important. Bayh encouraged exchange with others, including Republicans, to improve the measure and broaden support. When Poff justified his probing questioning during the 1965 House hearing, Bayh replied that no apology was needed because “[t]he more questions we ask and the more we try to delve into each other’s minds, the more all of us can see the difficulty of solving this problem and the more opportunity we will have of finding a solution. So fire away.” McCulloch justified the extensive questioning regarding a proposed constitutional amendment and criticized some (but not Bayh, he hastened to add) “who have raised the question of some of the minority to try to improve” the Bayh-Celler proposal. Bayh repeatedly expressed his willingness to consider objections and compromise. Many on both sides of the aisle had reason to feel part of the process.

This inclusive disposition developed and spread because leaders on both sides of the aisle preached and modeled a collaborative, problem-solving approach to the issue. That was Nixon’s message in his March 1964 testimony, and it was apparent when Keating accommodated Bayh’s wish to bring S.J. 139 to the floor, when Javits abandoned his proposal in favor of Bayh’s, and when Dirksen and Hruska championed S.J. Res. 1 after their amendments were defeated. Bayh argued at the Senate’s 1965 hearings that the failure to solve problems regarding presidential inability was not due to a lack of proposals but rather because of “a refusal or reluctance on the part of the proposers to sit down and work out an agreement which we admit is not perfect, but which is better than no solution at all.” Democrats, like Bayh, Ervin, and Katzenbach, also compromised. Partisans on both sides of the aisle seemed to respond to the words and deeds that encouraged and modeled accommodation.

Bayh also recognized that Eisenhower, Nixon, and Brownell could speak powerfully regarding presidential inability and the rise of the vice presidency from their experiences during the Eisenhower administration. He gave them prominent roles in the hearings he held, the ABA made Eisenhower and Brownell featured speakers at its forum, and Bayh and other Democrats often cited them as authorities in discussions of the proposal. In arguing that letter agreements were insufficient, Bayh pointed out that both Eisenhower and

360. See Bayh, supra note 10, at 98–99, 105–06, 150; Beck, supra note 9, at 92, 98–100.
362. Id.
363. Id. at 67; id. at 84 (referring to the importance of “give and take”); id. at 86 (discussing the importance of questions).
Nixon had taken that position.\textsuperscript{365} When Folsom spoke of the difficult position of the Vice President during presidential disability deliberations based on the Eisenhower experiences,\textsuperscript{366} Bayh replied that Eisenhower thought that the Vice President had an inescapable constitutional responsibility.\textsuperscript{367} Celler invoked Brownell’s earlier rationale for why a constitutional amendment was needed\textsuperscript{368} and quoted Brownell in response to criticism from Republican Representative Clarence Brown (Ohio).\textsuperscript{369} Democratic Senators often invoked Eisenhower’s observations.\textsuperscript{370}

A proposal supported by Eisenhower and Johnson; Brownell and Katzenbach; Javits, Cooper, and Ervin; and Poff, McCulloch, and Celler became harder to challenge. Alternatives, like the enabling approach, could not overcome the bipartisan pedigree of Bayh’s proposal. Ultimately the arguments ended up being over details, like whether to include time limits and whether creation of an “other body” would supplant or supplement the Cabinet. It was easier to obtain the two-thirds majorities in the House and Senate since proponents of the proposal could seek support from all members, not simply Democratic ones. And the bipartisan support of the measure strengthened the prospects of ratification of the proposed Twenty-Fifth Amendment.

What produced the Twenty-Fifth Amendment was the willingness of legislators of both parties to focus on the national interest and on problem solving and to operate in a way that encouraged those dispositions. Democrats and Republicans agreed that existing provisions regarding presidential succession and inability were inadequate, presented perils, and needed to be addressed. They agreed that the status quo was unacceptable and presented a less attractive option than alternative courses. This disposition informed much behavior and persisted and grew as the proposal passed the various stages of the bicameral amendment process before being submitted to the states for ratification.

Rather than allowing disagreements to prevent achievement, the participants emphasized and built upon their common ground. In so doing, Republicans and Democrats together effectively addressed a problem that had confounded the founding fathers and America for 180 years.

IV. PARTISANSHIP (AND BIPARTISANSHIP) IN A BROADER CONTEXT

Partisanship is, of course, one, but only one, of the ways in which legislators and voters organize themselves to compete for political power and to pursue policy objectives. Bipartisanship involves a recognition that

\textsuperscript{365} 1964 Senate Hearings, \textit{supra} note 89, at 3 (statement of Sen. Birch Bayh).
\textsuperscript{366} 1965 Senate Hearing, \textit{supra} note 130, at 53–54 (statement of Sen. Birch Bayh).
\textsuperscript{367} Id. at 54.
\textsuperscript{368} Id. at 55.
\textsuperscript{369} 111 CONG. REC. 7936 (1965).
\textsuperscript{370} Id. at 3255 (statement of Sen. Ervin) (recalling Eisenhower’s emphasis on the importance of party continuity in the vice presidency); see also 1965 Senate Hearing, \textit{supra} note 130, at 54 (statement of Sen. Birch Bayh) (invoking Eisenhower’s observations regarding the Vice President’s role in determining presidential disability).
sometimes it is advantageous to work with partisan rivals to identify and pursue objectives collaboratively rather than competitively.

Partisanship is by no means the only obstacle to cooperative political behavior. People organize based on a range of demographic and other factors. Sometimes institutional commitments dictate political behavior and impede cooperation, such as when different legislative committees battle over jurisdiction, when Senators and representatives insist on the product of their own house, or when congressmen and executive officials divide regarding separation of powers issues. Sometimes egotism presents the obstacle as when people are unwilling to relinquish their own proposal or cede or share credit. Many of these divisions appeared when Congress considered how to address presidential succession and inability during the mid-1960s.

The hearings and debates on the Twenty-Fifth Amendment included numerous statements from members of Congress and other experts on the issue, all of which ran to nearly 1000 pages. Yet the voluminous legislative record contains no wiser or more eloquent statement of the challenge of collaborative problem solving than three paragraphs in the remarks of a twenty-seven-year-old lawyer testifying before Congress for the very first time during the hearings of the Senate Subcommittee on Constitutional Amendments on February 28, 1964. Here are those words:

Perhaps one of the main reasons for the continued failure to solve this problem has been the great diversity of proposals. All have some merit. None is completely without objection. Each proposal has its adherents. No proposal has ever commanded enough support to be adopted. I am convinced that this problem can be solved.

However, I am equally convinced that the problem will never be solved if the trend persists whereby each of us stubbornly adheres to his own point of view. If this problem is ever to be solved men must agree and if they are to agree, they must actively work at it.

The time has come for those who are genuinely interested in the safety of this Nation to stop emphasizing those points on which they differ and to start emphasizing those points on which they agree. It is urgent that the problem be solved now. To miss this opportunity and again leave unsolved one of the most serious problems ever to confront the Congress would be to trifle with the security of this great Nation. Therefore, we must make every human effort to agree on a workable solution.371

This comment diagnosed the perennial problem that had prevented progress on presidential succession and inability as well as in many other areas. It is easier to disagree than to agree, but a chorus making “My Way” the common creed is not the route to solving communal problems. Instead, we must prioritize problem solving, talk to one another, focus on the common objective, and build from areas of agreement, rather than emphasize

371. 1964 Senate Hearings, supra note 89, at 150 (statement of John D. Feerick).
differences. And work, work, work! The message was optimistic in its faith that the problem could be solved but realistic regarding the challenges. It was prescient in suggesting the urgent need for a solution and wise in recognizing that focusing on common interests and shared ideas was the route to collaboration and agreement.

Bayh embraced the message he heard at the February 28, 1964, hearings and professed it. During the January 29, 1965, Senate hearing, Bayh remarked that the obstacle to dealing with presidential inability historically had been the “many different proposals and a refusal or reluctance on the part of the proposers to sit down and work out an agreement which we admit is not perfect, but which is better than no solution at all.” Bayh closed his testimony before the House Judiciary Committee on February 9, 1965, by expressing a thought quite similar to the one he had heard a year earlier:

The main barrier, I want to emphasize, to our ability to find a solution has been the fact that so far we have had so many different opinions that we have never been able to come close to a consensus . . . . This in no way precludes this body from making improvements to the consensus, but I would ask you to consider once again the impossibility of finding perfection and the gravity of the situation which now exists in which we have no answer whatsoever.

People of Fordham no doubt recognize those words of that young witness as the voice of John Feerick and recognize in the 1964 statement the enduring message and course of a lifetime. Those words resonated in Congress, and the suggested approach helped Bayh, the ABA, and their Republican allies to bridge the various partisan and institutional divides in order to propose the Twenty-Fifth Amendment.

Of course there are problems that resist solution, where the common ground is too small or the divisions too deep or the emotions too raw. It takes two to tango, and sometimes there is not a willing partner. And, not all parties will have the patience or the wisdom or the skill to find the sweet spot where collaboration can occur.

But one-half century ago, the “Feerick Way” helped Congress solve problems that the likes of George Washington, Alexander Hamilton, and James Madison had left to future generations—problems their successors had exacerbated and failed to solve for nearly 180 years. Perhaps that same approach—the approach that provided the foundation for the bipartisan effort that led to the Twenty-Fifth Amendment—can also help us to solve many of the problems that currently afflict our communities, our nation, and the world in which we live. I hope so.

373. 1965 House Hearings, supra note 114, at 95 (statement of Sen. Birch Bayh).
Imagine this: Americans could pick the President by direct national election, in 2004 and beyond, without formally amending our Constitution.

A small number of key states—eleven, to be precise—would suffice to put a direct election system into effect. Alternatively, an even smaller number of key persons—four, to be exact—could approximate the same result, with a little help from their friends.

Begin with the key-state scenario. Article II of the Constitution says that "each state shall appoint, in such manner as the Legislature thereof may direct" its allotted share of presidential electors. Each state’s legislature thus has discretion to direct how state electors are appointed.

The legislature is free simply to name these electors itself. It is likewise free to direct by law that electors be chosen by direct popular state vote, winner-take-all. This is what almost all states do today.

So too, each state legislature is free to direct that its state electors be chosen by direct popular national vote. Each state could pass the following statute:

This state shall choose a slate of electors loyal to the Presidential candidate who wins the national popular vote.

( Technically, the legislature does not award electoral votes as such, but rather picks from competing slates of electors who have announced in advance their loyalty to particular candidates.)

The eleven most populous states together now have 271 electoral votes, one more than the 270 votes needed to win (out of a total of 538). Thus, if all eleven passed this statute, the presidency would go to the candidate who won the national popular vote.

For those who are counting, the eleven states are California (with 55 electoral votes after the 2000 census), Texas (34), New York (31), Florida (27), Pennsylvania (21), Illinois (21), Ohio (20), Michigan (17), New Jersey (15), Georgia (15), and North Carolina (15).

There is nothing magical about these eleven states; advocates of direct national election need not draw the poker equivalent of a royal flush. Some of the big eleven were to opt out, their places could be filled by any combination of smaller states with as many total electoral votes. We highlight the number eleven merely to illustrate how few states would be needed, in theory, to effectuate
direct national election.

It's worth pausing to let this soak in. Under the Constitution's Article V, a constitutional amendment providing for direct national election would as a practical matter require two-thirds support in the House of Representatives, a two-thirds vote in the Senate, and the further support of thirty-eight state legislatures.

Thus, under the Constitution, any thirteen states—perhaps the thirteen tiniest—could block an Article V amendment. In contrast, our hypothetical plan could succeed even if as many as 39 states and Congress (which directs how the District of Columbia's 3 electors are to be chosen) opted out.

Moving From Unilateral to Coordinated State Action

If the eleven biggest states were to pass our law, an odd theoretical possibility would arise: A candidate could win the presidency, by winning the national popular vote, even if he or she lost in every one of these big states! (Imagine a scenario where the candidate narrowly loses in each of these states, but wins big most other places.) Should this theoretical possibility deter big states from passing our law?

After all, the current electoral college landscape reflects an effort by virtually every state to maximize its own clout, by awarding all of its electoral votes to the candidate that wins the state, rather than dividing its electoral votes proportionately among candidates. Take New Jersey, with its 15 electoral votes. A proportional-voting New Jersey would have only 3 electoral votes truly at stake—the difference between a 9-6 blowout victory and a 6-9 blowout defeat. This would make New Jersey no more important than a tiny winner-take-all state like Wyoming (offering either a 3-0 win or a 0-3 defeat). A winner-take-all New Jersey means not 3, but 15 electoral votes are at stake, so candidates must pay more attention to the state.

For New Jersey to abandon winner-take-all when Wyoming and almost all other states are retaining it would be the electoral equivalent of unilateral disarmament. A similar concern might discourage New Jersey from unilaterally embracing our proposed national popular vote law—this too, is a form of unilateral disarmament, telling a candidate not to worry about winning votes in New Jersey. Indeed, a candidate could lose New Jersey's popular vote badly and still get all its electoral votes by winning nationwide. Even worse, New Jersey would be unilaterally disarming with no assurance that the presidency would in fact go to the national popular vote winner; acting alone, New Jersey cannot guarantee that its 15 would be enough to put the national vote winner over the 270 mark.

But New Jersey need not act unilaterally. Its law could provide that its electors will go to the national vote winner if and only if enough other states follow suit. Until that happens, New Jersey and every other likeminded state could continue to follow current (self-aggrandizing) methods of choosing electors. Thus, our new model state law would look something like this:

This state shall choose a slate of electors loyal to the Presidential candidate who wins the national popular vote, if and only if other states, whose electors taken together with this state's electors total at least 270, also enact laws guaranteeing that they will choose electors loyal to the Presidential candidate who wins the national popular vote.

Acting in this coordinated way, a group of largish states adding up to 270 would not really be disarming themselves. Although it is theoretically possible for a candidate to win a national vote while losing in all (or almost all) of the big states, this is an unrealistic scenario. In general, candidates would tend to lavish attention on most big states because there are lots of voters in these states. As a practical matter, one can't win nationally without winning, or at least coming very close, in various populous states.

Should expressly coordinated state laws of the sort we are imagining be deemed an implicit interstate agreement requiring congressional blessing under Article I, section 10 of the Constitution? Probably not. After all, each state would retain complete unilateral freedom to switch back to its older system for any future election, and the coordinated law creates no new interstate governmental apparatus. Indeed, the cooperating states acting together would be exercising no more power than they are entitled to wield individually. (The matter might be different if the coordinating states had sought to freeze other states out—say, by agreeing to back the candidate winning the most total votes within the coordinating states as a collective bloc, as opposed to the most total votes nationwide.)

How to Create a More Uniform System of Presidential Voting
Of course, any coordinated state-law effort would require specifying key issues: Majority rule or plurality rule? Runoff or no? How should recounts and challenges be handled?

It would be hard to rely completely on the laws and courts of each state, many of which might not be part of the cooperating 270 group. For example, the national vote might be close even though the state vote in some noncooperating state was not, and that state might refuse to allow a state recount. Indeed, a noncooperating state might theoretically try to sabotage the system by refusing to allow its citizens to vote for president! What if some state let 17 year-olds vote in an effort to count for more than its fair share of the national total? And what about Americans who live abroad or in the federal territories?

These questions suggest an even more mind-boggling prospect: our national-vote system need not piggyback on the laws and machinery of noncooperating states at all! Let these noncooperating states hold their own elections, but so long as they amount to less than 270 electors, these elections would be sideshows. The cooperating states could define their own rules for a uniform "National Presidential Vote" system. In that case, our law would read something like this:

Section 1. This state shall choose a slate of electors loyal to the Presidential candidate who wins the "National Presidential Vote," if and only if other states, whose electors taken together with this state's electors total at least 270, also enact laws guaranteeing that they will choose electors loyal to the Presidential candidate who wins the "National Presidential Vote."

Section 2. The "National Presidential Vote" shall be administered as follows... . . .

Section 2 of this model law would proceed to specify the precise rules of this "National Presidential Vote." For example, Section 2 could provide that Americans everywhere who want to be counted must register in a system to be administered by a nongovernmental election commission-made up, say, of a panel of respected political scientists and journalists (not unlike the newspaper consortium that recently announced its tallies of the Florida vote). Section 2 could also specify uniform rules of voting eligibility, uniform presidential ballots, and an election dispute procedure (with the final appeals decided by, say, Jim Lehrer). Alternatively, Section 2 might contemplate that the "National Presidential Vote" should be administered by a new interstate election council or directly by the federal government; and Congress could then pass a statute blessing this more elaborate interstate agreement.

Some will doubtless dismiss all this as mere academic daydreaming, but the daydreams are useful in illustrating how much constitutional creativity is possible within the existing constitutional framework, short of formal amendment. (In an article in the Spring, 2001 issue of The Green Bag, Northwestern Professor Robert Bennett pursues a similar thought experiment.)

**Asking Candidates About the Electoral College - and Binding Them To Their Word**

Here is a final daydream. What if the two leading presidential contenders in 2004 were asked about their views of the electoral college? After election 2000, this seems a perfectly sensible question: it is not purely theoretical to worry about electoral college misfires of various sorts. A question about the legitimacy of the electoral college is one of many questions the candidates should be asked by Jim Lehrer on the News Hour or at a debate.

If candidates believe in the college, they should be prepared to give their reasons. If they seek to duck the question as overly hypothetical, they should be pressed. And if they express disapproval of the system, and pledge allegiance to the principle of one person, one vote, then they should be asked if they are willing to put their principles into action. For the two major presidential candidates and their two running mates have it within their power to move us to direct national election.

A candidate could pledge that, if he loses the national popular vote, he will ask his electors to vote for the national popular vote winner. Having taken this pledge, the candidate could then challenge his rival to take a similar pledge. Each candidate could likewise insist that his Vice Presidential running mate take the pledge.

Presumably, the candidates' handpicked electors would honor their respective candidates' solemn pledges when the electoral college met; but if not, each candidate and running mate could further pledge to resign immediately after Inauguration in favor of the national popular vote winner.
The candidates themselves can make their pledges stick via the 25th Amendment, which allows a President to fill a vacant vice presidency. Suppose for example that Smith somehow is inaugurated even though Jones won the national vote. On inauguration day, Smith’s vice presidential running mate would resign immediately. Smith would then name Jones the new vice president under the 25th Amendment, and upon Jones’s pro-forma confirmation by Congress—he is, after all, the man with the mandate in our hypothetical—Smith would step down in favor of Jones.

If this scenario seems odd, it is useful to recall that it is not that different from the one that made Gerald Ford President in 1974: Vice PresidentSpiro Agnew resigned, and then was replaced by Ford, who in turn became President upon Richard Nixon’s resignation.

Another analogy: Beginning with GeorgeWashington, who resigned after eight years even though he would have easily won a third term, early Presidents gave America a strong tradition of a two-term limit on the presidency.

Likewise, presidential candidates today could, via pre-election pledges and (if necessary) post-inauguration resignations, establish a strong tradition that the presidency should go to the person who actually won the national election. Just as the informal two-term limit ultimately became specified in constitutional text in the Twenty-second Amendment, so too a series of candidate pledges could eventually pave the way for a formal direct election amendment.

And all it would take to get the ball rolling is for four persons to take the pledge in 2004. Imagine that.
PRESIDENTIAL SUCCESSION AND INABILITY: BEFORE AND AFTER THE TWENTY-FIFTH AMENDMENT

John D. Feerick*

INTRODUCTION .......................................................................................... 908
I. THE CONSTITUTIONAL AND STATUTORY PROVISIONS ......................... 909
II. PRESIDENTIAL SUCCESSION AND INABILITY PRIOR TO THE TWENTY-FIFTH AMENDMENT ........................................................ 911
   A. The United States Constitution’s Succession Clause ......................... 911
      1. Meaning of “Inability” Under the Succession Clause................. 911
      2. Who Is To Judge Whether Inability Exists? .............................. 912
         a. Vice President or Other Officer upon Whom the Presidential Functions Devolve ......................................................... 913
         b. Congress ............................................................................. 915
         c. The Judiciary ....................................................................... 916
         d. The Cabinet......................................................................... 917
   B. History of Presidential Disability Prior to the Twenty-Fifth Amendment ....................................................................................... 918
      1. Madison's Illness................................................................... 918
      2. Tyler Precedent...................................................................... 918
      3. Garfield's Inability ................................................................. 919
      4. Wilson's Inability ................................................................. 920
      5. Eisenhower's Inabilities ......................................................... 921
      6. Kennedy's Assassination ....................................................... 922
III. THE TWENTY-FIFTH AMENDMENT ..................................................... 922
   A. Ratification .................................................................................... 922
   B. An Analysis of the Twenty-Fifth Amendment ................................. 924
      C. History Post-Ratification ............................................................ 926
         1. Reagan's Assassination Attempt .......................................... 926
         2. Reagan's Cancer Surgery ..................................................... 929
         3. Appointment of Gerald Ford as Vice President................. 930

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4. Succession of Gerald Ford to the Presidency and
   Appointment of Nelson Rockefeller as Vice President ..... 931
5. George W. Bush's Invocations ........................................... 931
   D. An Appraisal .......................................................... 932
IV. A BRIEF HISTORY OF VICE PRESIDENTIAL VACANCIES .......... 933
V. GAPS IN THE CURRENT SUCCESSION LAW ...................... 934
   A. Vice Presidential Disability Followed by Presidential Death .. 935
   B. Concurrent Vice Presidential and Presidential Disability ...... 935
   C. Disabled President Followed by Disabled Acting President ... 936
   D. Vice Presidential Vacancy Scenarios ................................ 936
   E. A Response ........................................................... 936
VI. ADDRESSING THESE GAPS: A VACANT VICE PRESIDENCY OR
   DISABLED OCCUPANT .................................................. 937
   A. Contingent Grants of Power ......................................... 940
   B. The Ability of Congress To Legislate ............................ 942
VII. BEYOND THE VICE PRESIDENCY: LEGISLATIVE OFFICERS IN THE
   LINE OF SUCCESSION AND SPECIAL ELECTIONS .................... 943
CONCLUSION ........................................................................ 948

INTRODUCTION

Each year in the United States, the Constitution is celebrated in a myriad of ways. It richly deserves such veneration for all it has made possible, not simply in the United States but throughout the world. It is the oldest living written Constitution of its kind, providing a model for many of the written constitutions of the world. Among its many provisions are several on the subject of presidential succession. These provisions have been applied to give the country stability and continuity. They have evolved over time, beginning with the foundational provisions of Article II, Section 1, Clause 6, added to by the Twelfth, Twentieth, and Twenty-Fifth Amendments, and supplemented by acts of Congress establishing a line of succession beyond the Vice Presidency. To the present moment, the resulting legal structure has served the nation well, though imperfectly at times, by anticipating and providing for contingencies involving the highest offices of the United States.

The Framers of the Constitution did not spend a great deal of time on the succession provisions, but just enough to get the nation started. The Twenty-Fifth Amendment answered questions they left open in the area of presidential inability and gave further significance to the Vice Presidency, which had been adopted almost as an afterthought. The absence of discussions by the Framers in the area of presidential succession is not surprising given that it was not until near the end of the Constitutional Convention that they settled on the method of selecting the President and many of the powers of the Office.

As strong as the system of presidential succession may appear, complacency can easily set in, leading to an unwillingness to confront gaps
and defects that reveal themselves along the way. The Twenty-Fifth Amendment, a memorial to a fallen President, was propelled forward by a tragedy that brought into focus the intractable issue of presidential inability and the absence of procedures for filling a vacancy in the Vice Presidency. The terrorist attacks of September 11, 2001, raised modern questions as to the adequacy of the provisions for dealing with presidential inability, continuity in government, and the Electoral College system.

Several gaps in the area of presidential inability are triggered by the absence of any provisions in the Twenty-Fifth Amendment for dealing with the disability of a President when there is either no Vice President or the Vice President has himself become disabled. This was not a drafting oversight but rather reflected a judgment by congressional leaders to accomplish what they could in the politics of that time.1 This Article examines these gaps and offers approaches for dealing with them. The Article also comments on proposals with respect to the line of succession beyond the Vice Presidency, a line considered by many scholars to be unconstitutional because it includes legislative officers, and for other reasons that will be discussed below.

I. THE CONSTITUTIONAL AND STATUTORY PROVISIONS

A useful starting point is an overview of the current constitutional and statutory provisions on the subject of presidential succession.

Article II, Section 1, Clause 6 brought together two proposals made at the Constitutional Convention. The first provided for a successor to the President in the event of his death, resignation, removal or inability.2 The second gave Congress the power to establish a line of succession.3

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1. This subject was very much present in the 1965 House deliberations on the Amendment, as evidenced by a letter I sent to Representative Richard Poff at his request, stating in part the following:

   You asked if I could suggest some language which would cover the case of simultaneous inability of the President and Vice-President. As I see it, you have basically three situations in mind: (1) the inability of a Vice-President at a time when the President is disabled, (2) the inability of an Acting President, and (3) the inability of a President when there is no Vice-President. If it should be determined essential to have provisions covering these cases, I would suggest adding two sections to the basic proposal. These sections might read as follows:

   “6. The inability of the Vice-President shall be determined in the same manner as that of the President except that the Vice-President shall have no right to participate in such determination.”

   “7. In case of the death, resignation, removal or inability of the Vice-President, the person next in line of succession shall act in lieu of the Vice-President under Sections 4 and 5 with the heads of the Executive Departments or such other body as Congress may by law provide.”


2. 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 185–86 (Max Farrand ed., 1911).

3. Id. at 535.
the resulting provision created issues for later generations regarding the status of a Vice President after a succession event and the kind of “Officer” appropriate for the line of succession.

The Twelfth Amendment established separate voting for President and Vice President, giving the U.S. Senate a role where no candidate for Vice President had received a majority of the electoral votes. It also provided that if an election of President fell to the U.S. House of Representatives, with no candidate having a majority of the electoral votes and no candidate having been selected by the beginning of the President’s term, the Vice President “shall act as President, as in the case of the death or other constitutional disability of the President.”

Later, Section 3 of the Twentieth Amendment, providing that the Vice President elect shall become President if the President-Elect has died before his inauguration, replaced this provision of the Twelfth Amendment. It further added that if the President has not been chosen, or has failed to qualify, by the beginning of the term, the Vice President-Elect shall act as President until a President has qualified. It went on to state, “Congress may by law provide for the case wherein neither a President elect nor Vice President elect shall have qualified, declaring who shall then act as President . . . and such person shall act accordingly until a President or Vice President shall have qualified.” Further, Section 4 of the Twentieth Amendment gave Congress the power to provide for the death of any of the persons from whom the House or Senate may choose for President and Vice-President, respectively, when the right to do so devolved on them under the Twelfth Amendment.

Finally, the Twenty-Fifth Amendment clarified the status of a Vice President in case of a succession event, provided for cases of inability, and established a procedure for filling a vice presidential vacancy.

The current federal succession statute provides for a line of succession after the Vice President, going first to the Speaker of the House of Representatives, then the President pro tempore of the Senate, followed by the individual Cabinet members. Other provisions relating to presidential succession are found elsewhere in the Constitution, as well as in procedures

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4. U.S. CONST. art. II, § 1, cl. 6; see also infra Part III.A.
5. See infra Parts VII–VIII.
6. U.S. CONST. amend. XII. Originally, the Constitution provided for two electoral votes per elector for the Presidency and awarded the Vice Presidency to the presidential candidate with the second highest number of electoral votes, whether a majority or not. Id. art. II, § 1, cl. 3.
7. Id. amend. XII.
8. Id. amend. XX, § 3.
9. Id.
10. Id.
11. Id. § 4.
12. Id. amend. XXV; see also infra Part IV.B.
of the national political parties, past precedents, and congressional practices to fill a vice presidential vacancy.

For example, the Democratic Party, at its most recent Convention, provided for the filling of a vacancy on the national ticket in the event of death, resignation, or disability after adjournment of the Convention of the Party’s nominee for President or Vice President. It gave such authority to the Democratic National Committee, requiring that it confer with the Party’s leadership in Congress and the Democratic Governors Association. Republican Party procedures employ similar provisions. The Republican National Committee is empowered to fill vacancies or reconvene the national convention for that purpose.

II. PRESIDENTIAL SUCCESSION AND INABILITY PRIOR TO THE TWENTY-FIFTH AMENDMENT

A. The United States Constitution’s Succession Clause

Any analysis of presidential succession begins with the United States Constitution, whose Article II Succession Clause reads:

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

As will be discussed in detail below, the Clause has been the subject of much debate. In particular, since the Constitutional Convention of 1787 there has been uncertainty as to both the definition of inability as well as the critical question of who is to be its judge. In addition, prior to the ratification of the Twenty-Fifth Amendment, it was unclear whether a succession event resulted in the Vice President succeeding to the Office of the President itself, or simply assuming the powers and duties of the Office.

1. Meaning of “Inability” Under the Succession Clause

The Constitutional Convention does not indicate to which situations the Framers intended the term “inability” to apply. At the Convention, only delegate John Dickinson of Delaware raised this issue by asking, “What is the extent of the term ‘disability[?]’”

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15. Id.
17. Id.
During President James Garfield’s illness in 1881, a number of well-known legal authorities were of the opinion that “inability” in the Succession Clause referred solely to mental incapacity. For example, Professor Theodore W. Dwight of Columbia Law School, one of the leading constitutional authorities of that time, held this view. Similarly, former Senator William Eaton of Connecticut stated, “There can be no disability that the President can be conscious of,” and “It must be a disability, as, for example, if he were insane, which is patent to everybody except himself.”

Others at the time were of the view that “inability” was not restricted solely to mental incapacity. Rather, “a case . . . exists whenever the public interest suffers because the President is unable to exercise his powers . . . .” Indeed, proponents of this view believed that the inability provision of the Succession Clause should be construed broadly, covering all circumstances that might cause a President to be “unable” to discharge the powers and duties of his Office. For example, it was written at the time in the New York Herald that, “The word ‘inability’ . . . means an inability of any kind . . . of the body or mind . . . temporary or permanent, . . . [which] disables [the President] from discharging the powers and duties of his office.”

Massachusetts Representative Benjamin Butler, when writing of President Garfield’s illness, said “inability includes everything in the condition of a President which precludes him from the full discharge of the powers and duties of his office” in which case “the discharge of these powers and duties becomes immediately the duty of the Vice-president.” Other distinguished authorities reasoned that whether or not an inability exists often depends on the surrounding circumstances.

2. Who Is To Judge Whether Inability Exists?

In addition to the ambiguity surrounding the type of situations intended to be covered, the Succession Clause also does not specify who is to
determine when an inability exists (and when it ceases). Again, the debates from the Constitutional Convention are mostly silent on this question. Again, only John Dickinson raised this problem when asking, “[W]ho is to be the judge of [disability]?”28 From that time and until the ratification of the Twenty-Fifth Amendment, there were several views relating to the proper method of establishing the existence and termination of presidential inability.29 This debate provides guidance in answering a crucial question should a situation arise beyond the scope of the Twenty-Fifth Amendment.

a. Vice President or Other Officer upon Whom the Presidential Functions Devolve

When President Garfield was shot in 1881, an event that brought focus to issues regarding the Succession Clause, public opinion favored that the successor should determine when a President was disabled.30 While President Garfield was incapacitated, most said that it was the obligation of Vice President Chester A. Arthur to exercise the powers and duties of the President, and “no enabling action by the courts, the Congress, the Cabinet, or the President was necessary.”31 Former Illinois Supreme Court Justice Lyman Trumbull wrote at the time that “[i]t is questionable whether any law can be framed placing this question of inability in a better position than the Constitution has left it,” and that whenever there is an obvious case of disability, the Vice President should assume power if important public business required executive action.32

Professor Ruth C. Silva, a leading scholar on presidential succession, wrote:

[Justice] Trumbull was probably correct in saying that the successor must shoulder the burden of making the decision in the first instance. Since he has the duty of acting as President in certain contingencies, his official discretion extends to the determination of whether or not such a contingency actually exists.33

She explained further:

In contingent grants of power it is a well-established rule of law that the one to whom the power is granted is to decide when the emergency has arisen. Thus the Vice President, or the “officer” designated by law to act as President, is constituted the judge of a President’s inability in the first instance. . . . The Constitution provides that the power of acting as President belongs to the Vice President or to the “Officer” while a

29. See infra notes 30–64 and accompanying text.
30. SILVA, supra note 21, at 100; see also infra Part III.B.3.
31. Id. at 100–01.
32. Trumbull, supra note 27, at 421–22 (“Any Vice-president who should assume those duties in a doubtful case, when the exigency did not unmistakably require it, would be treated as a usurper by all patriotic citizens. Peaceful successions to the Presidency, under our system of government, must always depend on a sound public opinion, supported by the good sense and the intelligence of the people . . . .”).
33. SILVA, supra note 21, at 101.
President is disabled. Since the Constitution mentions only the successor, he is the judge of the facts.34

In 1961, President John F. Kennedy asked his Attorney General, Robert F. Kennedy, to write an opinion regarding the construction to be given to the presidential inability provisions of the Succession Clause.35 Attorney General Kennedy’s opinion noted, “The large majority [wa]s of the view that the Vice President, or other ‘officer’ designated by law to act as President has the authority under the Constitution to decide when inability exists.”36 The opinion cited the conclusion drawn by President Dwight D. Eisenhower’s Attorney General, Herbert Brownell, that the Vice President is the sole judge of a President’s inability where the President is unable to do so himself:

This is so because the Constitution does not state who should determine the President’s inability in the many circumstances in which, as the founders themselves must have foreseen, it cannot be the President himself. The Cabinet could not have been intended to judge the issue, since this body is not referred to in the Constitution. It is not the Congress, except by the negative sanction of impeachment and conviction for a wrongful attempt to exercise power. Nor is it the Supreme Court, because the question of presidential inability is hardly one which fits any type of jurisdiction conferred by the Constitution on that tribunal. But the power to determine the inability of the President rests in the Vice President not simply because the Constitution places it nowhere else.37 By a well-known principle of law, whenever any official by law or person by private contract is designated to perform certain duties on the happening of certain contingencies, unless otherwise specified, that person who bears the responsibility for performing the duties must also determine when the contingency for the exercise of his powers arises. Similarly, under the present Constitution, it is the President who determines when his inability has terminated and he is ready once more to execute his office.38

Similarly, prior to the ratification of the Twenty-Fifth Amendment, I wrote, “As the Constitution is now written, it is the Vice-President’s duty to act as President in cases of inability and therefore, by implication, his duty to make the determination of inability,”39 noting that Brownell had persuasively argued this point.

34. Id. (citations omitted).
36. Id. at 88.
37. The Twenty-Fifth Amendment formalizes the Vice President’s role in determining presidential inability. U.S. CONST. amend. XXV, § 4.
39. John D. Feerick, The Problem of Presidential Inability—Will Congress Ever Solve It?, 32 FORDHAM L. REV. 73, 126 (1963). In this Article I noted that several cases are frequently cited for this proposition. See e.g., J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 413 (1928) (giving the President authority to fix rate of custom duties on imports); Field v. Clark, 143 U.S. 649, 700 (1892) (authorizing the President to suspend provisions of a tariff act); Martin v. Mott, 25 U.S. (12 Wheat.) 19, 30 (1827) (allowing the President to
b. Congress

Others held the view that Congress had the power to decide the question of a President’s incapacitation. Some of the earliest constitutional scholars proposed that the matter could best be handled by concurrent resolutions, with one resolution declaring the existence of an inability and a subsequent resolution declaring its termination. During President Garfield’s inability, Governor Jacob B. Jackson of West Virginia argued that presidential disability is a political question: “the only way now in which the disability contemplated in the constitutional clauses referring to the subject could be announced and the Vice President called to the office of the President, was by act of Congress.” Additionally, some have suggested that the power to remove a disabled President through impeachment proceedings may furnish a method for deciding the inability question.

Advocates for the view that Congress had the power to determine presidential inability found more support for the proposition in the Constitution’s Elastic Clause. Also known as the Necessary and Proper Clause, it provides that “[t]he Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” Supporters of this view disagreed with the argument that “the grant of power to Congress to designate a successor in case of double vacancy necessarily excludes congressional power to legislate on the subject of presidential inability,” reasoning that “the power to provide for the determination of disability is a power necessary and proper to carry into execution the powers vested in the President,” and “providing for the determination of presidential inability is necessary to ensure that the executive power does not fall into abeyance.”

call militia into service); Cargo of the Brig Aurora v. United States, 11 U.S. (7 Cranch) 382, 388 (1813) (giving the President power to renew trade with certain countries); see also Brownell, Jr., supra note 38, at 199–201.

40. See Silva, supra note 21, at 105 (citing 14 Cong. Rec. 1007 (1883) (statement of Sen. Charles W. Jones)). Professor Ruth C. Silva noted that, “The provisional constitution of the Confederate States actually did contain such a provision,” and under Article II, Section I, Clause 4 of that document, “[T]he President’s inability was to be determined by a two-thirds vote of the Congress . . . .” Id. at 105 n.76. The permanent constitution of the Confederacy omitted this provision. Id.

41. See, e.g., Silva, supra note 21, at 105 (discussing former Columbia University constitutional law Professor John W. Burgess’s proposal for Congress to determine inability).

42. A Question for Congress: Governor Jackson, of West Virginia, on Presidential Disability, Views of Ex-Senator Trumbull, Other Opinions as to a Remedy for the Existing Situation, N.Y. Herald, Sept. 9, 1881, at 8.

43. See, e.g., Silva, supra note 21, at 105 (discussing former Virginia Representative and constitutional law Professor John Randolph Tucker’s suggestion that Congress may remove a disabled President through such proceedings).

44. See id. at 106–07.


46. See, e.g., Silva, supra note 21, at 106.
Professor Silva noted that “the great weight of opinion . . . support[s] the position that Congress has no such power” to determine inability either specifically or generally. She pointed out that “[t]he speeches in Congress have nearly all denied congressional power to provide for cases of inability on the ground that the delegation of power to Congress to provide for succession beyond the Vice President excludes all other congressional power to deal with presidential succession.”

Attorney General Brownell agreed that Congress had no such authority if there were an able Vice President in place; however, he left open the possibility of congressional power on the matter in the event of a double vacancy or double disability, writing:

> Since the Constitution confers no power upon Congress in connection with presidential inability so long as the Vice President is in office and able to act, congressional action under the ‘necessary and proper’ clause would seem restricted to the uncommon situation in which both the President and the Vice President are incapacitated.

### c. The Judiciary

When President Garfield fell ill, Professor Dwight said that the definition of presidential inability is a “judicial question” outside “the sphere of legislation.” Similarly, John Randolph Tucker, a well-known lawyer and commentator at the time, thought the federal courts could be given jurisdiction to make the determination of inability “as a case arising under the Constitution.” Other noted commentators agreed that the federal judiciary could determine a President’s disability. For example, David K. Watson suggested that the Attorney General could bring a mandamus action against the Vice President, compelling him to exercise the powers and duties of the President. John W. Burgess added that both the Supreme Court and Congress could decide cases of inability. While the issues were primarily “judicial questions,” “[i]f it should be left to . . . Congress . . . to declare when disability happens and when it ceases, I think the solution of

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47. Id. at 107.
48. Id.; see also Ruth C. Silva, Presidential Inability, 35 U. DET. L.J. 139, 171 (1957) (“The only power expressly given to Congress to provide for presidential succession is the power to declare what officer shall act as President when there is neither a functioning President nor a functioning Vice President. This would seem to deny congressional power to deal with inability, because enumeration in the Constitution of certain powers denies all others unless incident to an expressed power or necessary to its execution . . . .”).
49. Brownell, Jr., supra note 38, at 206; see also infra note 173 and accompanying text.
50. Dwight, supra note 22, at 440.
51. 2 JOHN RANDOLPH TUCKER, THE CONSTITUTION OF THE UNITED STATES: A CRITICAL DISCUSSION OF ITS GENESIS, DEVELOPMENT, AND INTERPRETATION 713 (1899).
52. 1 DAVID K. WATSON, THE CONSTITUTION OF THE UNITED STATES: ITS HISTORY APPLICATION AND CONSTRUCTION 893–95 (1910) (discussing Attorney-General v. Taggart, 29 A. 1027 (N.H. 1890), where the New Hampshire Supreme Court held that the existence of an inability may be determined on a petition for mandamus against a governor’s successor to compel him to act as governor).
53. 2 JOHN W. BURGESS, POLITICAL SCIENCE AND COMPARATIVE CONSTITUTIONAL LAW 240 (1891).
the question which best comports with the spirit of our institutions will have
been reached.”

Professor Silva disagreed about judicial involvement, writing, “It is
certain that the Supreme Court could not be given original jurisdiction to
make this determination. For the Court has already ruled that its original
jurisdiction is limited to that set forth in the Constitution.” Over the
years, many bills had been proposed that would give the Supreme Court
original jurisdiction to determine presidential inability. When the
Marbury objection was raised during 1920 congressional hearings on such a
proposal, Representative John J. Rogers of Massachusetts, the bill’s author,
“had no answer.” At the same hearings, Minnesota Representative
Andrew Volstead suggested that the lower federal courts could be given this
jurisdiction, to which Ohio Representative Simeon Fess responded that only
a constitutional amendment could confer federal jurisdiction, categorizing
the issue as “political and not justiciable.”

d. The Cabinet

Some, principally former members of the executive branch, have
suggested that the Cabinet might declare a President’s inability. Former
President Herbert Hoover suggested a commission of between seven and
fifteen heads of executive departments or agencies, reasoning that “a
President’s inability . . . should be determined by the . . . [political] party
having the responsibilities determined by the election.” Indeed, two bills
were introduced to allow the Cabinet to declare an inability during
President Woodrow Wilson’s illnesses. The main legal question
regarding those bills was “whether Congress had power to authorize the
Cabinet to determine a President’s inability.”

Critics of allowing the Cabinet to play a role, including former Attorney
General Brownell, pointed out that this would be antithetical to original
meaning as the framers could not have intended the Cabinet, a body not
referred to in the Constitution, to judge the issue of disability. During
President Garfield’s illness, West Virginia Governor Jackson answered
former President Ulysses S. Grant’s suggestion that the President’s
physician certify his inability to the Cabinet by saying, “The Cabinet cannot

54. Id.
55. SILVA, supra note 21, at 103 (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137
(1803)).
56. Id.
57. Id.
58. Id. at 103–04.
59. Id. at 107; Feerick, supra note 39, at 113.
60. Presidential Inability: Hearing on S.J. Res 100 et al. Before the Subcomm. on
Constitutional Amendments of the S. Comm. on the Judiciary, 85th Cong. 11 (1958).
61. SILVA, supra note 21, at 107.
62. Id. at 107–08.
63. See, e.g., Brownell, Jr., supra note 38, at 204; see also supra note 49 and
accompanying text.
and ought not to decide it, for its members are the creatures of the
President, called to and continued in office at his pleasure."64

B. History of Presidential Disability prior to the Twenty-Fifth
Amendment65

1. Madison’s Illness

In 1813, President James Madison suffered an illness that left him unable
to conduct the responsibilities of the Office for three weeks, setting off
widespread discussion of presidential succession. Word traveled that
President Madison was critically ill, and attention focused on the possible
succession of Vice President Elbridge Gerry, then almost sixty-nine years
old. There was speculation that the President might not survive, and there
was concern over the ability of Vice President Gerry if he were to assume
the Office.66 Both houses of Congress became engrossed with the
possibility of Madison’s death and Gerry’s succession.

President Madison slowly began to recover from his illness, and on July
2, First Lady Dolly Madison wrote that the President’s fever had subsided
and he was improving. On July 7 it was announced that the President had
resumed the most urgent public business, meeting with a Senate committee
a week later. Madison spent time in his Montpelier home in August where
his health continued to improve, and when he returned to Washington in
October of 1813, it was clear his recovery was complete.

2. Tyler Precedent

What became known as the “Tyler Precedent” concerned the question of
whether a succeeding Vice President ascended to the Office of the President
itself, or merely assumed the powers and duties of the Office upon the
President’s death. On April 4, 1841, President William Henry Harrison,
then the oldest President at inauguration, died of pneumonia. When news
reached Vice President John Tyler, he immediately headed to Washington
where he took the presidential oath of office. Tyler made clear his belief
that he ascended to the Office of the President itself and was not merely
acting as President.

64. A Question for Congress, Governor Jackson, of West Virginia, on Presidential
Disability., Views of Ex-Senator Trumbull, Other Opinions as to a Remedy for the Existing
Situation, N.Y. HERALD, Sept. 9, 1881, at 8.
65. Part III.B is adapted from chapters one and four of JOHN D. FEERICK, THE TWENTY-
66. French Minister Louis Serurier wrote on June 21:
The thought of [Madison’s] possible loss strikes everybody with consternation.
It is certainly true that his death in the circumstances in which the Republic is
placed, would be a veritable national calamity. The President who would succeed
him for three and a half years is a respectable old man, but weak and worn out. All
good Americans pray for the recovery of Mr. Madison.
Id. at 4.
Tyler’s ascendency to the “Office” of the President was not without dispute, and leaders of the Whig Party referred to him simply as the “Acting President.” John Quincy Adams, a former President of the United States and at the time of the Tyler Precedent a member of the House of Representatives, noted in his diary: “[Tyler’s assumption of the Office of the President] is a construction in direct violation both of the grammar and context of the Constitution, which confers upon the Vice-President, on the decease of the President, not the office, but the powers and duties of the said office.”\textsuperscript{67}

Upon the convening of the special session of the Twenty-Seventh Congress on May 31, 1841, Tyler’s assumption of the Presidency came under attack. When Virginia Representative Henry A. Wise introduced a resolution calling for the formation of a committee “to wait on the President of the United States,” New York Representative John McKeon moved to strike “President” and replace it with “Vice-President, now exercising the office of the President.”\textsuperscript{68} Representative McKeon further stated that “a grave constitutional question” had been presented, and this question should be set “at rest for all future time.” However, the House of Representatives rejected McKeon’s suggestion and passed the Wise resolution.

The Tyler Precedent was formalized upon the ratification of the Twenty-Fifth Amendment, which makes clear that upon a President’s death, removal, or resignation, the Vice President succeeds to the Office of the President.\textsuperscript{69}

3. Garfield’s Inability

On July 2, 1881, the nation was faced with its first prolonged case of presidential inability when President Garfield was shot by an assassin and wavered between life and death for the next eighty days.

During this period, the President’s visitors were restricted to family and physicians, with only occasional visits from members of his Cabinet. During President Garfield’s inability period, his doctors determined he needed rest to have any chance at recovery and prevented him from discharging his powers and duties. His only official act during this time was the signing of an extradition paper on August 10. The Cabinet tried to keep the wheels of government turning, but there was much the members could not do, such as handling foreign affairs.

In late August, Secretary of State James Blaine prepared a paper on presidential inability, arguing that since the Constitution contained no directions for replacing a disabled President, Vice President Arthur should be called to Washington to take over the Presidency. Only a few members of the Cabinet agreed, with a majority of the view that under the Tyler Precedent, any succession by Vice President Arthur would be to the Office

\textsuperscript{67} 10 MEMOIRS OF JOHN QUINCY ADAMS: COMPRISING PORTIONS OF HIS DIARY FROM 1795–1848, at 463–64 (Charles Francis Adams ed., 1876).
\textsuperscript{68} FEERICK, supra note 65, at 6.
\textsuperscript{69} U.S. CONST. amend. XXV, § 1.
of the President for the remainder of the term. Arthur, however, fearful of being labeled a usurper, made it clear that he would not assume presidential responsibility.

Following President Garfield’s death on September 19, 1881, the debate over the meaning of the Succession Clause continued in the press, legal journals, and Congress. When Vice President Arthur succeeded to the Presidency, there was no Vice President, no President pro tempore of the Senate, and no Speaker of the House of Representatives—in short, no constitutional successor to the Presidency. Newly-elevated President Arthur recognized this problem, and in several messages to Congress, he expressed concern over the ambiguities of the succession provision.70

4. Wilson’s Inability

On October 2, 1919, President Wilson suffered a stroke that paralyzed the left side of his body. The President’s close friend and physician, Dr. Cary Grayson, released a bulletin stating, “The President is a very sick man.” From that time until the inauguration of President Warren G. Harding on March 4, 1921, the country was without the services of an able President.

While President Wilson lay ill and unable to discharge the powers and duties of office, attempts were made to provide executive leadership. Secretary of State Robert Lansing suggested to the President’s secretary, Joseph Tumulty, that the Vice President be called upon to act as President. When Secretary Lansing suggested that either Dr. Grayson or Tumulty certify the President disabled, Tumulty declared, “You may rest assured that while Woodrow Wilson is lying in the White House on the broad of his back I will not be a party to ousting him.”71 In the days and weeks following President Wilson’s stroke, there were repeated demands for Vice President Thomas Marshall to act as President, but the confusion surrounding the succession provision, coupled with Vice President Marshall’s reluctance to appear as a usurper, prevented him from so acting.

70. President Chester A. Arthur wrote:
Is the inability limited in its nature to long-continued intellectual incapacity, or has it a broader import? What must be its extent and duration? How must its existence be established? Has the President whose inability is the subject of inquiry any voice in determining whether or not it exists, or is the decision of that momentous and delicate question confided to the Vice-President, or is it contemplated by the Constitution that Congress should provide by law precisely what should constitute inability and how and by what tribunal or authority it should be ascertained? If the inability proves to be temporary in its nature, and during its continuance the Vice-President lawfully exercises the functions of the Executive, by what tenure does he hold his office? Does he continue as President for the remainder of the four years’ term? Or would the elected President, if his inability should cease in the interval, be empowered to resume his office? And if, having such lawful authority, he should exercise it, would the Vice-President be thereupon empowered to resume his powers and duties as such?

FEERICK, supra note 65, at 10.

71. JOSEPH P. TUMULTY, WOODROW WILSON AS I KNOW HIM 443–44 (1921).
5. Eisenhower’s Inabilities

On September 24, 1955, President Eisenhower suffered a heart attack while vacationing in Colorado. That evening, Vice President Richard M. Nixon met with members of the Cabinet to discuss arrangements for operation of the executive branch during President Eisenhower’s recovery in Denver. It was decided that the Cabinet and White House should continue the administration of the government. The Cabinet agreed on the following procedure: First, on actions that Cabinet members would normally take without consulting either the Cabinet or the President, there would be no change from the normal. Second, on questions which would normally be brought before the Cabinet for discussion before any decision should continue to be discussed there. Third, decisions requiring consultation with the President should first go to the Cabinet or the National Security Council for thorough discussion and possible recommendation before going to President Eisenhower in Denver for his consideration. Although this system worked without incident, presidential assistant Sherman Adams noted that it left everyone “uncomfortably aware of the Constitution’s failure to provide for the direction of the government by an acting President when the President is temporarily disabled and unable to perform his functions.”

The question of inability was revived on two other occasions during the Eisenhower administration. On June 8, 1956, the President had an attack of ileitis and was taken to Walter Reed hospital. The following day, he underwent a two-hour operation for the removal of an obstruction of the small intestine, during which he was unconscious. The President was up and walking by June 10 and deemed “fully recovered” by August 27.

The other incident occurred on November 25, 1957, when the President suffered a stroke affecting his ability to speak. The next day, members of his staff met to discuss President Eisenhower’s condition. However, medical bulletins indicated that his health had improved, and by December 2, the President was back at work in the White House.

As Congress pondered the inability problem, President Eisenhower became increasingly concerned about the recurrence of another case of inability. He therefore drafted and presented to Vice President Nixon an informal “letter agreement,” which offered an imaginative and practical approach to the inability problem. The agreement was released to the public and provided:

1. In the event of inability the President would—if possible—so inform the Vice President, and the Vice President would serve as Acting President, exercising the powers and duties of the office until the inability had ended.

2. In the event of an inability which would prevent the President from so communicating with the Vice President, the Vice President, after such consultation as seems to him appropriate under the circumstances, would

72. FEERICK, supra note 65, at 20 (internal citation omitted).
decide upon the devolution of the powers and duties of the Office and would serve as Acting President until the inability had ended.

(3) The President, in either event, would determine when the inability had ended and at that time would resume the full exercise of the powers and duties of the Office.73

Later, President Kennedy and Vice President Lyndon Baines Johnson, President Johnson and House Speaker John W. McCormack, and President Johnson and Vice President Hubert H. Humphrey, Jr. adopted similar understandings. However, these letter agreements did not have the force of law behind them and depended entirely on the good will of the incumbent President and Vice President. Nevertheless, they represented the first significant step toward solving the inability problem.

6. Kennedy’s Assassination

On November 22, 1963, the nation experienced one of its most shocking tragedies when President Kennedy was assassinated. Efforts made to save the President, though unsuccessful, underscored again the absence of procedures to account for the case in which a President might linger unconscious, either for days or for a more extended period of time.74 Succession beyond the Vice Presidency also came into focus as rumors circulated that Vice President Johnson had suffered a heart attack shortly after President Kennedy had been shot. Fortunately, there was no truth to these rumors, and the nation did not have to test the adequacy of succession beyond the Vice Presidency under the 1947 succession law.

III. THE TWENTY-FIFTH AMENDMENT

A. Ratification

The tragic death of President Kennedy revived the conversation on the need to solve the problems of presidential succession and inability. Following President Kennedy’s assassination, Vice President Johnson immediately succeeded to the Office of the President, leaving the Vice Presidency vacant.75 From November 22, 1963 until January 20, 1965, the United States had no Vice President.76 Further, the Speaker of the House of Representatives and the President pro tempore of the Senate, the successors to President Johnson under the succession statute, “were both aged and,

73. Id. at 55–56 (internal citation omitted).
74. James Reston of The New York Times noted that “[f]or an all too brief hour today, it was not clear again what would have happened if the young President, instead of being mortally wounded, had lingered for a long time between life and death, strong enough to survive but too weak to govern.” James Reston, Why America Weeps, N.Y. TIMES, Nov. 23, 1963, at 1.
even by their own admission, doubtful about their capacities to fill the Presidency, should that eventuality arise.” It became clear that providing another means for filling the vacancy, like allowing the President to choose a new Vice President, was necessary.

A number of congressional proposals addressing presidential inability and succession followed President Kennedy’s death. Senator Birch Bayh of Indiana, Chairman of the Senate Subcommittee on Constitutional Amendments, and several other senators proposed a constitutional amendment, Senate Joint Resolution 139, “containing provisions on inability, filling a vice presidential vacancy, and succession beyond the vice presidency.” President Johnson informed the Senate that he unqualifiedly endorsed the proposed amendment.

In conjunction with Senator Bayh’s proposal, the American Bar Association (ABA) formed a conference of twelve lawyers to examine the problems and offer recommendations. At this two-day conference it was decided that agreements between the President and Vice President, such as that between Eisenhower and Nixon, provided only a partial solution to the inability problem. The ABA conference proceeded to recommend that an amendment to the Constitution should be adopted to permanently resolve the problems arising in the event of the inability of the President.

The conference recommended that in the event of presidential inability, the powers and duties of the President, but not the Office, would devolve upon the Vice President, or person next in the line of succession, for the duration of the inability or until expiration of the President’s term. Further, it was suggested that “[t]he amendment should provide that the inability of the President may be established by declaration in writing of the President,” and “[i]n the event that the President does not make known his inability, it may be established by action of the Vice President or person next in line of succession with concurrence of a majority of the Cabinet . . . .”

The conference also considered the related question of presidential succession, agreeing that the “Constitution should be amended to provide that in the event of the death, resignation or removal of the President, the Vice President or the person next in the line of succession shall succeed to the office for the unexpired term,” because it “is highly desirable that the

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77. Id.
78. Id. at 10.
79. FEERICK, supra note 65, at 59.
81. The following discussion of the ABA conference and the ratification of the Twenty-Fifth Amendment is adapted from chapters five and six of FEERICK, supra note 65. For a detailed description of the work of the ABA conference, see FEERICK, supra note 23, at 246–54; see also John D. Feerick, Presidential Inability: The Problem and a Solution, 50 A.B.A. J. 321, 323–24 (1964); James C. Kirby, Jr., A Breakthrough on Presidential Inability: The ABA Conference Consensus, 17 VAND. L. REV. 463, 475–78 (1964).
82. FEERICK, supra note 65, at 60 (internal citation omitted).
83. Id. (internal citation omitted).
84. Id. (internal citation omitted).
office of the Vice President be filled at all times.” The ABA endorsed the conference consensus on February 17, 1964, and it was formally presented to the Subcommittee on Congressional Amendments on February 24.

At the hearings of the Subcommittee on Constitutional Amendments in 1964, a majority of the witnesses expressed support for the inability provisions proposed by the ABA. As a national consensus on the inability problem gradually began to take shape along the lines of the ABA approach, widespread agreement arose at the hearings on the need for having a Vice President at all times. The Vice President would provide for an orderly transfer of executive authority in the event of the death of a President.

While there was general agreement regarding the need for a Vice President, the measures and recommendations presented to Senator Bayh’s Subcommittee differed on the means of filling such a vacancy. Eventually it was decided that whenever there is a vacancy in the Vice Presidency, the President would nominate a Vice President, who would take office after confirmation by both houses of Congress.

As Congress debated the proposed amendment, many of the ABA’s recommendations were adopted, while others were amended or eliminated from the final legislation. For example, the recommendation that the Vice President, or person next in the line of succession, with concurrence of a majority of the Cabinet (or other body provided for by Congress), would establish presidential inability was not fully adopted in the final legislation. The final version of the Amendment provides only for the Vice President to declare the President disabled with concurrence by the Cabinet (or other body provided by Congress), remaining silent on the ability of the person next in line to do so, as suggested by the ABA proposal.

After numerous Congressional hearings, the final version of the Twenty-Fifth Amendment passed the House and the Senate in 1965, was ratified by the necessary state legislatures on February 10, 1967, and was formally proclaimed the Twenty-Fifth Amendment to the Constitution at a White House ceremony held on February 23, 1967.

B. An Analysis of the Twenty-Fifth Amendment

The Twenty-Fifth Amendment of the Constitution establishes procedures for filling a vacancy in the Office of the Vice President and for responding to presidential disabilities. There are four sections of the Amendment, each providing different procedures depending on the specific circumstance.

Section 1 provides, “In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.”

85. Id. at 61 (internal citation omitted).
86. Proposals for filling a vice presidential vacancy included presidential nomination, congressional selection, the election of two Vice Presidents every four years, the reconvening of the last electoral college to select a new Vice President, and a new election.
87. See U.S. Const. amend. XXV, § 2.
88. See id. § 4.
89. Id. § 1.
This Section formalizes the precedent set when Vice President Tyler claimed the title of “President” after the death of President Harrison.

Section 2 provides, “Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.” The use of “whenever” and “shall” clarifies that the President must nominate a person for Vice President in the event of a vacancy. The history of Section 2 manifests the intention that there be both a President and a Vice President at all times, and whenever a vacancy occurs in the office of the Vice President, both the President and Congress must act with “reasonable dispatch” to fill it. Thus, Section 2 reflects the increased significance and role the Vice President plays in the government.

Section 3 provides:

Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

This section affords the President discretion in declaring his own inability and makes clear that in such a case, the Vice President is to discharge the powers and duties of the Presidency. In a disability situation under Section 3, the Vice President does not assume the Office or title of “President.”

Section 4 of the Amendment provides a mechanism for the Vice President and a majority of either the “principal officers of the executive departments or of such other body as Congress may by law provide” to declare the President unable to discharge the powers and duties of his office, in the event the President does not do so himself. This section covers the most difficult cases of inability—when the President cannot or refuses to declare his own inability.

The terms “unable” and “inability” are undefined in either Section 3 or 4 of the Amendment, not as the result of an oversight, but rather “a judgment that a rigid constitutional definition was undesirable, since cases of inability could take various forms not neatly fitting into such a definition.”

90. Id. § 2.
93. U.S. CONST. amend. XXV, § 3.
94. Id. § 4.
95. FEERICK, supra note 65, at 197.
Circumstances commonly thought to fall under these Sections include cases of mental inability, as well as situations where the President might be kidnapped or captured, under an oxygen tent at a time of enemy attack, or bereft of speech or sight.\textsuperscript{96} The debates of 1964 and 1965 made clear that unpopularity, incompetence, impeachable conduct, poor judgment, and laziness do not constitute an “inability” within the meaning of the Amendment.\textsuperscript{97}

\textbf{C. History Post-Ratification}

\textbf{1. Reagan’s Assassination Attempt}

On March 30, 1981, John W. Hinkley, Jr. shot President Ronald Reagan as he exited the Washington Hilton Hotel after delivering a speech.\textsuperscript{98} At first it was unclear whether President Reagan had been struck by one of the bullets in his left side, or if he had instead only broken a rib when Secret Service agents shoved him into his limousine after hearing the shots fired.\textsuperscript{99} In fact, a bullet had bounced off the President’s limousine and hit the President.\textsuperscript{100} The bullet, a “Devastator” bullet designed to explode on impact, never exploded.\textsuperscript{101} The prognosis the doctors gave for President Reagan’s recovery was incredibly positive, and because the bullet had not struck the heart, Dr. Dennis O’Leary, a spokesperson for the George Washington Hospital where Reagan was treated, said the President “was never in any serious danger.”\textsuperscript{102}

As the President underwent surgery to remove the bullet, events at the White House took on historical significance.\textsuperscript{103} When President Reagan was shot, Vice President George H.W. Bush was en route from Fort Worth to Austin, Texas, for a speech.\textsuperscript{104} Upon hearing the news, Vice President Bush headed back to Washington, D.C. immediately.\textsuperscript{105} There, members of the Cabinet and staff gathered in the White House Situation Room.\textsuperscript{106} President Reagan’s Secretary of State, Alexander M. Haig, Jr., noted in his memoirs that the officials handling the crisis were “an ad hoc group; no

\textsuperscript{96} Id. at 198.
\textsuperscript{97} See 111 CONG. REC. 3282–83 (1965) (statement of Senator Birch Bayh) (explaining that the Amendment does not cover a decision that might render the President unpopular but rather situations where the President is unable to perform the powers and duties of his office); see also Presidential Inability and Vacancies in the Office of the Vice President: Hearing on S.J. Res. 13 et al. Before the Subcomm. on Constitutional Amendments of the S. Comm. on the Judiciary, 88th Cong. 25 (1964).
\textsuperscript{99} See id. at 54–56.
\textsuperscript{100} Id. at 54.
\textsuperscript{102} FEERICK, supra note 65, at xi.
\textsuperscript{103} Id.
\textsuperscript{104} Id.
\textsuperscript{105} Id.
\textsuperscript{106} Id.
plan existed, we possessed no list of guidelines, no chart that established rank or function. Our work was a matter of calling on experience and exercising judgment.”

Less than two hours after the shooting, Deputy Press Secretary Larry Speakes held a press briefing where he was unable to answer many questions about the President’s status and about the administration’s crisis management plan.108 When asked, “Is the President in surgery?,” Speakes replied, “I can’t say.”109 When asked, “Who’s running the government right now?,” he responded, “I cannot answer that question at this time.”110 Finally, when asked, “[W]ho’ll be determining the status of the President and whether the Vice President should, in fact, become the acting President?,” he replied, “I don’t know the details on that.”111 A concerned Secretary Haig dashed from the Situation Room to the White House press room where he infamously declared, “I am in control here” to the question, “Who is making the decisions for the government right now?”112

The Reagan administration did not invoke the Twenty-Fifth Amendment during the crisis surrounding the attempted assassination of the President. Accounts vary, but “it seems clear that the issue was resolved by a handful of officials without the kind of formal action by the Cabinet and Vice President that the Amendment contemplated” under Section 4.113

Fred F. Fielding, White House Counsel for President Reagan at the time, described in detail his eyewitness account of these events at the Fordham Law Review’s April 2010 symposium:

“Upon word of the shooting and that the President had actually been hit, I called the National Security Adviser and we started to assemble people in the Situation Room, which is, of course, the secure facility within the White House complex. . . .

The group that gathered in the Situation Room that day consisted of ten or more individuals, people leaving and coming at various points. It wasn’t a full Cabinet meeting, but rather an ad hoc assembly of people. . . .

. . . .

The scene in the Situation Room, if I could try to describe it, was obviously apprehensive, but it wasn’t harried or frantic. Again, go back

108. FEERICK, supra note 65, at xii.
109. HAIG, Jr., supra note 107, at 158.
110. Id. at 159.
111. Id.
112. Id. at 160. The full text of Secretary Alexander M. Haig, Jr.’s response is:

Constitutionally, gentlemen, you have the President, the Vice President, and the Secretary of State, in that order, and should the President decide he wants to transfer the helm, he will do so. He has not done that. As of now, I am in control here, in the White House, pending return of the Vice President and in close touch with him. If something came up, I would check with him, of course.

Id.
113. FEERICK, supra note 65, at xiii.
to context. The people that were in the room were professionals. The Cabinet had only recently been assembled. These were people that had come from different backgrounds. Some people came from the President’s California retinue and his governor’s team. Others were former Nixon Administration officials. Some were brand new to the whole thing. In all fairness, this was a roomful of strangers who really operated fairly well together under these circumstances.

While no one approached me or the Attorney General with any requests for papers sufficient to exercise Section 3 or 4 of the Twenty-Fifth Amendment during the time I was there, I had earlier prepared such papers. I had them with me in draft, for both Section 3 and Section 4 coverage.

... As we all know, the Twenty-Fifth Amendment was not invoked on March 30. I have read that during that tense afternoon the draft Sections 3 and 4 letters were pulled from my hands and sealed in a safe. It’s not so. But think how silly that sounds. It wasn’t a great secret that the Twenty-Fifth Amendment was in play, if you will. To say that suddenly things were pulled and put in a safe sounds very silly.

It is true that we were informed that the bullet had been removed from the President’s lung after surgery, and an hour later, we were informed that doctors were very confident of a full recovery. That news quelled any further thoughts or discussion about invoking the Twenty-Fifth Amendment until the Vice President returned. He was en route back. Of course, once he got back, he met with us, in an expanded group in the Situation Room. The group of us—the Attorney General, I, the Chief of Staff, and Secretary [of Defense] Weinberger, but not the Secretary of State, went into the Vice President’s office. There we discussed whether Section 4 should be invoked, at that point. The decision was made that it should not be. The next morning the President was alert. He was joking, writing notes to people. He met and conducted some very minor official tasks, with the cameras being there to show that the President was working. The Vice President met with the senior staff and oversaw routine business.

Some have contended that the Twenty-Fifth Amendment should still have been under consideration in the course of the ensuing days. The President recovered gradually and underwent additional procedures. People presumably were talking about Section 4, or a prompting by the President to engage in Section 3. But if the amendment hadn’t been triggered on the day of the shooting, hadn’t been triggered that evening, it certainly was not going to be willingly engaged, absent a change in the President’s health, by the mere virtue of his understandably reduced schedule. The world had been told he was recovering, and, thankfully, that’s what turned out to be the case.114

2. Reagan’s Cancer Surgery

The Twenty-Fifth Amendment was implicated for a second time during the Reagan Administration on July 12, 1985, when the President entered Bethesda Naval Hospital for a surgical procedure to remove a polyp from his colon.115 Before undergoing anesthesia, President Reagan signed a document addressed to the Speaker of the House of Representatives and the President pro tempore of the Senate transferring power to Vice President Bush as Acting President, while also disclaiming any formal use of the Twenty-Fifth Amendment.116 The document read, in relevant part:

After consultation with my counsel and the Attorney General, I am mindful of the provisions of Section 3 of the 25th Amendment to the Constitution and of the uncertainties of its application to such brief and temporary periods of incapacity. I do not believe that the drafter of this amendment intended its application to situations such as the instant one.

Nevertheless, consistent with my longstanding arrangement with Vice President George Bush, and not intending to set a precedent binding anyone privileged to hold the office in the future, I have determined and it is my intention and direction, that Vice President George Bush shall discharge those powers and duties in my stead commencing with the administration of anesthesia to me in this instance.117

Five hours after surgery, Fielding and Chief of Staff Donald Regan informally tested President Reagan to determine his readiness to resume the Presidency by handing him a two-sentence letter addressed to the congressional leaders.118 The letter read:

Following up on my letter to you of this date, please be advised I am able to resume the discharge of the constitutional powers and duties of the office of the President of the United States. I have informed the Vice President of my determination and my resumption of those powers and duties.119

Upon receiving this letter from Fielding and Regan, Reagan quickly replied, “Gimme a pen” and signed the letter.120

Although President Reagan’s initial letter disclaimed any use of the Twenty-Fifth Amendment, he followed all the guidelines and procedures specified in Section 3.121 Further, no constitutional provision except the

115. FEERICK, supra note 65, at xv.
116. Id.
117. Texts of Reagan’s Letters, N.Y. TIMES, July 14, 1985, at 20; see also 131 CONG. REC. 19,008–09 (1985) (containing the text of President Reagan’s letter to Hon. Strom Thurmond, President pro tempore of the Senate).
118. FEERICK, supra note 65, at xv–xvi.
119. Texts of Reagan’s Letters, N.Y. TIMES, July 14, 1985, at 20; see also 131 CONG. REC. 19,009 (1985) (containing the text of President Reagan’s letter to Hon. Strom Thurmond, President pro tempore of the Senate).
120. FEERICK, supra note 65, at xvi.
121. Section 3 of the Amendment states:
Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to


Twenty-Fifth Amendment would have allowed President Reagan to designate the Vice President as the Acting President. President Reagan’s disclaimer was likely made for two reasons: “fear of the reaction of the country and the world to a ‘President’ who admitted to being disabled, and concern that admitting to the Amendment’s invocation would set a harmful precedent for the presidency.”

President Reagan’s later account of the event even mentioned invoking the Amendment:

Before they wheeled me into the operating room, I signed a letter invoking the Twenty-fifth Amendment, making George Bush acting president during the time I was incapacitated under anesthesia. They gave me a shot of Pentathol and I awoke several hours later feeling groggy and confused.

Later, when I was fully alert, I signed a letter reclaiming the presidency from George. . .

Nancy Reagan’s account mirrored that of the President:

The operation began at eleven o’clock that Saturday morning. Half an hour earlier, Ronnie had signed the papers authorizing George Bush to be acting president for the next eight hours. This was the first time the provisions of the Twenty-fifth Amendment had ever been put into effect. . . Fred Fielding, the White House counsel, came in with the documents, which were then delivered to Speaker Tip O’Neill, and to Strom Thurmond, president pro tempore of the Senate.

3. Appointment of Gerald Ford as Vice President

Section 2 of the Twenty-Fifth Amendment was first invoked in 1973, following Spiro T. Agnew’s resignation as Vice President on October 10. Two days later, President Richard M. Nixon nominated Representative Gerald R. Ford of Michigan to replace Agnew.

At Fordham Law Review’s presidential succession symposium, Benton Becker, counsel to Ford during his vice presidential confirmation hearings, discussed the incredible scope of the vetting process. Becker noted that the inquiry into Ford’s life was “far far more detailed, because there were many people in Washington in September of 1973 who believed that this nominee them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

U.S. CONST. amend. XXV, § 3.
122. FEERICK, supra note 65, at xvi.
123. Id.
was going to be President, one way or another. Sooner or later, Richard Nixon was going to resign or be impeached.”

The background check into Ford included an immediate designation of seventy-two FBI agents working full-time on the matter. In fact, it was so extensive that it even included questioning a halfback from Ohio State University who had played college football against Ford, who was asked to give details of an unnecessary roughness penalty called against the future President.

The United States Senate voted 92–3 to confirm Ford on November 27, 1973, and the House of Representatives did the same, voting 387–35. Immediately following his confirmation as the Vice President, Ford was administered the vice presidential oath by Chief Justice Warren E. Burger before a joint meeting of the Congress held in the chamber of the House of Representatives.

4. Succession of Gerald Ford to the Presidency and Appointment of Nelson Rockefeller as Vice President

Section 1 of the Twenty-Fifth Amendment was first invoked on August 9, 1974, when President Nixon resigned from office, triggering Vice President Ford’s succession to the Office of the President for the rest of the term and leaving a vacancy in the Vice Presidency. On August 20, 1974, acting under Section 2 of the Twenty-Fifth Amendment, President Ford nominated former New York Governor Nelson A. Rockefeller to replace him, who was confirmed by Congress and sworn into office four months later.

5. George W. Bush’s Invocations

On both June 29, 2002, and July 21, 2007, President George W. Bush invoked Section 3 of the Twenty-Fifth Amendment when undergoing medical procedures requiring sedation, thereby temporarily transferring his powers and duties to Vice President Dick Cheney as the Acting

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129. Id.
132. Id.
133. For a detailed discussion on the resignation of President Richard M. Nixon, the succession of Ford to the Presidency, and the installation of Nelson A. Rockefeller as Vice President, see chapter ten of FEERICK, supra note 65.
President. In contrast to President Reagan’s letters, President Bush’s letters to congressional leaders specifically cited Section 3 of the Amendment, marking the first time this Section was invoked explicitly.

D. An Appraisal

The extraordinary occurrence of the resignations of an elected President and Vice President within the same four-year term (Nixon and Agnew) and their replacement by a President and a Vice President selected under Section 2 drew considerable attention to the Twenty-Fifth Amendment. At that time, Journalist James Reston wrote, “On the brief record of the 25th Amendment, it has served the nation well under extraordinary and unforeseen circumstances.”

When charges of criminal wrongdoing were leveled against Vice President Agnew, the option of resignation was viable partly because of the procedures of the Twenty-Fifth Amendment. Without it, it is possible that significant pressure against resignation would have developed because a resignation would have placed a member of the opposition party at the head of the line of succession. However, with the Amendment in place, the administration was able to consider whether a resignation was in the national interest without having to worry about a lack of party continuity in the executive branch should something happen to the President.


137. See, e.g., Letter from George W. Bush, President of the U.S., to President Pro Tempore of the U.S. Senate (June 29, 2002), available at http://georgewbush-whitehouse.archives.gov/news/releases/2002/06/20020629-4.html (“[I]n accordance with the provisions of Section 3 of the Twenty-Fifth Amendment to the United States Constitution, this letter shall constitute my written declaration that I am unable to discharge the Constitutional powers and duties of the office of President of the United States.”) (emphasis added).

138. Part IV.D is adapted from chapter thirteen of Feerick, supra note 65.

The Amendment also assisted the country during the difficult impeachment proceedings against President Nixon. Since the Amendment had operated to replace a Republican Vice President with a Vice President from the same party, Congress was able to conduct the impeachment in the months that followed with the knowledge that it could not be charged with attempting to turn over control of the executive to the Democrats by installing the House Speaker as President. Because of the Amendment, President Nixon was able to resign in 1974 without having to surrender his party’s control of the White House.

At the 1975 review hearings on the Twenty-Fifth Amendment before the Senate Subcommittee on Constitutional Amendments, New Jersey Representative Peter Rodino discussed the Amendment:

I think it is unquestionable that without section 2 of the 25th amendment, this Nation might not have endured nearly so well the ordeal of its recent constitutional crisis.

... Had there been no amendment, not only would the Nixon and Agnew resignations still have left the Nation without a nationally elected executive, but the uncertainty and partisan divisions which would have been inherent in the operation of the succession statutes might have threatened the very constitutional process which ultimately preserved our institutions. Or, barring that, they might have rendered any “new administration” wholly unable to govern.140

Invocations of Section 3, occurring twice under President George W. Bush, proceeded smoothly and without confusion or delay, providing for a continuous operation of the executive branch with the President temporarily sedated. Section 4 of the Amendment, perhaps the strongest test the inability provisions might face, has yet to be tested.

IV. A BRIEF HISTORY OF VICE PRESIDENTIAL VACANCIES

The Twenty-Fifth Amendment has been effective in promoting stability in the government; however, troubling scenarios are still imaginable, in particular if a succession event were to occur with the Vice Presidency vacant. As our history indicates, such a circumstance is not uncommon.

The first vacancy in the Vice Presidency occurred in 1812 upon the death of George Clinton.141 Since that time, six other Vice Presidents have died in office: Elbridge Gerry (1814), William R. King (1853), Henry Wilson (1875), Thomas A. Hendricks (1885), Garrett A. Hobart (1899), and James...

140. Examination of the First Implementation of Section Two of the Twenty-Fifth Amendment: Hearing on S.J. Res. 26 Before the Subcomm. on Constitutional Amendments of the S. Comm. on the Judiciary, 94th Cong. 34–35 (1975) [hereinafter 1975 Senate Hearing]. For a detailed appraisal of the Twenty-Fifth Amendment, see Feerick, supra note 65, at 213–30.

141. Feerick, supra note 23, app. A.II.
S. Sherman (1912). In addition, there have been several other instances when the Office has been vacant:

1832–33: Vice President John C. Calhoun resigned from office
1841–45: Vice President John Tyler became President upon the death of President William Henry Harrison
1850–53: Vice President Millard Fillmore became President upon the death of President Zachary Taylor
1865–69: Vice President Andrew Johnson became President upon the death of President Abraham Lincoln
1881–85: Vice President Chester A. Arthur became President upon the death of President James Garfield
1901–05: Vice President Theodore Roosevelt became President upon the death of President William McKinley, Jr.
1923–25: Vice President Calvin Coolidge became President upon the death of President Warren G. Harding
1945–49: Vice President Harry S. Truman became President upon the death of President Franklin D. Roosevelt
1963–65: Vice President Lyndon B. Johnson became President upon the death of President John F. Kennedy
1973: Vice President Spiro Agnew resigned from office
1974: Vice President Gerald Ford became President upon the resignation of President Richard Nixon

Potential gaps in current succession law are mainly attributable to scenarios where there is no functioning Vice President.

V. GAPS IN THE CURRENT SUCCESSION LAW

The Twenty-Fifth Amendment provides valuable safeguards for ensuring continuity of government by requiring the President to nominate a Vice President in the event of a vacancy as well as providing procedures for responding to disabilities. However, the Amendment does not provide for every possible disability scenario, leaving certain succession contingencies unaddressed. In addition, the Twenty-Fifth Amendment does not address

142. Id.
143. Id. apps. A.I, A.II.
144. Gerald Ford filled this vacancy under Section 2 of the Twenty-Fifth Amendment. See supra Part IV.C.3.
145. Nelson Rockefeller filled this vacancy under Section 2 of the Twenty-Fifth Amendment. See supra Part IV.C.4.
146. See infra Part VI.
147. The drafters of the Twenty-Fifth Amendment intentionally declined to provide for every conceivable succession contingency that could arise, primarily to ensure that the Amendment would pass both houses of Congress and be ratified by the necessary three-fourths of the state legislatures. It was believed at the time that an amendment providing for every possible contingency would be too complex and therefore unlikely to survive the difficult ratification process. Included were solutions to the problems identified by history.
Election Day scenarios relevant to the succession discussion. 148 Professor Akhil Reed Amar has written several articles detailing gaps in current succession law. 149

Most potential problems result from the Twenty-Fifth Amendment’s emphasis on presidential, not vice presidential, succession. If the Vice President suffers an inability, current law offers no framework for determining that he is disabled. Further, if the Vice Presidency is vacant, or if the Vice President is disabled, the Section 4 procedures used to declare the President disabled are unavailable. Section 4 requires that the “Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide” must declare the President disabled in the event the President does not do so himself. 150 Succession events occurring absent a functioning Vice President could create difficult scenarios, as outlined in Professor Amar’s articles and explained below. 151

A. Vice Presidential Disability Followed by Presidential Death

In this example, the Vice President is disabled before the President dies. 152 Under current law, the disabled Vice President would become the new President. 153 After succession, no statutory or constitutional provision provides a mechanism by which to declare the new President disabled if he is unable to do so himself. 154 Under Section 4, the Vice President and the Cabinet, together, trigger the inability determination in the event the President fails to do so voluntarily under Section 3. 155 After the disabled Vice President automatically succeeds to the Presidency under Section 1, it is impossible to declare him disabled under the Twenty-Fifth Amendment because there is no Vice President to trigger the Amendment.

B. Concurrent Vice Presidential and Presidential Disability

In this example, the Vice President is comatose, and the President becomes disabled, but does not die, as the result of either a terrorist attack

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See supra notes 1, 95–97 and accompanying text; infra note 166 and accompanying text; see also supra Part IV.A.

148. For example, under current law the result is unclear if a presidential candidate were to die or become disabled either on the eve of Election Day, or after Election Day but before the Electoral College meets, or after it meets and before Congress declares the electoral votes. See John D. Feerick, The Electoral College—Why It Ought to Be Abolished, 37 FORDHAM L. REV. 1, 23–24 (1968); see also Akhil Reed Amar, Applications and Implications of the Twenty-Fifth Amendment, 47 HOUS. L. REV. 1, 7–12 (2010).

149. See, e.g., Amar, supra note 148; Akhil Reed Amar & Vikram David Amar, Constitutional Accidents Waiting to Happen—Again: How We Can Address Tragedies Such as Political Assassinations and Electoral Terrorism, FINDLAW (Sept. 6, 2002), http://writ.lp.findlaw.com/amar/20020906.html.


151. See, e.g., Amar, supra note 148, at 21–23; Amar & Amar, supra note 149.

152. Amar & Amar, supra note 149.


154. Amar & Amar, supra note 149.

155. Id.
or natural causes.\textsuperscript{156} Again, current law requires that, unless the President voluntarily steps down under Section 3, the Vice President and the Cabinet together determine presidential disability under Section 4 of the Twenty-Fifth Amendment. Therefore, if the Vice President himself is disabled and unable to initiate Section 4, the provisions of the Twenty-Fifth Amendment "freeze[] up, and there is no clearly established legal framework for determining presidential disability."\textsuperscript{157}

\textbf{C. Disabled President Followed by Disabled Acting President}

Suppose a President becomes disabled and a fit Vice President assumes the role of Acting President, under either Section 3 or Section 4 of the Twenty-Fifth Amendment.\textsuperscript{158} Then, if the Acting President later becomes disabled, there is no Vice President in place to initiate the disability determination process.\textsuperscript{159}

\textbf{D. Vice Presidential Vacancy Scenarios}

If the Vice President has died and has yet to be replaced under Section 2 of the Twenty-Fifth Amendment, or if the President has died and the former Vice President becomes President but has yet to install a new Vice President, there is once again no Vice President in either case to trigger the Twenty-Fifth Amendment disability determination process in the event the President is disabled.\textsuperscript{160}

\textbf{E. A Response}

Professor Amar is certainly correct in his assertion that the Twenty-Fifth Amendment does not address every conceivable succession contingency. However, as previously noted, the drafters of the Amendment declined to provide for every such contingency to ensure that the Amendment would pass both houses of Congress and proceed to ratification by the necessary three-fourths of state legislatures. It was believed at the time that an amendment providing for every possible scenario would be too complex and therefore unlikely to survive the difficult congressional and state ratification processes and that a perfect solution would probably never be found.\textsuperscript{161}

Professor Amar is also correct in his observation that these continuity gaps result mainly from situations in which the nation lacks a functioning Vice President. The Amendment’s drafters understood this problem, and Section 2 of the Twenty-Fifth Amendment reflects the idea that the country should have a Vice President at all times. However, the confirmation

\begin{itemize}
  \item \textsuperscript{156} \textit{Id}.
  \item \textsuperscript{157} \textit{Id}.
  \item \textsuperscript{158} \textit{Id}.
  \item \textsuperscript{159} \textit{Id}.
  \item \textsuperscript{160} \textit{Id}.
  \item \textsuperscript{161} \textit{See supra} notes 1, 95–97 and accompanying text; infra note 166 and accompanying text; \textit{see also supra} Part IV.A.
\end{itemize}
process required to fill a vice presidential vacancy takes time, and during this process there will inevitably be a period where the office is indeed vacant. For example, Congress took two months to confirm Vice President Ford, nominated by President Nixon after the resignation of Vice President Agnew. Following Nixon’s resignation, Congress took four months to confirm President Ford’s vice presidential nominee, Nelson Rockefeller, under Section 2 of the Amendment.

To shorten the length of any vice presidential vacancy, the ABA recommended in 1974 the use of joint hearings by both houses of Congress to fill a vacancy under Section 2. This recommendation was an attempt to ensure that any vacancy in the Vice Presidency would be short lived and reflected the ABA’s opinion that it is critical that the nation have a Vice President at all times.

VI. ADDRESSING THESE GAPS: A VACANT VICE PRESIDENCY OR DISABLED OCCUPANT

The Twenty-Fifth Amendment did no more than (i) address serious issues of presidential inability created by the wording and implementation of the original succession provision and (ii) add a method for filling a vacancy in the Vice Presidency. The framers of the Amendment considered, but ultimately chose not to address, a number of additional succession areas—the likes of which continue to be the subject of lively debate among distinguished scholars. These include such subjects as how to determine either a President’s inability in the absence of an able Vice President or a Vice President’s inability in general. As Lewis Powell, then President of the ABA, testified before the House Judiciary Committee in 1965: “It is not necessary . . . that we find a solution which is free from all reasonable objection. It is unlikely that such a solution will ever be found, as the problems are inherently complex and difficult.”

Assuming a vacancy in the Vice Presidency at a time of presidential inability, I suggest that the President should not be impeded in turning over

162. See supra notes 127, 130–32 and accompanying text.
163. See supra notes 133–35 and accompanying text.
166. 1965 House Hearing, supra note 91, at 225. The American Bar Association working group did, however, advance in its recommendations that in the event of a vacancy in the Vice Presidency, the person next in line of succession should act with the Cabinet in considering the inability of a President under Section 4 of the Amendment. This recommendation did not work its way into the Amendment. As written, the inability provisions of the Amendment are not available when there is no Vice President. See supra Part IV.A.
his powers and duties to the person next in line of succession, since it is
clear from Article II that such an Officer only serves for the period of the
inability. But with a legislative line of succession, it is hard to believe, but
certainly possible, that a President of one political party would voluntarily
turn over his powers and duties to a Speaker or President pro tempore of the
other major party.167 The more troublesome case occurs if the President
refuses to step aside voluntarily when a substantial issue exists as to his
inability. The procedures of Section 4, requiring a Vice President, are not
available here.

The question then arises as to the role of the person next in line of
succession, since the law contemplates his service as Acting President when
the President is disabled, failing a Vice President.168 It may be argued that
the person who has the statutory duty to serve as President has the
discretion to make the decision whether the circumstances justify his
exercise of the powers of the Office of President. This officer acts under
Congress’ Article II power to establish a line of succession for the “Case of
Removal, Death, Resignation or Inability, both of the President and Vice
President,” until the removal of the disability or the election of a new
President.169 The Twenty-Fifth Amendment did not change this power,
except that by establishing a procedure for filling a vacancy in the Vice
Presidency, it limited the circumstances under which the succession statute
might be used.170

The suggestion I advance as to the powers and duties of the potential
successor is in line with the well-established legal principle concerning
contingent grants of power. Indeed, this principle undergirded the adoption

167. This very issue was the subject of at least two episodes of the television program
“The West Wing.” See The West Wing: The Dogs of War (NBC television broadcast Oct. 1,
2003); The West Wing: 7A WF 83429 (NBC television broadcast Sept. 24, 2003).
as amended at 3 U.S.C. § 19 (2006)).
169. U.S. Const. art. II, § 1, cl. 6.
170. This subject was part of a telephone conversation I had, as a representative of the
ABA, with Representative Charles M. Mathias, another member of the House Judiciary
Committee, on April 9, 1965, concerning the relationship between the Vice Presidential
Vacancy provision of the Amendment and Congress’s power under Article II, which
prompted a follow up letter stating as follows:

As I indicated, I do not believe that there is any conflict between this provision
and that part of the succession provision now in the Constitution which gives
Congress the power to appoint a successor in the case where there is neither a
President nor Vice-President. The latter provision would remain intact should the
Judiciary Committee’s proposal pass the Congress. Section 2 is operative only
when there is a vacancy in Vice-President. The last part of Article II, Section 1,
clause 6, is operative only when there is a vacancy in both the presidency and vice-
presidency, in which case Congress can declare who shall act as president. Under
Section 2 of the proposal such person would have the power to fill the vacancy in
the vice-presidency. Since the Committee’s proposal does not deal with
simultaneous vacancies in the offices of President and Vice-President, there is no
need to include in the proposal the existing provision which gives Congress the
power to establish a line of succession.

Letter from John D. Feerick to Representative Charles Mathias, U.S. House of
by three presidential administrations of the four letter agreements between Presidents and Vice Presidents discussed earlier. Of course, the Twenty-Fifth Amendment superseded these agreements and limited the discretion of the Vice President by requiring concurrence in any disability decision by a majority of the Cabinet or “such other body as Congress may by law provide.” It did not address the role of the person next in the line of succession, however.

Without a Vice President, some of the procedures of the Twenty-Fifth Amendment are unavailable, opening the possibility of using the contingent grant of power theory as legal support for allowing the person next in the line of succession to declare a President’s disability. I recognize that if he acted alone, he would have a power greater than that of the Vice President in similar circumstances, leading to the question of whether Congress might be able to restrain that power by requiring consultation with and concurrence by the President’s Cabinet, as would have had to be done by the Vice President.

This question involves an analysis of the reach of the Article II power given to Congress to declare what Officer shall act as President in a case of death, removal, resignation, or inability. Does Article II enable Congress to provide guidance to the successor it designates for service as Acting President in an inability situation? Does the Necessary and Proper Clause of Article I, Section 8 offer additional help? It states that Congress may make “all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” It would be quite compatible with the Twenty-Fifth Amendment were Congress to legislate that the person next in line of succession must seek the concurrence of the Cabinet as well in a presidential inability scenario.

As to the application of the above proposal, how might it deal with an issue of double inability? The same process of allowing the next in line of succession to make the vice presidential determination could be appropriate as a necessary precondition to the decision of presidential inability in such a circumstance. The presidential successor would be Acting President after having resigned another office, as, for instance, the Speakership under the 1947 law. While these contingencies may appear remote, nonetheless the unforeseeable does occur, as in the 1970s when the country’s two highest officers resigned. These subjects are deserving of thorough examination by Congress, as Professor Amar and others have quite appropriately urged. A review of the law supporting the proposals advanced here follows.

171. See supra Part III.B.5.
173. Id. art. I, § 8, cl. 18.
A. Contingent Grants of Power

Martin v. Mott\(^{174}\) held that the grantee of a contingent power determines whether the contingency has arisen.\(^{175}\) Pursuant to statutory authority, President James Madison ordered several of the states to protect against the imminent danger of a British invasion during the War of 1812.\(^{176}\) In compliance with the President's directive, Governor Daniel D. Tompkins of New York ordered militia companies to assemble in New York City.\(^{177}\) Jacob Mott, a private in one of those companies, refused to obey the order, calling into question whether the President had the authority to judge and decide the existence of the exigency of an invasion.\(^{178}\)

The Supreme Court unanimously decided “that the authority to decide whether the exigency has arisen . . . belongs exclusively to the President, and that his decision is conclusive upon all other persons,” urging that “this construction necessarily results from the nature of the power itself, and from the manifest object contemplated by the act of Congress.”\(^{179}\) Writing for the Court, Justice Joseph Story explained that since the President had acted pursuant to a valid exercise of Congress's power, the President—in his role as Commander in Chief—had the sole authority to determine whether the exigency that necessitated his use of statutory authority actually existed.\(^{180}\)

The Court’s holding in Yamataya v. Fisher\(^{181}\) could be analogized to support the contention that under the current legal framework, where there

\(^{175}\) Id. at 31–32 (“Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction, that the statute constitutes him the sole and exclusive judge of the existence of those facts.”).
\(^{176}\) Id. at 20. President Madison acted pursuant to the Enforcement Act of 1795, which provided:

“That whenever the United States shall be invaded, or be in imminent danger of invasion . . . it shall be lawful for the President of the United States to call forth such number of the militia of the state, or states, most convenient to the place of danger, or scene of action, as he may judge necessary to repel such invasion, and to issue his orders for that purpose, to such officer or officers of the militia, as he shall think proper.”

Id. at 29 (quoting Militia Act of 1795, ch. 36, § 1, 1 Stat. 424).
\(^{177}\) Id. at 20.
\(^{178}\) Id. at 20–23, 28–29.
\(^{179}\) Id. at 30; see also J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 406 (1928) (“Congress has found it frequently necessary to use officers of the Executive Branch, within defined limits, to secure the exact effect intended by its acts of legislation, by vesting discretion in such officers to make public regulations interpreting a statute and directing the details of its execution . . . .”); Prideaux v. Frohmiller, 56 P.2d 628, 631 (Ariz. 1936) (“Whether an emergency or contingency exists authorizing the Governor to incur debts against the emergency fund under section 2620 is a question of fact, the ascertainment of which naturally devolves upon the Governor. The exercise of his discretion upon the facts should not be disturbed by the courts unless for a lack of power or an abuse of discretion.”); Scofield v. Perkerson, 46 Ga. 325, 343 (1872) (“Where a duty is imposed upon an officer to be performed upon the happening of a contingency, and no mode is pointed out whereby he is to be officially informed that the contingency has happened, it necessarily is a part of the duty required of him to ascertain the happening of the contingency for himself.”).
\(^{181}\) 189 U.S. 86 (1903).
is a succession event not provided for by the Twenty-Fifth Amendment, the next person in line of succession under the 1947 law would be the sole judge of disability, and his judgment would not be subject to judicial review. There, an immigration inspector ordered Yamataya deported under an immigration statute providing that aliens who are “paupers or persons likely to become a public charge” “shall be excluded from admission into the United States.” Yamataya contested her deportation order, contending she was deprived of her liberty without due process of law because she had not been given any notice or opportunity to be heard in the proceeding in which her right to liberty was tried.

The Court held that decisions of administrative or executive officers acting under their delegated powers constituted due process of law and were not subject to judicial review, stating where a “statute gives discretionary power to an officer . . . he is made the sole and exclusive judge of the existence of those facts, and no other tribunal, unless expressly authorized by law to do so, is at liberty to reexamine or controvert the sufficiency of the evidence on which he acted.”

Recent case law supports the same principles. Utah Ass’n of Counties v. Bush concerned the designation of 1.7 million acres of federal land as a national monument pursuant to the Antiquities Act of 1906. The Act gave the President the authority, “‘in his discretion,’ to establish as national monuments ‘objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States.’” The action against the President alleged that his designations violated the Act by not pertaining to “objects of scientific or historic value.” The Court noted that the plaintiffs sought an interpretation of the Act requiring the kind of extensive judicial review long foreclosed by precedent. The Court cited Martin for the principle that the grantee of a contingent power decides when the contingency has arisen, adding that “[a] grant of discretion to the President to make particular judgments forecloses judicial review of the substance of those judgments altogether.”

Article II’s Succession Clause, of course, does not explicitly grant the next in line a discretionary power to decide inability. However, as suggested by the case law, a person granted power in certain contingencies is implicitly given the discretionary power to decide whether or not the contingency has arisen. Further, as the 1947 Act mentions no person or

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182. For example, if there is an issue regarding the President’s inability and there is no functioning Vice President to initiate Section 4.
183. See id. at 98; see also infra note 192 and accompanying text.
185. Id. at 88–89.
186. Id. at 98.
188. Id. at 1176.
189. Id. at 1177–78 (quoting Antiquities Act of 1906, 16 U.S.C. § 431 (2006)).
190. Id. at 1185.
191. Id.
192. Id.
193. Silva, supra note 21, at 101; see also supra notes 174–80 and accompanying text.
entity, either explicitly or implicitly, other than the successor as holding the succession power, then in circumstances where procedures of the Twenty-Fifth Amendment are unavailable, the “officer” designated by law to act as President under the 1947 Act is granted the sole discretion to determine whether an inability exists.

B. The Ability of Congress To Legislate

The landmark decision of *McCulloch v. Maryland*194 analyzed the extent of Congress’ power under the Constitution’s Necessary and Proper Clause.195 There, the Court decided whether Congress had the power to charter a bank, and central to this issue was the Court’s interpretation of the Clause.196 The Court held that Congress could use the Necessary and Proper Clause to create a bank, even though the Constitution did not explicitly grant the power to Congress, reasoning that the word “necessary” does not refer to the only way of doing something, and does not mean “absolutely necessary,” but rather applies to various procedures for implementing all constitutionally established powers.197 Chief Justice John Marshall further explained, “The clause is placed among the powers of Congress, not among the limitations on those powers.”198 Later in *Kansas v. Colorado*,199 the Supreme Court was careful to note that the Clause “is not the delegation of a new and independent power, but simply provision for making effective the powers theretofore mentioned.”200

The Constitution provides that Congress has the power to declare what officer shall act as President in the event of a double vacancy or double disability.201 A federal statute providing for procedures to determine disability in the event of a double vacancy arguably would be within the scope of the power granted to Congress under this provision. Such a statute would be a necessary and proper means of exercising the power given to Congress under Article II to provide a line of succession in the case of a double vacancy or disability. It would not appear to grant a new and independent power to Congress, only a measure to ensure the legitimate end of providing for a successor beyond the Vice President in circumstances where additional process is deemed necessary as an effective use of the power.

195. Id. at 411–22.
196. Id. at 400–01.
197. Id. at 421 (“We admit . . . that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”).
198. Id. at 419.
199. 206 U.S. 46 (1907).
200. Id. at 88; see also Brownell, Jr., *supra* note 38, at 206.
201. U.S. Const. art. II, § 1, cl. 6.
Further support that Congress may have the ability to legislate beyond simply declaring who may act as President in the event of a double vacancy or inability can be found in the 1947 succession statute itself. The current succession statute does more than merely state a line of succession beyond the Vice President, additionally instructing that: (i) if a Cabinet member becomes Acting President, he only serves until a qualified and prior-entitled House Speaker or President pro tempore “bumps” him, becoming the new Acting President;202 (ii) either the House Speaker or President pro tempore must resign from his respective post before becoming Acting President;203 (iii) any officers under “impeachment by the House of Representatives at the time the powers and duties of the office of the President [would] devolve upon them” are ineligible to act as President.204 By providing these guidelines, the 1947 Act supports an expansive view of Congress’s power in double vacancy scenarios. Also to be noted is the provision of federal law requiring a presidential or vice presidential resignation to be in writing and filed with the Secretary of State.205

VII. BEYOND THE VICE PRESIDENCY: LEGISLATIVE OFFICERS IN THE LINE OF SUCCESSION AND SPECIAL ELECTIONS

One of the few certainties regarding the scope of Congress’s power in dealing with presidential succession is its ability to provide for cases of a double vacancy or inability, “declaring what Officer shall then act as President.”206 However, even this seemingly simple provision has not been free from controversy.

The current succession statute provides that the Speaker of the House and the President pro tempore of the Senate are in the line of succession following the Vice President.207 The designation of these legislative officers in the line has come under attack, both from legal and policy standpoints.

In my earlier writings I made suggestions with respect to the line of succession, expressing a preference for a Cabinet line, as in the law of 1886,208 based on these legal and policy considerations. In addition, I proposed that the Cabinet line of succession be extended to include persons in widely separated parts of the country, “since all of those persons who are presently in the line of succession spend much time in Washington, D.C., the whole line could be wiped out in a nuclear attack on that city.”209 Similarly, I offered reflections with respect to the period extending from the conclusion of the nominating conventions to Inauguration Day, believing that the existence of political party procedures minimized some of these

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203. Id. § 19(d)(3).
204. Id. § 19(e).
205. Id. § 20.
207. 3 U.S.C. § 19(a), (b).
209. FEERRICK, supra note 23, at 275.
threat areas and that Congress had the power to change the date of the
election.210

From a legal standpoint, many believe that the present law is
unconstitutional on several grounds. 211 First, there is a serious question as
to whether the House Speaker and President pro tempore are “Officers” of
the United States as defined by the Constitution. Professor Silva argued
that “the Constitution does not contemplate the presiding legislative officers
as officers of the United States”, and that this view is “supported by all the
commentators.”212 Professor Amar writes, “[T]here are compelling reasons
to think that the current succession statute is itself unconstitutional,” and
“Congress in 1947 unconstitutionally and unwisely switched away from
Cabinet succession by putting congressional barons—the Speaker of the
House and the President pro tempore of the Senate—first in line, ahead of
the Secretaries of State and Defense.”213 Professor Amar also questions the
constitutionality of the Act’s “bumping” provision:

[T]he Act’s bumping provision, Section 19 (d)(2), constitutes an
independent violation of the Succession Clause, which says that the
“Officer” named by Congress shall “act as President . . . until the
[presidential or vice presidential] Disability be removed, or a President
shall be elected.” Section 19 (d)(2) instead says, in effect, that the
successor officer shall act as President until some other suitor wants the
job. Bumping weakens the Presidency itself and increases instability and
uncertainty at the very moment when the nation is most in need of
tranquility.214

Additionally, in his article for this publication, Professor Joel K.
Goldstein discusses in detail an analysis as to whether or not legislative
officers in the line of succession would be unconstitutional, arguing that
textual and originalist arguments have proven inconclusive as to this
question.215

A serious question undoubtedly exists regarding whether legislative
leaders are “Officers” as intended by the Constitution. Still, the
Constitution is not without its ambiguities in this area. In analyzing these
legal considerations it may be helpful to examine the succession provisions
of the original thirteen colonies and states to understand potentially the
intentions of the Constitution’s drafters. 216

Colonial provisions, as well as those of early state constitutions, indicate
that legislative succession was sometimes considered in filling a vacancy in
the office of the executive. New York, for example, ran the line of

210. See id. at 270–75.
211. For a detailed discussion of whether the Speaker and President pro tempore are
“officers” in a constitutional sense, see Amar, supra note 148, at 9, 22–24, 27–29; Ruth C.
212. Silva, supra note 211, at 463–64.
214. Id. at 31.
215. Joel K. Goldstein, Taking from the 25th Amendment: Lessons in Ensuring
216. Feerick, supra note 23, at 37.
succession first to a lieutenant governor, followed by the President pro tempore of the Senate;217 while Delaware and North Carolina’s line of succession included the speaker of the lower house.218 These states’ succession provisions, drafted not long before the United States Constitution, could support an argument that legislative succession was in fact within the contemplation and experience of the Constitution’s Framers.

While the question of whether the Constitution contemplated legislative leaders as “Officers” is a difficult one, I would accept these legal risks if I thought the policy reasons for excluding legislators from the line of succession were not compelling. First, the experience of House Speakers and Presidents pro tempore are almost strictly legislative in nature, and these congressional leaders may lack the executive skill required for the nation’s chief executive.219 As Professor Bruce A. Ackerman adds, while the Speaker of the House is typically a seasoned politician, this is not true of the President pro tempore of the Senate, which is “an honorific position that, for example, was held by Strom Thurmond into his nineties.”220 The central figures in today’s Senate are the majority and minority leaders, but it is the President pro tempore, rather than these individuals, who is in the line of succession under the current statute.221

Professor Silva advanced a second policy consideration for removing legislative officers from the succession statute, noting that members of Congress are elected locally. Therefore, they are not chosen for their knowledge of national issues or their conception of a national vision.222 Professor Silva argued for an executive line of succession, reasoning that “a Cabinet member can better be depended on to continue the policy” of the administration and is more likely to lead in “harmony with popular government” than a succeeding legislative officer.223

I believe the principal reason for removing legislative officers from the line of succession is to ensure continuity of policy and administration at a time of crisis—an objective that cannot be ensured with legislative officers in the line. Our history demonstrates it is by no means remote to have a

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217. N.Y. CONST. of 1777, art XXI, reprinted in 5 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 2623, 2633 (Francis Newton Thorpe ed., 1909) (“[W]henever the government shall be administered by the lieutenant-governor, or he shall be unable to attend as president of the senate, the senators shall have the power to elect one of their own members to the office of president of the senate, which he shall exercise pro hac vice. And if, during such vacancy of the office of governor, the lieutenant-governor shall be impeached, displaced, resign, die, or be absent from the State, the president of the senate shall, in like manner as the lieutenant-governor, administer the government, until others shall be elected by the suffrage of the people, at the succeeding election.”).

218. FEERICK, supra note 23, at 37–38. For a more detailed discussion on succession provisions in the colonies and early state constitutions, see chapter three of id.

219. Id. at 266.


221. Id.

222. SILVA, supra note 21, at 158.

223. Id.
President and Vice President of one party and a Congress dominated by another.224 As Professor Goldstein points out, “Since 1969, the President and Speaker of the House have come from opposite parties [in] twenty-eight of the forty-two years.”225 A quick shift in party control in the event of a double vacancy will not provide the necessary stability in what would, in all likelihood, be a time of crisis, if not trauma. Appointed Cabinet members are more likely to see eye to eye with the President on issues of national policy, and therefore Cabinet succession will better maintain policy continuity should an emergency arise creating the need for succession beyond the Vice President.

The Continuity of Government Commission advanced proposals for succession beyond the Vice Presidency in a recent report.226 The Commission made the following recommendations:

A reordering of the Presidential line of succession to: Vice President, Secretary of State, Secretary of the Treasury, Secretary of Defense, Attorney General, followed by four or five newly appointed individuals residing outside of Washington, D.C. A dual vacancy in the presidency and vice presidency during the first two years of a term should trigger a special election within five months. The winner of the election would serve the remainder of the term and would displace the temporary successor.227

Additionally, the Commission suggested “removing Congressional leaders and acting secretaries from the line . . . to limit confusion over who can assume power.”228 The report also proposed “reducing the time between the casting and counting of electoral votes” and clarification by Congress of “procedures for incapacitation and . . . guidelines for continuity in the event of an attack at the presidential inauguration or during the time period before the inauguration.”229 It added: “If possible, the outgoing president should appoint some or all of the incoming president’s cabinet nominees prior to the inauguration to ensure individuals will remain in the line of succession.”230

Two aspects of these proposals on which I have written and offered views relate to the Electoral College system, whose abolition I favor,231 and a special election for a new President and Vice President in the event of a double vacancy, which I do not favor.

224. See, e.g., Feerick, supra note 23, app. E (listing numerous occasions during which either the Speaker of the House of Representatives or President pro tempore of the Senate, or both, were from a different party than the President). Most recently, Democratic Speaker Nancy Pelosi served under Republican President George W. Bush.

225. Goldstein, supra note 215, at [+65].


227. Id. at 68.

228. Id.

229. Id.

230. Id.

231. For a detailed discussion of the electoral college, see Feerick, supra note 148.
A special election in the event of a double vacancy was part of the 1792 Succession Law,\textsuperscript{232} and words to permit it were included in the law of 1886.\textsuperscript{233} As I have written previously, “It seems to have been assumed during the debates that if there were such an election, the new President would have to serve for a full four-year term on the theory that this is the only term referred to in the Constitution for a President.”\textsuperscript{234}

The subject of a special election was considered but rejected in the debates leading to the adoption of the 1947 succession statute. In particular, one of the main architects of the law expressed “strong reservations about the constitutionality of a special election law.”\textsuperscript{235} The resignations of President Nixon and Vice President Agnew led to a flurry of proposals for a special election in the event of a double vacancy or a single vacancy in the office of Vice President.\textsuperscript{236} These proposals were considered in the review of the first implementations of Section 2 of the Twenty-Fifth Amendment.\textsuperscript{237} The congressional review at the time found that the Amendment, in providing for a replacement Vice President, had functioned well in the most difficult of circumstances.\textsuperscript{238} The best feature of Section 2, in my opinion, is its assurance of stability and continuity in what otherwise might be a double vacancy were the Vice Presidency left vacant after the death, resignation, or removal of a President or of a Vice President.

Turning to the viability of a special election in the event of double vacancies in the offices of President and Vice President, it is an interesting idea clouded by uncertainty and controversy. The practice would raise serious questions after simultaneous vacancies regarding the legitimacy of such a means of transferring presidential power. One issue involves the nature of the specially-elected President and Vice President’s term. While the Constitution only provides for a four-year term for an elected President and Vice President commencing January 20, it is not entirely free from doubt whether a special election would be for four years or for the duration of the existing term, which was the basis of the proposal made and rejected in 1947. While there is appeal to the notion of a special election in the

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\textsuperscript{232} Act of Mar. 1, 1792, ch. 8, § 10, 1 Stat. 239, 240 (repealed 1886) (“That whenever the offices of President and Vice President shall both become vacant, the Secretary of State shall forthwith . . . specify[] that electors of the President of the United States shall be appointed or chosen in the several states . . .”).

\textsuperscript{233} Act of Jan. 19, 1886, ch. 4, § 1, 24 Stat. 1 (repealed 1947) (listing officers who could act as President in a double vacancy until “the disability of the President or Vice-President is removed or a President shall be elected”).

\textsuperscript{234} FEERICK, \textit{supra} note 23, at 146; \textit{see also} Charles S. Hamlin, \textit{The Presidential Succession Act of 1886,} 18 HARV. L. REV. 182, 183 (1905).

\textsuperscript{235} FEERICK, \textit{supra} note 65, at 225–26.

\textsuperscript{236} \textit{See, e.g., id.} at 216–17 (describing Senator John O. Pastore’s 1973 proposed constitutional amendment regarding special elections).

\textsuperscript{237} \textit{See generally} 1975 Senate Hearing, \textit{supra} note 140.

\textsuperscript{238} \textit{See id.} at 15, 34–35.
event of a double vacancy, I suggest that succession stability is better
served by the present system.\textsuperscript{239}

Finally, I note that I supervised a special clinical seminar on presidential
succession at the Fordham University School of Law in the fall of 2010,
along with my esteemed colleagues Dora Galacatos and Nicole Gordon.
The students in the seminar advanced proposals to fill gaps or make
improvements in the current scheme for presidential succession.
Recognizing the practical difficulties of removing legislative officers
totally from the line of succession, the students studied whether there
should be a different line of succession only in the case of temporary
presidential inability (and the Office of the Vice President is vacant),
preserving the current line of succession for filling vacancies caused by
death, resignation, or removal. The students also noted the difficulties,
practical and otherwise, of having governors, ambassadors, or former
presidents in the line of succession. They considered whether keeping
acting secretaries in the line of succession gives the country greater
protection, from a rule of law perspective, by including these fifteen
individuals in an extended line in case of mass tragedy. Among other
topics, they also explored the practical alternatives available to the
Executive Branch in the absence of legislation to correct existing gaps.

\textbf{CONCLUSION}

The ambiguities of the Succession Clause have created complex
questions during difficult moments in the nation’s history. The Twenty-
Fifth Amendment has been successful in answering many of these
uncertainties. It is now clear that in cases of removal, resignation, or death
of the President, the Vice President succeeds to the Office of the Presidency
for the remainder of the term. In cases of inability, the Vice President does
not succeed to the Office of the Presidency, but rather acts as President for
the duration of the President’s inability. When there is a functioning Vice
President in place, the Amendment answers with certainty the question of
who is to determine when presidential inability exists and establishes
procedures for doing so. Further, the Amendment requires the President to
fill a vice presidential vacancy in the event one arises, creating further
stability in the presidential succession process by helping to ensure that a
Vice President will be in place to initiate Sections 3 and 4 of the
Amendment should the need surface.

The Amendment, however, does not address and provide for every
conceivable succession scenario, as was understood at the time of its
adoption. In particular, in situations where the Vice Presidency is vacant
(or the Vice President is disabled) and the President is disabled but has not
declared himself to be under Section 3, what happens is not entirely clear.

I agree with a number of well-known scholars that the person granted
certain powers should an emergency arise is the one to decide whether or

\textsuperscript{239} For a more detailed discussion on this subject, see \textit{Feerick}, supra note 65, at 220–27.
not the emergency has arisen. Therefore, the Speaker of the House would be the person to make the disability determination in the event no Vice President could do so. However, there is no current law in place to provide procedures and safeguards to ensure that the Speaker (or next in line) does not abuse this power (such as the Twenty-Fifth Amendment’s requirement that the Vice President has supporting opinion from a majority of the Cabinet). I believe a good case can be made that Congress has the power to create such a law.

Prior to the Twenty-Fifth Amendment, Congress probably had no power to legislate on presidential inability so long as there was a functioning Vice President in place. The Amendment now makes clear the procedure for determining inability when there is a functioning Vice President. However, Congress may have lawmaking power in the event of a double vacancy or double disability. If so, Congress should consider legislation establishing procedures for assisting the person next in line to reach a determination of a President’s inability. Any statute should provide safeguards to promote public confidence and to ensure that the next in line does not abuse his power in declaring a presidential disability, such as a requirement that a majority of the Cabinet (or other body provided for by Congress by law) agree with the next in line’s assessment. Further, any future statutes dealing with succession should consider the constitutional issues and potential policy consequences of including legislative officers in the line of succession. Finally, while a special election in the event of a double vacancy raises appealing prospects, such an election would be clouded by difficult questions, both from legal and policy standpoints.
Birch Bayh and the Quest for a More Perfect Constitution

The Indiana senator, who died on Thursday, produced two successful amendments to the Constitution. But the one closest to his heart — the popular election of the president — fell short.

By Jesse Wegman

Mr. Wegman is a member of the editorial board. His book, “Let the People Pick the President,” will be published early next year.

March 14, 2019

Changing the United States Constitution is like winning an extremely long, slow-motion lottery.

Since 1887, when the nation’s charter was ratified, more than 11,000 amendments have been proposed. Twenty-seven have succeeded.

The odds of any one person writing an amendment that clears all the required hurdles — a two-thirds vote in both houses of Congress followed by ratification in three-quarters of the states — are minuscule. Doing it more than once is a virtual impossibility.

In American history, two people have that distinction.

One is James Madison, the founding father who did more than perhaps any other to shape the Constitution itself, and then almost immediately afterward drafted and pushed through the first 10 amendments, also known as the Bill of Rights.

The other is Birch Bayh, the former three-term Democratic senator from Indiana who died early on Thursday at 91.

Mr. Bayh was still in his first term when, in the mid-1960s, he became a one-man constitutional reform machine. In the wake of President John Kennedy’s assassination, Mr. Bayh drafted and steered through Congress the 25th Amendment, which set out rules for the temporary replacement of a president or vice president who dies, resigns or becomes unable to govern. A few years later he did the same for the 26th Amendment, which lowered the voting age to 18.
He may yet get credit for a third: the Equal Rights Amendment, which would prohibit discrimination on the basis of sex. After Representative Martha Griffiths, a Michigan Democrat, pushed the E.R.A. through the House, Mr. Bayh sponsored it in the Senate, where it passed in 1972. It has slowly been racking up ratifications ever since. Thirty-seven states have approved it, one shy of the required 38.

But the amendment that would have had the biggest impact of all was the one he could not get passed.

Between 1966 and 1970, Senator Bayh led a vigorous national campaign to abolish the Electoral College and elect the president by a direct popular vote.

He was far from the first to try. Our system of presidential electors — an antidemocratic relic of the late 18th century — has been targeted for reform or abolition roughly 700 times, more than any other part of the Constitution. No one has ever come as close to eliminating it as Mr. Bayh.

Abolition wasn't even part of his original plan. He thought, as many people did at the time, that the Electoral College needed only a few tweaks. As chairman of the Senate's subcommittee on constitutional amendments, Mr. Bayh arranged for hearings on various reform proposals. On the first day of hearings, he rejected the idea of a national popular vote out of hand. The smaller states, which believed they benefited from their disproportionate number of electoral votes, would never go for it. "Putting it optimistically," he said, the chances of Congress passing a popular-vote amendment were "extremely slim, if not hopeless."

A few months later, he did a complete about-face.

In a remarkable speech on May 18, 1966, Mr. Bayh said the hearings had convinced him that the Electoral College was no longer compatible with the values of American democracy, if it had ever been. The founders who created it excluded everyone other than landowning white men from voting. But virtually every development in the two centuries since — giving the vote to African-Americans and women, switching to popular elections of senators and the establishment of the one-person-one-vote principle, to name a few — had moved the country in the opposite direction.

Adopting a direct vote for president was the "logical, realistic and proper continuation of this nation's tradition and history — a tradition of continuous expansion of the franchise and equality in voting," he said.

He then explained how the Electoral College was continuing to harm the country. The winner-take-all method of allocating electors — used by every state at the time, and by all but two today — doesn't simply risk putting the popular-vote loser in the White House. It also encourages candidates to concentrate their campaigns in a small number of battleground states and ignore a vast majority of Americans. It was no way to run a modern democracy.

In short, Senator Bayh said, the president "should be elected directly by the people, for it is the people of the United States to whom he is responsible."
The speech was galvanizing, and by 1968, his popular-vote campaign had won the support of 80 percent of the country, according to a Gallup poll — Republicans and Democrats, as well as organizations as varied as the Chamber of Commerce, the League of Women Voters and the American Bar Association.

Then came the chaotic election of 1968, when George Wallace, the former Alabama governor and arch-segregationist, nearly managed to deadlock the vote and force Congress to pick the winner. Most people were just beginning to understand how bizarre and dangerous the Electoral College was. The prospect of an unreconstructed racist determining the presidency rightly horrified them. As the best-selling author James Michener wrote in a book advocating a switch to the popular vote, the Electoral College was a “time bomb lodged near the heart of the nation.”

In September 1969, the House voted overwhelmingly to abolish the Electoral College and replace it with a direct popular vote. President Richard Nixon got onboard, and polls of state legislatures suggested strong support throughout the country. All signs pointed to another successful amendment for Mr. Bayh and a radical change in the way Americans chose their presidents. All signs but one.

As soon as the amendment reached the Senate, it was blocked by Southern segregationists, led by Strom Thurmond of South Carolina, who were well aware that the Electoral College had been created to appease the slaveholding states. They were also aware that it continued to warp the nation’s politics in their favor, since millions of black voters throughout the South were effectively disenfranchised by restrictive registration and voting laws. Even those who were able to vote rarely saw their preferences reflected by a single elector. A popular vote would make their voices equal and their votes matter — and would encourage them to turn out at higher rates.

The Southerners delayed and filibustered the amendment until it died, finally, on Sept. 29, 1970. The last attempt to end the filibuster failed by five votes.

It was a devastating loss, but Mr. Bayh didn’t give up. He continued to push his popular-vote amendment throughout the 1970s, bringing it back every couple of years, not stopping until he was swept out of office in the Reagan revolution of 1980, when he lost his seat to a young Indiana congressman named Dan Quayle.

With Mr. Bayh’s departure, the Senate lost its most devoted advocate for a national popular vote. “No one was a better legislator than he was, and he couldn’t get it done,” Jay Berman, the senator’s former chief of staff, told me. “It’s just such an empty feeling because it was so right to do. And we couldn’t do it.”

Last fall I visited Mr. Bayh at his home on Maryland’s Eastern Shore, to interview him for a book I’m writing about the Electoral College and the push for a popular vote. Mr. Bayh shuffled to the door to greet me, keeping one hand on his wife, Kitty, for balance. Even stooped over, he was tall, with a full head of white hair. His handshake was frail, but I could feel the memory of a lifelong politician’s confident grip. We sat around the kitchen table, drank iced tea and talked for hours.
The oldest memories were intact. “Nobody in my family background had ever been involved in politics,” he said, recalling a childhood spent working on his grandparents’ farm in Terre Haute. “When my father found out what I was doing, I think he wondered what he’d done wrong as a parent.”

On the topic of the popular vote, he struggled to reconstruct scenes from half a century ago. But the pain of the loss was still there. If anything, it was keener, now that the Electoral College has awarded the White House to two popular-vote losers in the past two decades.

“I don’t know,” Mr. Bayh said, shaking his head. “I like to think as a country, as we grow older, we learn. It just makes such good sense.”

When I asked about the familiar charge that eliminating the Electoral College would lead to “mob rule,” Mr. Bayh brushed it off. “That, to me, is the positive end of it. Why shouldn’t they? Why shouldn’t they be able to determine their own destiny?”

Related

Birch Bayh, 91, Dies; Senator Drove Title IX and Other Historic Legislation

March 14, 2019

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Birch Bayh, 91, Dies; Senator Drove Title IX and 2 Amendments

By Adam Clymer

March 14, 2019

Birch Bayh, the liberal former senator from Indiana whose work in Congress had an enduring impact on American life — in protecting women from sex discrimination in education, guaranteeing 18-year-olds the right to vote and providing for the removal of a sitting president — died on Thursday at his home in Easton, Md. He was 91.

The cause was pneumonia, the family said in a statement announcing his death.

Mr. Bayh, a Democrat who served in the Senate from 1963 to 1981, drove some of the most historic legislation of his era. He was the principal architect of two constitutional amendments: the 25th, which dealt with presidential disability and vice-presidential vacancies, and the 26th, which gave 18-year-olds the vote in both state and federal elections.

He was a chief Senate sponsor of the failed Equal Rights Amendment, which would enshrine in the Constitution protections against discrimination on the basis of sex. He pushed through another amendment that would have abolished the Electoral College and had presidents elected by direct popular vote, lining up strong support in the Senate but failing in the end to muster enough votes to send it to the states for ratification.

And he championed Title IX, drafting the language for that landmark federal legislation, which barred sex discrimination at schools and colleges and greatly expanded sports programs for women.

Title IX brought him his greatest satisfaction, Mr. Bayh said — even though, as he acknowledged, many others were involved in its passage, notably Representatives Edith Green of Oregon and Patsy Mink of Hawaii.
“I’d say probably this had a more profound impact on more Americans than anything else I was able to do,” he said in a telephone interview for this obituary in 2010.

Title IX, an amendment to education legislation passed in the 1960s as part of President Lyndon B. Johnson’s Great Society programs, was developed while Congress was considering the Equal Rights Amendment.

Title IX, which barred discrimination against women by institutions receiving federal aid, was seen as a fast track to equality in education while the broader amendment made its way more slowly through state legislatures. (The Equal Rights Amendment ultimately died in 1982 after failing to get the approval of 38 state legislatures.)

In 1972, in a speech on the Senate floor, Mr. Bayh said: “One of the great failings of the American educational system is the continuation of corrosive and unjustified discrimination against women. It is clear to me that sex discrimination reaches into all facets of education — admissions, scholarship programs, faculty hiring and promotion, professional staffing and pay scales.”

He added, “Because education provides access to jobs and financial security, discrimination here is doubly destructive to women.”
Billie Jean King, the former tennis star and a strong advocate for women's equality in sports, said in a statement, “You simply cannot look at the evolution of equality in our nation without acknowledging the contributions and the commitment Senator Bayh made to securing equal rights and opportunities for every American.”

Mr. Bayh, a farmer and lawyer, had been speaker of the Indiana General Assembly when he was elected to the Senate in 1962, upsetting the three-term incumbent in that seat, Homer E. Capehart. As a freshman senator Mr. Bayh was made chairman of the Senate Judiciary's subcommittee on constitutional amendments, a post he would hold for almost two decades.

**Lines of Succession**

His first successful amendment, the 25th, emerged after President John F. Kennedy was assassinated in 1963 and Johnson, then the vice president, succeeded him to the White House. The transition left no sitting vice president, and the next two in line of succession were the speaker of the House, John W. McCormack, who was 71, and the Senate president pro tempore, Carl Hayden, who was 86.

In 1964, the Senate passed an amendment put forth by Mr. Bayh permitting a president to nominate a new vice president if that office became vacant (as happened with Johnson's succession). But the House, led by Mr. McCormack, would not consider the measure while he remained next in line.

Then, in 1965, after Johnson had been elected and Hubert H. Humphrey had become vice president, both chambers passed the amendment.
Besides clarifying the line of succession and giving the president the power to nominate a new vice president, the measure explained the process by which the vice president would be named acting president if the president was unable to perform his or her official duties. It also detailed how disputes about a president’s ability to discharge official powers would be resolved.

The amendment was ratified by the states in 1967. It was first put to use in 1973, when Spiro T. Agnew resigned as vice president and was succeeded by Gerald R. Ford. It was invoked again in 1974, when President Richard M. Nixon resigned and Ford succeeded him. Ford chose Nelson A. Rockefeller as vice president.

More recently, the prospect of an unprecedented use of the amendment — to remove a sitting president found to be unfit for office — has been raised off and on by critics of President Trump.

Mr. Bayh’s championing of voting rights for 18-year-olds led originally, in 1970, to an ordinary law passed in the midst of the Vietnam War. The Supreme Court, however, soon reduced its scope, ruling that Congress could legislate the age of voting only for federal offices. Mr. Bayh and others in Congress responded with the 26th Amendment, subject to the approval of the states.

And the states, facing the onerous prospect of maintaining separate voter rolls for federal and state offices, ratified the amendment in record time — in 10 weeks. It became part of the Constitution on July 1, 1971.
Mr. Bayh was also the sponsor in the Senate of the amendment that would have abolished the Electoral College and provided for the election of the president and vice president by direct popular vote. A similar House measure passed, but in 1970 a joint resolution failed to gain the necessary two-thirds vote in the Senate, coming up short by just a handful of votes despite Mr. Bayh’s lobbying on both sides of the aisle.

He also promoted amendments to give the District of Columbia full representation in Congress; declare that Americans had an inalienable right to “a decent environment”; and lower the minimum-age requirements for serving in the House (to 22 from 25) and the Senate (to 27 from 30).

On the Judiciary Committee, he led the opposition to two of Nixon's Supreme Court nominees, Clement F. Haynsworth and G. Harrold Carswell. In 1969, the Democratic-controlled Senate rejected Judge Haynsworth, in large part as payback for Republicans’ filibustering the 1968 nomination of Abe Fortas to be chief justice. Judge Carswell was rejected after it was revealed that he been an acknowledged believer in white supremacy and, as a federal prosecutor in Florida, had transformed a public golf course into a private, whites-only club.

**A Plane Crash in the Fog**

Perhaps the most dramatic moment in Mr. Bayh’s life took place away from the Senate. He was traveling with his friend, Senator Edward M. Kennedy of Massachusetts, to a Democratic convention there on June 19, 1964. Mr. Bayh was scheduled to be the keynote speaker, and Kennedy was to be nominated for his first full term. (Kennedy had entered the Senate through a special election to fill the seat left vacant when his brother John became president.)

After voting for final passage of the 1964 Civil Rights Act, the two senators rushed to National Airport, where a small chartered plane was ready to take them to Westfield, Mass. But the airport in Massachusetts was fogged in, and the plane crashed when the pilot tried to make an instrument landing.
The pilot and a Kennedy aide were killed, and Kennedy's back was broken. Mr. Bayh and his wife, Marvella, were shaken up but managed to climb out of the crashed plane. Fearing a fire from aviation fuel, Mr. Bayh went back to the plane and dragged Kennedy to safety through a hole in the fuselage.

After a brief campaign for president in 1971, which he ended when Marvella Bayh had surgery for breast cancer, Mr. Bayh tried again in 1976. He was one of 12 Democrats who sought the nomination.

Mr. Bayh sought to establish himself as a liberal alternative to the centrist Jimmy Carter, but Morris K. Udall of Arizona took on that mantle instead and battled, unsuccessfully, against Mr. Carter throughout the primaries.

The Bayh campaign never caught on. It was troubled by poor fund-raising and a style described by Charles Mohr of The New York Times as “juvenile, corny.” His campaign theme song, to the tune of “Hey, Look Me Over,” began: “Hey, look him over, he's your kind of guy. His first name is Birch and his last name is Bayh.” He dropped out of the race in March.

Birch Evans Bayh Jr. was born on Jan. 22, 1928, in Terre Haute, Ind., to Leah (Hollingsworth) Bayh, a high school teacher, and Birch Bayh Sr., a former head basketball coach and athletic director at what is now Indiana State University and a longtime specialist in physical education. Birch Jr. had a younger sister, Mary Alice.
A product of public schools, he graduated from Purdue University in 1951 and from the Indiana University School of Law in 1960. Marvella (Hern) Bayh, his first wife, died in 1979 at 46.
He is survived by a son from that marriage, Birch Evans Bayh III, a former governor of Indiana and senator from that state who is known as Evan; and two grandchildren. He is also survived by his second wife, Katherine (Halpin) Bayh, known as Kitty, and their son, Christopher.

After leaving the Senate, Mr. Bayh was chairman of a commission on presidential disability sponsored by the Miller Center at the University of Virginia and the founding chairman of the National Institute Against Prejudice and Violence, a nonprofit organization.

He also become the subject of a sexual-assault accusation in 2016 by a technology journalist, Xeni Jardin, who said in a series of tweets that he had groped her in the 1990s in the back seat of a car in the presence of unidentified male colleagues of hers. News websites, including Vox, reported the allegation at the time, but Mr. Bayh did not respond publicly. Ms. Jardin repeated the accusation to The Times on Wednesday, saying that Mr. Bayh had been trying to pull her onto his lap as she got into the car. Reached by email on Thursday, a Bayh family spokesman did not comment on the accusation.

**Title IX: A Continuing Cause**

Mr. Bayh stayed involved with Title IX long after he was defeated for re-election in 1980 by Dan Quayle, the future vice president under George H. W. Bush. While Title IX was not particularly controversial when enacted, arguments over it deepened through the years. Mr. Bayh spoke publicly on the issue, served on commissions that weighed its impact and acted as a lawyer in lawsuits concerning it while a partner in the Washington office of Venable LLP.

“If I took the whole panoply of inequality and absolute criminal activity against women,” he said in the 2010 interview, “I think the most egregious conduct — where the most damage was done by the way they were treated — was in education. Many of the premier institutions wouldn't let women in. Others had quotas. Others would let women in but would confine them to the ‘women's’ curriculum.”

He credited his first wife with inspiring him to take up the cause. After meeting Marvella Hern at a national speech contest, which she won, he learned that she had wanted to enter the University of Virginia in 1951 but was told that “women need not apply.” (She attended Oklahoma State University instead.)

“So,” he said, “I got a cram course on something I knew absolutely nothing about.”

His education on the issue led to his memorable speech on the Senate floor two decades later. In it he derided the “stereotype of women as pretty things who go to college to find a husband, go on to graduate school because they want a more interesting husband, and finally marry, have children and never work again.”

“The desire of many schools not to waste a ‘man's place' on a woman stems from such stereotyped notions,” he said. But, he added, “the facts absolutely contradict these myths about the ‘weaker sex,’ and it is time to change our operating assumptions.”

**Correction:** March 14, 2019

An earlier version of this obituary misstated Mr. Bayh's birth date. It was Jan. 22, 1928 — not Jan. 28.
INTERVIEW

A MODERN FATHER OF OUR CONSTITUTION:
AN INTERVIEW WITH FORMER SENATOR BIRCH BAYH

Following the death of President John F. Kennedy in 1963, Birch Bayh, then a freshman Senator from Indiana, undertook a remarkable campaign to amend the U.S. Constitution and address gaps in our system of presidential succession. The effort to ratify the Twenty-Fifth Amendment was orderly, swift, and effective. In leading this campaign, Senator Bayh took his first step in becoming the only American since the Founding Fathers to draft more than one amendment to the Constitution. As part of this Symposium, the Fordham Law Review sought to merge constitutional theory with historical context and the practicalities of lawmaking surrounding the Twenty-Fifth Amendment. The following interview lends a historical and practical perspective to the academic discussion of our nation’s system of presidential succession and sheds light on the distinguished career of an inspiring public servant.

INTRODUCTION

The honorable Birch Bayh led an enduring career in public service. As a Senator, he was a framer of two amendments to the Constitution, and nearly oversaw the ratification of a third. During his time in office he spearheaded the passage of some of the most important federal laws of the 1960s and 1970s.

Hailing from Terre Haute, Indiana, and raised on his family farm, Bayh attended Purdue University School of Agriculture after serving in the U.S. Army. Prior to his election to the Senate, Bayh was a Member of the Indiana House of Representatives, where he eventually served as Minority Leader and later as Speaker. During his time in state office, Bayh studied for his law degree from Indiana State University at night and continued to run the family farm. In 1962, he was elected to the United States Senate, where he served until 1981.

During his Senate career, Senator Bayh served on the Judiciary Committee, the Appropriations Committee, and the Environment and Public Works Committee. He demonstrated an early commitment to social justice and equal opportunity, helping to draft the monumental Civil Rights
Act of 1964\(^1\) and Voting Rights Act of 1965.\(^2\) Bayh later co-authored Title IX of the Education Amendments of 1972 (Title IX),\(^3\) a milestone in the women’s rights movement that prohibits discrimination on the basis of sex in federally funded education programs and activities. Bayh was also the chief architect of the Juvenile Justice and Delinquency Prevention Act of 1974,\(^4\) which aims to prevent the detention and incarceration of youth in juvenile and adult facilities. In 1977, as Chairman of the Select Committee on Intelligence, he co-sponsored the Foreign Intelligence Surveillance Act of 1978,\(^5\) a response to Fourth Amendment violations resulting from domestic spying programs. Through his co-authorship of the Bayh-Dole Act,\(^6\) which enables small businesses and nonprofit organizations, such as universities, to retain title to inventions developed under federally funded research programs, Senator Bayh revolutionized the U.S. patent system. The Bayh-Dole Act has been hailed as “[p]ossibly the most inspired piece of legislation to be enacted in America over the past half-century” and was the impetus behind similar legislation in other countries across the globe.\(^7\)

More than just an active author of legislation, as a member of the Senate Judiciary Committee, Senator Bayh helped defeat two of President Richard M. Nixon’s nominees to the U.S. Supreme Court, Judges Clement Haynsworth and G. Harrold Carswell, who were both alleged to be segregationists. For this work he won the highest honor from the Leadership Conference on Civil Rights for “his unyielding dedication to human equality and civil freedom.”\(^8\)

Senator Bayh has the distinct honor of being the only American since the Founders to draft multiple amendments to the Constitution.\(^9\) As Chairman of the Senate Subcommittee on Constitutional Amendments, Senator Bayh authored two amendments to the Constitution: the Twenty-Fifth Amendment on Presidential and Vice Presidential succession,\(^10\) and the Twenty-Sixth Amendment, which lowered the voting age to eighteen in the midst of the Vietnam War Draft.\(^11\) Bayh was also the principal Senate sponsor of the Equal Rights Amendment, which passed both Houses of

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9. *Id.*
10. U.S. CONST. amend. XXV.
11. U.S. CONST. amend. XXVI.
Congress and was ratified by thirty-five states, missing by three states the required number for ratification as a constitutional amendment.12

Throughout his tenure in the Senate, Bayh also focused on electoral reform. On January 10, 1977, Senator Bayh introduced a proposed amendment that would have abolished the Electoral College and provided for direct election of the President and Vice President of the United States.13 The resolution came close to moving through the Senate, but ultimately failed to garner enough votes to end the filibuster blocking the bill.14 Following his tenure in the Senate, Senator Bayh served as Chairman of the National Institute Against Prejudice and Violence from 1984 to 1994. Bayh is presently a partner at Venable LLP in Washington, D.C. He also remains active in Electoral College reform through his work with the National Popular Vote initiative.

INTERVIEW

Deborah Eltgroth, Editor-in-Chief of Volume 78 of the Fordham Law Review, and Daniel Hafetz, Symposium Editor of the same, conducted the interview that follows at Senator Bayh’s home in Easton, Maryland on October 2, 2009. Accompanying the Law Review was John D. Feerick, professor and former Dean of Fordham University School of Law. Feerick attended Fordham University and obtained his law degree from Fordham University School of Law in 1961. During his time in law school, he served as Editor-in-Chief of the Law Review.

Feerick first immersed himself in the topic of presidential succession in a 1963 article published in the Fordham Law Review, entitled The Problem of Presidential Inability—Will Congress Ever Solve It?.15 He published a later article in the same volume, The Vice-Presidency and the Problems of Presidential Succession and Inability.16 While serving on the American Bar Association Conference on Presidential Inability and Vice Presidential Vacancy, Feerick worked with Senator Bayh during the Senator’s Twenty-Fifth Amendment campaign. Feerick’s scholarship and ideas ultimately culminated in the text of the Twenty-Fifth Amendment. He has published two books on the subject, From Failing Hands: The Story of Presidential

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12. The Equal Rights Amendment read as follows:
   Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.
   Sec. 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this Article.
   Sec. 3. This amendment shall take effect two years after the date of ratification.

13. See generally Birch Bayh, Foreword to John R. Koza et al., Every Vote Equal: A State-Based Plan for Electing the President by National Popular Vote, at xxv–xxvi (2d ed. 2008).
14. Id. at xxv.
15. 32 Fordham L. Rev. 73 (1963).
Succession\textsuperscript{17} and The Twenty-Fifth Amendment: Its Complete History and Applications.\textsuperscript{18} He remains an active scholar in this field, contributing to this Symposium with his article on Presidential Succession and Inability: Before and After the Twenty-Fifth Amendment.\textsuperscript{19} His efforts to turn his academic expertise on presidential succession into practical contributions continue with his inauguration in 2010 of the Fordham University School of Law clinic on The Adequacy of the Presidential Succession System.

For many years Feerick served as Chairman of the New York State Commission on Government Integrity, and he is a past Chairman of the Board of Directors of the American Arbitration Association. He founded and now serves as director of the Feerick Center for Social Justice and Dispute Resolution at Fordham University School of Law, which focuses on legal issues critical to the poor and underrepresented, with family homelessness among the center’s most urgent priorities. Feerick continues to teach, write, and work as a mediator, arbitrator, and volunteer.

I. INTRODUCTIONS

FORDHAM L. REV.: While reading your book One Heartbeat Away,\textsuperscript{20} we were struck that, as a freshman Senator who had found himself in this incident of history, President Kennedy just assassinated, you had both the understanding and grasp of the law and the Constitution to arrive at the language and provisions for this Amendment. But just as striking was your political foresight, your intuition, and how you learned so quickly the process for getting something like this passed. It wasn’t just any piece of legislation; it was a constitutional amendment, and thus was even more of a Herculean effort. And it was with such mastery that you were able to do that.

SENATOR BAYH: I hope I approached it that way. I think I learned from my father during the brief period of time he was in my life. He ended up going to Kunming, China. Mom died when I was twelve. They were both schoolteachers. Dad coached four sports at Indiana State University and taught history, and then came to Washington doing the D.C. public school system’s physical education program. In April of ’41, before the war started, they asked him to come in and start this program. The Army gave him a mission of going around and establishing physical fitness programs adjacent to all of these concrete ships they were putting down. This was before Pearl Harbor so that thinking was a little farsighted there.

Anyhow, I loved him dearly. I learned a lot from him. He was a basketball referee. In fact, he’s in the Indiana Basketball Hall of Fame.

\textsuperscript{17} John D. Feerick, From Failing Hands: The Story of Presidential Succession (1965).
\textsuperscript{19} John D. Feerick, Presidential Succession and Inability: Before and After the Twenty-Fifth Amendment, 78 Fordham L. Rev. 907 (2010).
\textsuperscript{20} Birch Bayh, One Heartbeat Away: Presidential Disability and Succession (1968).
because of his refereeing prowess. In my family, you didn’t argue with the referee or the umpire. My sport was baseball. If it was close enough to call, it was close enough to swing at.

I grew up with my maternal grandparents while they were in their eighties. Particularly my grandmother, who was a schoolteacher—I felt like she was both mother and father to me. My granddad was a sort of stoic, rawboned fellow that came over the Allegheny Mountains in a covered wagon right after the Civil War and put that farm together. I was blessed to have them to take my sister and me in when we were basically orphans. It was a life-changing experience for me, because I fell in love with the farm. It’s still in my blood. I still have my patch of tomatoes out here. They’re not going to be there for long. Nature’s taking care of that.

The thing I love about agriculture is that it’s pretty hard to get away from the facts. There it is. Mother Nature takes care of it. If you do something wrong, you pay. I learned to treat other people the way you’d like to be treated yourself, whether in the law firm, the classroom, or in the United States Senate. This is no different today. I think a lot of people do just this. I was blessed to have people, at least during those days, who treated other people the way they’d like to be treated: listen to what somebody has to say and then make a judgment call and hope that, once the call is made and the majority speaks, the others will go along. I was fortunate to have a lot of good teachers—my colleagues. Even as we disagreed, I think one learned. I was blessed that I had a chance to spend eight years in the legislature and, at the tender age of thirty-one—I was still in law school—to be Speaker of the House and have a legislative body from the ages of twenty-four to seventy-one. Most of those newcomers were old enough to be my father and had never held public office in their lives. We had a houseful of cats here. How do you put them together?

So I learned rather quickly. It was about treating them like they would like to be treated and the way I’d like to be treated myself. I think being a good legislator is sort of like being a good citizen. The Twenty-Fifth Amendment is a good example of getting the so-called loyal opposition involved.

I think they make a lot out of it when you run for public office and you get a lot of press and people say a lot of nice things, like you just said. But I think you would say that about my neighbors here in the neighborhood and certainly the people I grew up with on the farm, who gave me my basic understanding of what life was all about.

FEERICK: We’d like to begin, Senator, with the topic of the Twenty-Fifth Amendment and succession.

SENATOR BAYH: I’ll be glad to give you my best thinking. It’s just my thinking.

In looking at this subject, immodest as it may sound, you probably have right here around this table the two minds that have spent more time worrying about this and given it more thought than anybody else in America. That’s because we happened to be there at that time, and that was our mission. As I think will come out in the answers to some of these
questions, John Feerick, as a very young lawyer, an assistant for the American Bar Association (ABA), played a key role in putting this all together. I can’t speak too highly of him. He happens to be a friend, but even if I didn’t like him, I’d have to say that there’s no way we could have gotten this done without his assistance. You have the role of the Bar Association, which I’ll speak to later on. His assistance went way beyond just being a player in the Bar Association.

FEERICK: In Washington you had Don Channell; in Chicago, Bert Early and Lowell Beck.

SENATOR BAYH: But you were the fuselage that held it all together, the nitty-gritty. And that’s how we developed such a close relationship. This subject has played such an important role in my life. Once you’re immersed in it, as John Feerick and I have been, you never get it out of your system.

John Feerick and I have had the wonderful experience of working together to put the Twenty-Fifth Amendment to bed and also to defend it from a group of folks in North Carolina that kept telling us that they knew better how to do it. All of their thoughts were well intended, but none of them had a full appreciation of the history that went into putting the Twenty-Fifth Amendment together. As I’ll point out in here, the Twenty-Fifth Amendment is not a perfect document, but we think—at least I think and I continue to think—it’s probably the best you’re going to get under the circumstances. You start tinkering with it—it’s sort of like pushing your finger in a balloon. You push it in someplace and it pops out someplace else. And usually the pop is bigger than the push was.

In teaching over at Washington College and preparing a talk on the separation of church and state, I ran across a great Holmes quote, and I think it’s relevant to looking at the Twenty-Fifth Amendment. He said, “[A] page of history is worth a volume of logic.”

We lived the history. A lot of other people have the logic about how it worked, but we lived the history that went behind putting this document in the Constitution.

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II. THE TWENTY-FIFTH AMENDMENT: HISTORY AND PHILOSOPHY

The Subcommittee on Constitutional Amendments & the Committee Process

FORDHAM L. REV.: How did you get involved in the Subcommittee on Constitutional Amendments?

SENATOR BAYH: My predecessor was Senator Estes Kefauver, who died early on when I got to the Senate. That was a real loss, because he’d been a hero of mine. He was a man of the people. He took on President Truman. He did what he thought was right. I thought that I had a chance to serve on the Judiciary Committee with him.

FEERICK: My recollection is that Kefauver died in August of ’63.

SENATOR BAYH: He did. He did. I remember learning, at Sibley Hospital—I had just cut off a big toe with the front end of the lawn mower, and I was in bed over there. Somebody said, “Estes Kefauver died.” “Oh, my gosh,” I thought.

In October of 1963, Fred Graham, who had been Kefauver’s Chief of Staff—who later went on to be a correspondent for CBS—reached out to me about the vacancy on the Subcommittee on Constitutional Amendments. Fred said, “You know, there’s this vacancy, and you’re the only Senator on the Judiciary Committee that doesn’t have a subcommittee. You might want to talk to Senator Eastland about that. He may have decided to close the committee down, but it wouldn’t hurt to talk to him.”

So I got an appointment and saw Senator Eastland. He got a little scotch and ice. I didn’t really drink at the time, but I may have taken a sip or two of it. And I made my pitch: “Mr. Chairman, when I went to law school, constitutional law was my most exciting subject. Boy, it would be my dream come true if I could be Chairman of that Subcommittee.”

He said, “Well, Birch, I hope you understand here, but Allen Ellender has been giving us a rough time. I sort of told him I’d close this down. I hope you understand, boy.”

I said, “Mr. Chairman, I’d even put one of my own staff people there. It wouldn’t cost you a nickel.”

“I just made up my mind, Birch. I hope you understand.”

“Thank you, Mr. Chairman,” and I left.

The next morning, 9:00, my secretary said, “You’ve got Chairman Eastland on the phone.”

“Birch?”

“Yes, Mr. Chairman.”

“I want you to be Chairman of that Subcommittee. I think you’d be a good one.” Click.

Whenever else could a plantation owner, one step away from being a slave master, an avowed segregationist, ever do anything to get a little chit with a liberal young turk like me? We became very good friends, he and I did, not just because of that, but because of other things. I remember one
time, several years later, he sat down next to me and said, “Birch, I want you to explain something to me.”

“Yes, Mr. Chairman.”

“You got this abortion issue. You got this prayer issue. You got this busing issue. Any one of those would kill me back home. How do you do it, boy?”

I said, “I don’t know, Mr. Chairman. Maybe I’m not doing it right. We’ll see what the people think.”

So we had that kind of relationship.

FEERICK: Senator Eastland, during those years that he chaired the Judiciary Committee, was towering in importance and significance—he controlled what went to the floor of the Senate from the Judiciary Committee.

SENATOR BAYH: There’s no way of invoking cloture and getting your bill out of the Judiciary Committee. You can vote it out. But if the Chairman won’t let it come up, you won’t have a chance to vote on it. He had that power.

But I liked him and I think he liked me. I didn’t like some of the things he stood for, and the other way around. But I’m sure he supported us on the Twenty-Fifth Amendment. I know he did. I’m sure he opposed us on direct elections of presidents. And he was one of those first in line when it came to racial issues, a strong segregationist.

_Fordham L. Rev.:_ There was this watershed moment leading up to the passage of the Twenty-Fifth Amendment, the tragic death of the President. There was no question that Lyndon Johnson was going to become President at the time. Yet why did you identify it as something that absolutely needed to happen? Why is this so important to us as a country?

SENATOR BAYH: First of all, we were confronted with the stark reality that the President is human and life can be taken out rather quickly. It almost happened—it was a millimeter away with Reagan. We found out that—for the sixteenth time—the Vice President had become President and nobody died after the Vice President took office.

But the significance of a President dying is deepened when there is a vacancy in the Vice Presidency. You get a real tragedy in the country when a President is assassinated or dies due to his health. To add to that the uncertainty about the authority of the person who takes over—as would be the case if the President who succeeds dies and you have the Speaker of the House take over—you may get someone who is of a different party. Although we like to believe that everybody knows who the Speaker of the House is, I’m not sure everybody equates Nancy Pelosi as being the next President of the United States.

If I had to do this thing over, I’d try to find a way to placate my colleagues in the Senate, but back then it was a matter of deference. The
President Pro Tem of the Senate, Robert C. Byrd, becoming President of the United States? The President Pro Tem of the Senate is not even the majority of the Senate. It’s just whoever has been there the longest.

One of the things that catalyzed this more than anything else and got people’s interest was that joint session of Congress, with Lyndon Johnson addressing the Congress immediately after taking office. And there was this image of Carl Hayden and John McCormack at the ages of eighty-six, and seventy-one, respectively. Yet one or both of those people could end up being President of the United States. There needed to be steps taken to fill that vacancy.

Why is it important to act? I think it’s important to act so that you don’t have the Succession Act take effect. The answer to many of the criticisms of the remaining gaps in the Twenty-Fifth Amendment is that it is essential to fill that vacancy quickly.

Basically, it’s one crisis at a time. The crisis of succession is bad enough. Let’s not have a crisis of lacking confidence in the person who goes there, because that wasn’t what was supposed to be done.

Compromise in the Process

FORDHAM L. REV.: One interesting issue is that of compromise, in terms of what the final product was as compared to some of the discussions leading up to the passage of the Amendment.

SENATOR BAYH: Like I say, it’s not a perfect document, but we struggled with it. As they say, “Laws and sausage are the same: You don’t want to see either one of them made.” The process is sometimes a questionable process that ultimately reaches a good end. But I don’t think it’s too questionable a process, because it’s our process, our democratic process.

There was a major difference of opinion as to how to approach this. Apparently there are some who still don’t understand why we reached the conclusion we reached. But we did it by compromise. My good friend Senator Everett Dirksen [of Illinois]—and he was a good friend—I couldn’t believe it: I was wet behind the ears, but the Republican opposition sought me out to work with me.

Where I’m coming from is, Everett Dirksen’s idea and the Republican idea was to have a Twenty-Fifth Amendment that gave Congress authority to act on this subject at some future time. I guess giving Congress authority to do something makes a lot of sense, but it seems to me—look at what it says in the Constitution about inability—there’s no question that Congress already had the authority to do it. You don’t need a document to create another authority.

But more to the point, it was our judgment, I think—Dean Feerick and the Bar Association and all of us who were pushing the Twenty-Fifth Amendment...
Amendment in its present and final form—wherever you have a disabled President, particularly, or wherever you have a vice presidential vacancy, there is a lot of jockeying around, where the politics of the day will determine what’s right or wrong, what’s good for our party and bad for theirs, or good for this human being or that human being. It’s impossible to avoid. That’s the human nature of the political system.

What we wanted to have was a system that would—right and wrong, without politics, without a crisis of the moment—say, “Here it is.” This would take away the ability to say, “Okay, how is it going to help me or hurt them?” because it’s right there in the Constitution, and this is what you have to do.

So we had respectful differences of opinion. Everett was an avid spokesman. He didn’t get quite as melodramatic on this as he did on the prayer amendment, but he made a very strong argument for his version.

I think when you get right down to the common sense of it, he understood why we were doing what we did. Once we had defeated him, he was a strong supporter of it. We passed it in the Senate and then the House passed it in a different version. I was chairing the Conference Committee, as the Chairman of that Subcommittee, and I would be the most junior member of the Senate conferees. Obviously, a minority leader would be on that as a Senate conferee. So I went over and I got an appointment to see Senator Dirksen. I went over to his office. He kept me waiting a long time. On his desk there was about a six-inch pile of postcards. They were arranged so that, even with a casual sideways glance, you could see.

“We need the prayer amendment.” He was softening me up. He said, “You know, I just get all these petitions for doing something about this prayer amendment.”

I said, “Senator, I’m going to make sure we have a hearing on your amendment. I promise you that. I’d like to make sure that we’re all on the same page supporting”—

“Oh, yes, I’ll support the Senate position. Those House members don’t know what they’re talking about.”

Well, we got a little compromise. But he was with us, once we had won. I think, in retrospect, he probably said, “Well, they’re probably right,” because he could have a better appreciation of the policies that would be going on than I could. So we really didn’t compromise on the idea of granting additional congressional authority to handle succession.

What we did compromise on was the amount of time to send a letter to the Speaker and the amount of time that you had to act if you were the Vice President or the President. That was really a little landscaping around the big house though.

Shaping the Amendment:  
_The Contributions of the American Bar Association and the Addition of Section 4_

FORDHAM L. REV.: Once you were the Chairman of the Subcommittee on Constitutional Amendments, how did the Twenty-Fifth Amendment begin to take shape?

SENATOR BAYH: In October 1963, I was the new Chairman of the Subcommittee on Constitutional Amendments. We all know what happened on November 22nd.

At the time, nobody doubted that the Vice President would come up, and nobody questioned the law.

But there were gaps. Bob Keefe, my Chief of Staff, found out that the Bar Association had legislation—they’d been studying this whole issue of succession for a long time. So he went to Don Channell, I guess, and Don Channell went to the powers-that-be. John, who did all the work, was assigned to this along with Lowell Beck. So the three of us began to move on this.

The Bar Association had done a lot of work on presidential succession and had given it a lot of thought and had put down the foundation of good legislation. I don’t know whether the bill that I introduced was exactly like the Bar Association had prepared it or whether it was something else.

FEERICK: One contribution of the Bar Association—there were contributions in a few areas—but one in particular—was the so-called either/or language of Section 4. In other words, it set out a particular formula in the Amendment—Vice President, Cabinet, as you said before—but then gave Congress a power to change the body that was to work along with the Vice President. It took parts of the two major proposals, one very specific and one that would give Congress broad power—in a sense, parts of each came into Section 4. That came out of the meetings that you participated in with the ABA conference group.

SENATOR BAYH: The Bar Association held a conference on this and had people from all across the country that were experts on the subject. We got a lot of input from that. With the product that came out of there, everybody had a little apple on that tree, but the major trunk was the Bar Association work that they had done.

John did all the heavy lifting as far as putting that conference together and seeing that everybody was properly attended to and copious notes were kept of what was said and by whom.

My gut tells me that when we put the legislation in, it did not have the alternative group. Somebody raised the question, what if the Cabinet won’t work, because it’s close to the President? That’s when we put in “such other body as Congress may by law provide.”

FEERICK: Just to set the record straight, Senator Bayh’s memory is correct. Even though the ABA had the consensus of the “such other body” language, I don’t think that got into the legislative proposals at that point.
The American Bar Association consensus was released at the end of January of 1964. It had a number of points. I’ll read you point five. It said,

The amendment should provide that the ability of the President to resume the powers and duties of his office shall be established by his declaration in writing. In the event that the Vice President and a majority of the Cabinet or such other body as Congress may by law provide shall not concur in the declaration of the President, the continuing inability of the President may then be determined by the vote of two-thirds of the elected members of each House of the Congress.  

In the ABA consensus discussions, in which you played a very important part, my recollection is that there came a point when we were debating a specific amendment as against an amendment that would give Congress a broad power to determine the beginning or the ending of the inability. The person who, as I recall, made the suggestion that maybe we could weave the two together was somebody you knew very well. His name was Vince Doyle, and he worked for the Library of Congress.

At some point in the discussion he suggested that idea. Then we went back and forth, and finally came to a consensus. When the ABA consensus was released at the end of January, it had the “such other body” language in there. But it’s possible that it didn’t get into the legislative proposals at that point.

SENATOR BAYH: There was a good deal of heated debate about, “What if the Cabinet won’t act?”

FORDHAM L. REV.: Out of loyalty?

SENATOR BAYH: Yes, out of loyalty. I was much surprised to find out Bobby Kennedy, still Attorney General at the time, was holding a rump group, and he had Phil Hart and some others back there in the back of the Senate, really giving them a hard time, that they shouldn’t support this, that President Kennedy didn’t know anybody on the Cabinet before he became President, although he served in the Congress with two or three of them. But I took him on. I’m not sure that he was the one that raised the question, because he was concerned that the Cabinet might be disloyal to the President, and thus the Cabinet couldn’t be trusted to act with the Vice President. That was his concern.

FORDHAM L. REV.: He was afraid of a coup?

SENATOR BAYH: Yes, which was one of the things we were concerned about. You could use this provision as a means of taking over the power of the Presidency.

I recall somebody raising that on the floor: What if the Cabinet is loyal to the President, even if he’s as loony as a bedbug or whatever? They won’t act.

But we thought the likelihood of that happening was slim. Everett Dirksen, when he came on board and supported this, after we’d voted down

25. FEERICK, supra note 18, at 60.
his alternative, he said, “In the white heat of publicity, Congress is going to do what’s right. They’ll do the brave thing.”

A lot of what we did was contingent on the fact that around the disability—particularly, the highly contested disability—there would be a whole lot of editorial comment and it would be impossible for somebody to be involved in a coup kind of situation.

FEERICK: The Senate passed the legislation first in September of ‘64. Section 4, which was Section 5 as introduced in 1963 and 1964, stated as follows:

> Whenever the President makes public announcement in writing that his inability has terminated, he shall resume the discharge of the powers and duties of his office on the seventh day after making such announcement, or at such earlier time after such announcement as he and the Vice President may determine. But if the Vice President, with the written approval of a majority of the heads of executive departments in office at the time of such announcement, transmits to the Congress his written declaration that in his opinion the President’s inability has not terminated, the Congress shall thereupon consider the issue.26

So as introduced in the Senate in 1963 and 1964, “such other body” is not present. But then when it passed in September, I think, of ‘64, it was in there.

SENATOR BAYH: It was put in as a result of somebody raising it on the floor.

They went back there in the cloakroom and cobbled up the language. There isn’t much there. But they were trying to determine just exactly what the words would say and not give too much away. There was a lot of give-and-take there. The Bar Association did have this in there—why we didn’t have it in there, I don’t know. I think we just didn’t want to confuse the situation and we wanted it to be clean—and we had faith that the Cabinet would act. But then a lot of the folks would say, “What if they don’t act? Then Congress shall prescribe by law.”

Now, I have a very distinct recollection of giving a speech, of Walter Reuther introducing me to the International Autoworkers Convention in Atlantic City. And who should arrive on the scene but Lyndon Johnson, President of the United States, also to address the autoworkers.

He said, “Birch, can we give you a ride back in the helicopter?”

“Thank you, Mr. President.”

“We’ll be glad to do that.”

So there were just the two of us in the cabin, Lyndon Johnson and little old Birch Bayh.

I said, “Mr. President, I’d like to talk to you about lending your support to our Twenty-Fifth Amendment.”

He said, “Birch, you’re never going to get that passed until you get a Vice President. The House is never going to vote to take John McCormack

26. *Id.* at 246.
out of the succession. You just need to wait until Hubert and I get elected. Then you introduce that thing, and you’ll have clear sailing in the House.”

A very wise man. It had never entered my mind in that crass a turn, but I could see why the members of the House—they just felt that kind of loyalty.

II.A. TWENTY-FIFTH AMENDMENT & DISABILITY

Presidential Disability

FORDHAM L. REV.: What were some other points of contention in the debates surrounding the Amendment?

SENATOR BAYH: A subject that gets my and Dean Feerick’s blood pressure up more than anything else—John, I shouldn’t speak for you, but having been in the trenches with you in North Carolina a couple of times—is presidential disability. One needs to recognize that to make the disability question work, if the President voluntarily gives up the office, he gets it back voluntarily. That’s the reason we put it that way, because we wanted that to happen. The only time it’s really been used in that way was when President Reagan said, “Well, I don’t think Congress really meant it, but I’m going to turn this over to Vice President Bush and let him be the Acting President.”

The one issue that kept coming up with the Miller Commission, and has kept coming up still, is determining the disability of a President in the event there’s a dispute, where the President, like Eisenhower, isn’t likely to assent, and the Vice President must act without getting presidential assent. Of course, when the President recovers, he can seek to reclaim, but the burden is on him to seek to reclaim, then, instead of the other people, as had been the case previously.

But where you have a difference of opinion between the President, on the one hand, and the Vice President and the majority of the Cabinet, on the other, as to whether he’s disabled, then you have a real problem. There are those who think the only way to make this determination is if you get a panel of doctors and let them be the judge, totally ignoring that if you get four different doctors on a panel, they probably could all have four different prognoses. Plus they have no appreciation at all of the political factors that you have to consider in this. It also ignores the fact that even a President that’s not all there can come across pretty astute for half an hour in front of a panel of doctors.

The doctor will ask some questions that may not be totally relevant in pinpointing what’s wrong with him, because he’s got political questions and one thing or another.

Obviously, you need to have a doctor or doctors involved in making that decision at the presidential level, before the President declares himself disabled. On the other hand, the Vice President and the Cabinet also have their doctors. Then they would reach a conclusion as to who’s right and
who’s wrong. But to make this final assessment, it just didn’t make sense having a panel of doctors who aren’t elected and responsible to anybody. That was a number-one point of contention with the Twenty-Fifth Amendment, and I think it is still an issue in some people’s minds.

The Importance of Having the Cabinet Make the Decision Regarding Disability

FORDHAM L. REV.: Going back to the Cabinet provision—of course, it doesn’t say “Cabinet” in the Constitution . . .

SENATOR BAYH: Then you get into the question about the way things are operating now.

FORDHAM L. REV.: Yes, that’s what we were thinking. When it was initially envisioned, those are the President’s closest advisers. The Vice President is a close adviser. But now the White House has such a robust policy arm, where there is a czar that is a counterpart to almost every department head. Does that undermine how you envisioned the Amendment to operate, which is to have people close to the President, who have insight into his health and his ability, to be able to make that call?

SENATOR BAYH: I don’t think so. It’s a delicate balance between getting the independent judgment of Cabinet officials that have some authority on their own, on the one hand, and having decisions made by people that are personal staff of the President. There’s very little independent judgment there. They would be more inclined to protect the President, in order to protect their own jobs, because if he’s out, they don’t know where they might sit with the Vice President.

So I think, to the extent that the Cabinet may not be as close to him, if the question of disability arises, they’re going to have all sorts of opportunity to examine the situation and see whether this is for real or not. I think they’re in a position to have more independent judgment, absent the President breathing down at them because he’s disabled, than the people in the office right next door to him in the White House.

FORDHAM L. REV.: You mean people other than those who are close advisors might work just as well?

SENATOR BAYH: I think so. Obviously, the kind of people that you describe—the czars and all those people that see him every day—they’re going to be called on by members of the Cabinet. I envision the Cabinet being in the back and having some very contentious discussions about this, and I think they’ll have some doctors in there, too. But the doctors aren’t going to have the final say.

FEERICK: Even with the changing appearance of the White House staff, different members of the Cabinet still have direct communication with the President. There are Cabinet meetings and there are other settings in which members of the Cabinet meet with the President and do have some empirical data available to them as to how the President is functioning from
those kinds of contacts with the President, notwithstanding the presence of a large White House staff.

FORDHAM L. REV.: And there might be all sorts of informal methods.

SENATOR BAYH: I’m sure that the President will be talking to at least one Cabinet person every day, because those people are the ones who have the responsibility for implementing what the people in the White House may decide.

Doctors and Declaring Disability

SENATOR BAYH: All those things that go back to Wilson’s situation—it was Edith Bolling and Joe Tumulty, Secretary to the President, who were making the decisions while the President was incapacitated.

At the Wake Forest Conference on presidential disability, there was the number one Wilson disability scholar—Dr. James F. Toole. He kept talking about all those terrible things that happened under Wilson, which all would have been handled under the Twenty-Fifth Amendment.27

FEERICK: When the Wake Forest group got started, they called and asked me if I would be on the planning committee. I said, “What are you planning for?”

They said, “Well, we have to repeal the Twenty-Fifth Amendment and put the doctors in place.”

I said, “I can’t join your planning committee. I can’t look at that issue fairly and objectively. You already started out with a conclusion that I don’t agree with.”

So I didn’t join the planning committee.

Then I get a call from the American Bar Association. They asked if I would represent them on that committee. Already having the earlier conversation with the doctors, I said, “No. I can’t be fair and objective. I think you need to find someone else.”

They said, “Do you have any suggestions?”

I said, “You might take a look at a professor by the name of Joel Goldstein.” I think that’s how Joel got involved.

But then, as you recall, at the very end, when they were coming down to the wire, I guess they wanted me to come to a meeting in Washington where they were summing up all the reports. You were there, Senator Bayh. I was there. Joel Goldstein was there. I wasn’t very happy with some of the conclusions. I think the three of us ended up writing a dissenting view.

SENATOR BAYH: They had two of these dissenting views. At least we were in on the conference. One of Bush’s doctors, Dr. Lawrence C. Mohr, was a champion on our side.

27. PRESIDENTIAL DISABILITY: PAPERS, DISCUSSIONS, AND RECOMMENDATIONS, supra note 21, at 3–6.
When you have the President’s doctor talking about what ought to be done, and it’s inconsistent with what the people who called the conference were suggesting—well, they called the conference with the idea of what ought to be done before anybody had been heard.

President Reagan’s Handling of the Twenty-Fifth Amendment

FEERICK: Fred Fielding, White House Counsel to Presidents Reagan and George W. Bush, is joining the Symposium in April.

SENATOR BAYH: He was right there at the time of the Miller hearing, I was on that panel, of course—

FEERICK: I think you co-chaired with Herb Brownell.

SENATOR BAYH: Yes. Herb was another indispensable player in this.

FEERICK: He was wonderful.

SENATOR BAYH: A great human being. He was Eisenhower’s Attorney General, when he suddenly awakened and he didn’t have a President who could talk, walk, or make decisions. So he had lived through all that and understood the importance of it. A great human being.

I remember asking Fred—this letter that Reagan sent to the Speaker and the President Pro Tem of the Senate was a letter that said, basically, “Although I don’t think this is what Congress had in mind when they wrote the Twenty-Fifth Amendment, I’m now turning the office over to my Vice President to serve as Acting President during my disability.”

I asked him, “Fred, how did you ever let the President send a letter like that?”

I forget who the President’s Chief of Staff was at the time. It was a big business type. Anyhow, he said, “This is the only thing we could get him to sign.”

He absolutely refused to recognize that in a situation where he was going to be non compos mentis, somebody else should be running the shop.

We also learned something else again. We learned from talking to doctors that anybody who has been heavily sedated should never make a decision of any consequence within forty-eight hours. It takes that long for the brain to clear. During that period of time, he signed the Iran-Contra documents.

As Herb Brownell said, “It’s one thing to be able to wave out the hospital window. It’s another to be able to govern.”

Obviously, the Twenty-Fifth Amendment doesn’t cover that. I think it’s all the more important—if anything happens—to not go rushing out there and making a decision before his mind really clears. It won’t be his decision, because he’ll think it’s clear from the beginning. But make sure that you have enough time to wait.

My concern with opening this issue for renewed debate and legislation—I don’t think you amend the Constitution by statute, although there are some

28. See FEERICK, supra note 18, at xv.
provisions that may express congressional intent and which can support a clarifying statute—is when you open it up for one of those things that’s simple and easy, Charlie and Susan and Molly all want to load onto that train. You end up with something that’s really a whole lot worse than what you have now. Of course, there’s the Succession Act. You can deal with that by statute.

FEERICK: I tend to be, to put in the bottom line, very protective of the present system. You know that.

SENATOR BAYH: I sort of am, too.

II.B. GAPS IN THE TWENTY-FIFTH AMENDMENT: DOUBLE VACANCIES, ELECTORAL GAPS, & “POLITICAL INCAPACITY”

Filling a Vacancy in the Vice Presidency

FORDHAM L. REV.: One of the areas of contention was filling a vacancy in the Vice Presidency. There has been some debate about having a special election to fill a vacancy in the Vice Presidency or, if there was a vacancy in both the Presidency and Vice Presidency, a special election to fill both offices.

FEERICK: So whenever there’s a vacancy in the Vice Presidency, one proposal is to have a special election to fill that vacancy, rather than, as in the Twenty-Fifth Amendment, have the President propose someone to the Congress to fill the vacancy.

SENATOR BAYH: We wanted to have a document in the Constitution that solved the problem while not creating a bigger one.

There are historical moments when you had presidents and vice presidents that couldn’t get along with one another. That contentious relationship was one that was not in the best interest of the country. So we want a President and a Vice President who, if they’re not working together, at least are not warring against each other. Sometimes the tension arises not from the officers themselves but between their staffs. The authority Kennedy gave Johnson was the first instance of a President giving the Vice President any authority. President Kennedy and President Johnson got along very well, despite the fact that their staffs, I don’t think, talk to each other if any of them are living now. Of course, when Johnson came in, he gave Humphrey authority. And so it goes.

I think that’s the right thing to do. But you don’t want to do that unless you have faith in the person that’s there. He needs to be basically one that you’re comfortable with. Hopefully he’ll disagree with you when he thinks you’re wrong, but when you say, “This is the way it is,” as President, the Vice President says, “Yes, sir. What can I do to help?”

In filling the vacancy, it seems to me that there needs to be somebody whom the President can work with. That’s why we gave him the power to nominate. But we don’t want him to be a kingmaker. Rather than reconvene the Electoral College, we had the same number of people voting, except in the two houses. They would elect, basically, after the President had nominated. And the process doesn’t have to be partisan—you’ll notice, there was a Democratic Congress that went along with Gerry Ford. In fact, I happened to have been the lead-off witness in the House hearings on the subject, saying that I thought Gerry Ford was just exactly the kind of person we had in mind when we wrote the Twenty-Fifth Amendment. History has proven that he was the right guy to move on up.

And you have to look at what the people said. Let’s take the Nixon experience and the Agnew experience, which was the first time that the succession became a matter of issue. Nixon had been elected for four years. The American people said, “We want him for four years.” We don’t know for sure, but when Agnew left and there was that vacancy, and Carl Albert was next in command, I can’t imagine Richard Nixon resigning and turning all the machinery of government, which was controlled by Republicans, over to a new President, Democrat Carl Albert. I just don’t think he would have. So the fact that the Amendment operated to put a Republican there who could step up when he resigned and continuity would exist in the government—I think, without that, Nixon would not have resigned. He would have been impeached. I don’t think that would have been in the best interest of the country.

So I think, in our own way, John, we did maintain sanity there by having the Twenty-Fifth Amendment in place. Gerry Ford, nobody questioned that he was the Vice President when he was chosen that way, and nobody questioned when he became President shortly thereafter.

Political Opportunism in Filling a Vacancy in the Vice Presidency

FORDHAM L. REV.: The timing of the appointment of Ford was interesting, because Agnew was already being investigated. That was under way before Watergate. Was there any concern that the Senate would hold up the appointment of Ford while the Vice Presidency was still vacant, impeach Nixon, and then install their man in the White House? There would be a double vacancy, a vacancy in the Presidency and the Vice Presidency, and then, theoretically, the Speaker of the House could have become President. Was that a concern at all?

SENATOR BAYH: Temptation, sure. The House was doing all the investigating, of course. They had to bring their proceedings. I have no doubt in my mind that if Nixon had stayed in there, they would have brought the proceedings and the Senate would have probably booted him out of there.

I’m certain it was in some people’s minds. They may have even expressed that to me. I think there would have been stronger support for that in the House, where Speaker Albert would have been next in line. But
anybody that raised that to me knew they’d have to clear me out of the Senate first in order to do that, because that wasn’t what the Twenty-Fifth Amendment intended.

I think, when it got right down to it, I’m sure Speaker Albert said the same thing: “It wouldn’t be bad to be President, but I’ve got the next-best job in town, maybe even the best job, as Speaker.” He had a respect for the constitutional structure, I think.

Political Uses of the Twenty-Fifth Amendment & Ambiguity in Legislative Intent

FORDHAM L. REV.: To the extent that there are gaps that the Twenty-Fifth Amendment left open, what are the obstacles in addressing these gaps and in convincing everyone that this is what we should be thinking about now? As an example of an issue open for debate, some authors have questioned whether the Twenty-Fifth Amendment’s disability provision can be invoked in a situation where the President is “politically incapacitated.”

SENATOR BAYH: There are a couple of gaps that are real gaps that I got to looking at that I thought probably could be handled. One issue has to deal with the authority of the Acting President in a situation of presidential disability. I think an Acting President has the same authority that a President would have under the circumstances. There’s no need for him being the “acting” there if there isn’t something giving him the authority to act in the full capacity as President as long as he’s there.

I’m trying to think how you get legislative history without having to pass a new statute—whether it be a committee report out of the Judiciary Committee of both houses, expressing the sentiment of the Senate and the House that, under the Twenty-Fifth Amendment, the Acting President should have all the power and authority given to any President, as long as he serves in that office. Then, based on that fact, conclude that we do not believe that the Twenty-Fifth Amendment is designed to be used as a political tool for presidents who are confronted with political problems.

Maybe the two ideas could be put together into a solid argument. But my concern is—I am very concerned that this Supreme Court is such a philosophically bound court. This is a concern of mine, having been intimately involved in Title IX and writing an amicus brief to the Court in the last case that they heard, the Jackson case. Title IX is just one short

30. See Akhil Reed Amar, Sterling Professor of Law & Political Sci., Yale Univ., Applications and Implications of the Twenty-Fifth Amendment, Address at the Frankel Lecture (Nov. 6, 2009), in 47 Hous. L. Rev. 1, 3–7 (2010); see also John D. Feerick, A Response to Akhil Reed Amar’s Address on Applications and Implications of the Twenty-Fifth Amendment, 47 Hous. L. Rev. 41 (2010).

sentence. It doesn’t say anything about whether retaliation exists or not.\footnote{See Jackson, 544 U.S. at 175 (holding that Title IX implied a private right of action for claims of retaliation, despite the fact that “Congress did not list any specific discriminatory practices when it wrote Title IX”), rev’g 309 F.3d 1333 (11th Cir. 2002).}
There were no hearings held on it. There’s no committee report to say what the committee intended. All it has are the words of the author. In this instance, it’s Senator Birch Bayh.

Where I’m going is that if we have a President who has political problems and something is done to try to take him out of there, and he appeals to the Supreme Court—if he’s a Republican President, how do you suppose they’re going to rule?

The Tilden-Hayes election is another example. There, the Republican Congress refused to accept the electors from three southern states that were for Tilden. Instead, they decided they’d set up a panel, which was bipartisan, composed of members of the House and Senate and one member of the Supreme Court, who happened to be a Republican. The vote was eight to seven Republican. They not only didn’t count the Tilden ballots, they counted the Hayes ballots, which gave him the Electoral College victory by one vote. As a tradeoff for the Democrats, Hayes agreed to take all of the troops out of the South that were enforcing the civil rights of blacks—so total regression. They weren’t slaves, but they were basically in the same position because they had no rights at all—all as a result of this one member of the Supreme Court.

It sort of makes one wonder about where the Court fits in, because it would be the court of last resort to settle any dispute like this.

FEERICK: You are picking up some of the suggestions that the Amendment might be available to a President who is going through an impeachment investigation. Can a President, under Section 3, remove himself or herself, saying, “This is a Twenty-Fifth Amendment use, because I don’t have enough time to take care of impeachment and my duties as President”?

That’s just one example of current debate about succession. Some people also argue that whatever use you have under Section 3 is perhaps a precedent for also using Section 4. Professor Amar of Yale Law School, who has written on the subject, has been provocative in some of the views about the reach of the inability provisions of the Amendment.\footnote{See, e.g., Amar, supra note 30.}

SENATOR BAYH: I think it’s a legitimate question here.

Let’s take the specific example: President Nixon is about to be impeached, so he invokes the disability provision and says, “I’m disabled,” and the Vice President becomes Acting President. I think he could do this legally, but I think that ensures he is going to get impeached. I don’t think that slows down the impeachment process. It might even accelerate it. So he’s out of there.

Now, when you have an Acting President who becomes President, Congress can deal with that one way or the other. I don’t see how you can
say you can’t use that as a subterfuge, but if it is subterfuge, then that’s a declaration against interest, it seems to me.

FEERICK: Here’s part of the issue. You have an issue about—one way to label it is “the fitness of a President.” This impeachment inquiry is going on, and the President wants to deal with the impeachment and says, “I’ve been disabled, because I have to spend a lot of time dealing with impeachment. Therefore, I can use the Twenty-Fifth Amendment.”

So the question that I think you have lurking throughout the document is, “What’s disability?” It’s back to the age-old question: What does it cover?

SENATOR BAYH: “What is the extent of the term ‘disability’ and who is to be the judge of it?” So said Dickinson of Delaware, as I recall.

FEERICK: So Professor Amar and others have suggested that, the term being general, it can cover a lot of different situations, even though in the debates leading to the Twenty-Fifth Amendment, most of the focus was on physical and mental capacity. There were examples given, such as what if the President is kidnapped?

SENATOR BAYH: His plane goes down on a deserted island and you can’t find him, there’s no communication, and missiles are getting launched or need to be launched.

Those are all very real concerns.

FORDHAM L. REV.: That was an area where the record was clearer because there were discussions about this very contingency. From reading the legislative history leading up to it, those were the recurring themes—physical disability or the far-removed chance of being kidnapped. But is it fair to say that these concerns about some of these more political uses are new issues?

SENATOR BAYH: I have some recollection of that coming up in the hearings: What if the President does this or that? I think the general reaction was very much as mine is here a couple of generations later: Any President that tries to do that is going to foredoom himself. If they don’t have impeachment proceedings started and he does something like that, then, it seems to me, this would be grounds for impeachment.

FORDHAM L. REV.: What if you had a situation where it’s not impeachment, and the judge orders the President to sit for a trial. In that situation, the President is essentially physically detained. But maybe the underlying issue in the civil trial could be grounds for impeachment. It seems that what you’re saying is that if it’s ever used in such a scenario, then there’s no threat, I guess, of misuse under Section 4, because you’ll just have impeachment, if that’s correct.

FEERICK: In my book on the Twenty-Fifth Amendment I write that “[w]hether Section 3 is broad enough to cover the case of a President’s deciding to step aside temporarily, as was suggested during Nixon’s last

34. FEERICK, supra note 18, at 3.
year in office, in order to devote his full time to his defense against impeachment and removal is a debatable question.\textsuperscript{36}

So I’m ducking the issue.

I continue, “Although such a use of the Amendment was never mentioned by the Congress which proposed it, it probably would not be beyond the scope of Section 3, since the Section was intended to be broadly interpreted. However, Section 3 does not provide a mechanism for a President to step aside temporarily without justification, thereby neglecting his duties.”\textsuperscript{37}

It’s interesting. I have a student right now, Brian Hannon, who is reading everything on disability and has a different view from Professor Amar. He is saying that “inability,” as he sees it, was not intended to be synonymous with “unfitness.” If you have an issue of unfitness—dealing with impeachment or some other political issue—that’s not inability.

So we have the debate. Some people would stretch the term to deal with things that we, at the time, never focused on specifically.

SENATOR BAYH: Maybe we focused on it and then said, “So what?” I guess a presidential disability is pretty much what the President says it is. The question is, how is it going to fly with members of Congress and with the public generally? That’s why the business of stepping out in order to avoid impeachment, I think, guarantees impeachment. The Supreme Court may say, if he’s not mentally incapacitated, you can’t impeach him. I could argue that case.

\textit{The Problem of Double Vacancies, Declaring an Acting Vice President Disabled & the Pre–Twenty-Fifth Amendment Letter Agreements}

FORDHAM L. REV.: Another question that the Twenty-Fifth Amendment does not resolve—albeit, a question raised by a far-fetched scenario—is how the disability provision would operate in a situation where the Vice President became Acting President, and then the Acting President became disabled. There would be no Vice President there to declare him disabled. Thus, Section 4 would be inoperative.

FEERICK: The question is, “What happens when nothing in the Twenty-Fifth Amendment deals with the disability of a Vice President who is acting as President during the disability of a President?”

SENATOR BAYH: You might argue, since there’s no longer a Vice President, that the Succession Act would be triggered.

FEERICK: Right. If there’s a serious issue, any issue, a disability of a Vice President acting as President, you’re not in the Twenty-Fifth Amendment analysis now.

SENATOR BAYH: Basically, you’re President.

\textsuperscript{36} FEERICK, supra note 18, at 198.
\textsuperscript{37} Id.
FEERICK: You’re right, Vice President acting as President. But you’re still the Vice President. If we didn’t have a Twenty-Fifth Amendment at all—just forget it for a second—and you had a serious case of the disability of a Vice President, how would you deal with it? The Succession Act applies to the disability of a President and Vice President. It applies if you have a double vacancy or a double disability.

The succession law says who is next in line. So the issue that some people would see is that the person next in line might assert that he’s entitled to act, because the succession law designates him as the successor in the event of the disability of a President and Vice President. Since the President is disabled and now the Vice President, acting as President, is disabled, the Speaker should be called upon to discharge her statutory duty as the Speaker of the House of Representatives to become the Acting President, replacing the current Acting President because he’s disabled—the current Acting President is a Vice President who is disabled.

SENATOR BAYH: I wish they’d change the succession statute. Like I mentioned earlier, I’m very concerned about the President Pro Tem. I would make it the Majority Leader of the Senate and the Speaker of the House. You have to give the Senate a little role there, I think, because they’re not going to go along with what you want to do. Would a new succession statute take precedent over the House, making the Majority Leader next in line over the Speaker? I don’t know. The House is the body that reflects the people generally.

FEERICK: What is your reaction to how declaring a President disabled would function without an explicit provision like the Twenty-Fifth Amendment? Before the Twenty-Fifth Amendment, when the Attorney General’s office—at the time, Robert Kennedy—put out an opinion to support the letter agreement between President Kennedy and then-Vice President Johnson, it supported the idea that the Vice President had authority to declare a President disabled.38 It said the President can pass over his powers and duties to the Vice President. But it also suggested that when the President was disabled, the Vice President had the authority to declare the President disabled and take over.

SENATOR BAYH: Only with the consent of the Cabinet.

FEERICK: This was the Kennedy opinion.

SENATOR BAYH: But I don’t agree with the Kennedy opinion.

FEERICK: So there is the issue of the legality of the Kennedy opinion before the passage of the Twenty-Fifth Amendment. The Kennedy letter agreement says that the Vice President should consult with whomever, particularly with the Cabinet. It doesn’t mandate that. But he takes over when the President is disabled. It’s implicit in there—maybe it’s explicit—that the Vice President can declare a President disabled, who is disabled.

INTERVIEW WITH FORMER SENATOR BIRCH BAYH

Who knows? Somebody has to determine that. At the time, Senator Bayh, I think you took issue with that.

SENATOR BAYH: That’s a prescription for a coup right there.

FEERICK: Yes. Even with the existence of the Twenty-Fifth Amendment, these letter agreements are still relevant, because they raise central questions to analogous situations where the Twenty-Fifth Amendment is inoperable. Benton Becker, General Counsel to President Ford, thinks the letter agreements constituted an unconstitutional delegation of power.

SENATOR BAYH: You mean the Kennedy agreement?

FEERICK: Yes. Why is he spending his time on that?

FORDHAM L. REV.: We believe he is looking at the letter agreements generally, which arranged for the transfer of power if the President became unable. There were similar agreements between President Eisenhower and Vice President Nixon, President Kennedy and Vice President Johnson, President Johnson and Speaker McCormack, and President Johnson and Vice President Humphrey.39 I believe he is focusing on Johnson’s agreement with McCormack, which arranged for the transfer of power from Johnson to McCormack if Johnson became unable. The Twenty-Fifth Amendment had not been enacted at that point. Some argue that that was an unconstitutional delegation of power.

FEERICK: The Twenty-Fifth Amendment does not apply if you have no Vice President. The Vice President is gone and the Vice Presidency is empty. It just happens suddenly. Something happens to the Vice President, and the President, arguably, is disabled. People speculate that if the President is disabled and there’s no Vice President, the Twenty-Fifth Amendment doesn’t cover that, and therefore it’s a gap.

That’s one of the examples. As you said before, all those possible contingencies were discussed. But it was hard enough to get the Amendment that we have now. If you put all these other contingencies in there, it pushes out this way, as you said.

SENATOR BAYH: This just argues for filling that vacancy quickly.

FEERICK: Right.

SENATOR BAYH: In the one experience we had, with Ford, it happened quickly. If Congress doesn’t go along with it, then . . .

FEERICK: If, for example, they were both shot, if something happened to both of them at the same time, and the Vice President dies—if the President is clearly disabled, the succession law is, I think, going to take over.

SENATOR BAYH: In that case it goes directly to the Speaker, which I prefer, frankly.

FEERICK: Would you reverse the order, too, and have the Majority Leader of the Senate go before the Speaker? That’s a different issue.

39. FEERICK, supra note 18, at 55–56 & n.*
SENATOR BAYH: If you’re going to make the change in the Senate, I think to just take them out of the position they are in now.

FEERICK: How does it work? If they are both disabled—suppose the President is unconscious and the Vice President died—I don’t think there’s any issue. The Speaker is immediately going to take over, under the succession statute. Who’s going to claim that there is not a disability there?

SENATOR BAYH: They can’t. Then the Speaker takes over.

FEERICK: Yes, in the case of a double disability.

SENATOR BAYH: The Twenty-Fifth Amendment is mute on that.

FEERICK: Yes. But the Constitution is not, because Section 2 gives Congress the power, under the other provisions of the Constitution, to redress the issue.

To that end, Congress has established a line of succession to cover double disability. It is in the Succession Law of 1947. If you have the situation where there’s an Acting President because the President is disabled, and an issue arises with the Vice President, the open question is whether Congress can say, “We have some power under the Necessary and Proper Clause to dictate how to handle a situation where it is clear that the President is disabled.” Congress can deal with the problem of a disability of the Vice President acting as President. They have some authority, under Article II of the Constitution, in dealing with the line of succession that gives them authority to say who the successor is in the case of a double disability, and possibly to say something about that disability.

Otherwise, you have an unworkable situation.

Now there is a serious issue about the Vice President’s disability. The Twenty-Fifth Amendment doesn’t apply because there is no specific constitutional provision for Congress or anyone in the Executive Branch to declare the Acting President disabled. Congress is saying that the Speaker takes over, with the disability of both the President and Vice President. But now Congress is faced with a situation where the Vice President who is acting as President doesn’t acknowledge that he has a disability. It’s easy if he says, “Yes, I’m disabled.” Then the Speaker takes over—there’s no issue.

So the question I have is where the Congress—because it hasn’t done so in the succession law—has some ability to legislate because it has the power to say who is next in line when there is a double disability. That enables Congress, under the Necessary and Proper Clause, to figure out how to deal with, in a double disability situation, the Vice President acting as President who is claiming he’s not disabled.

FORDHAM L. REV.: Theoretically, the Speaker could say, “I’m going to invoke Section 4 of the Twenty-Fifth Amendment. I’m going to declare the Vice President disabled.” Even though there’s no provision for the Speaker to do that, he could say, “Because I’m next in line, then I can

basically do what the Vice President should be able to do.” Then there could be a battle between Congress and the Speaker.

FEERICK: I think, if I were counsel for the Speaker, I might say, “You’re not bound by what the Cabinet says. You’re not bound by the Cabinet, because it doesn’t apply to you. In the absence of the Twenty-Fifth Amendment, which doesn’t apply, you have the power to take over at this point. The line of succession says you take over in a case of disability. This guy, who says he’s not disabled, is disabled,” although the Speaker would probably want to get some support from the Congress, I would think, as a practical matter, if you have a dispute between the Vice President acting as President, who claims to be able, and the Speaker, who says, “You’re not able.”

That’s a tough problem. I don’t know how that would play out. There are just a lot of possibilities.

SENATOR BAYH: If I were Speaker, I’d sure try to see if I could get the Cabinet to support me.

FEERICK: Right. That’s what you were saying.

FORDHAM L. REV.: To play it safe, make it legitimate.

FEERICK: If the Cabinet didn’t support him, then the Vice President is still acting as President, until such time as the country starts to express itself, depending on how he’s doing.

But something you said before to me, Senator Bayh, is very appealing. In a crisis like that, you can’t rule out good people figuring out how to deal with that in a way that’s respectful of the Constitution and promoting public confidence. It may not go down well for those who want to see everything defined in advance.

SENATOR BAYH: I would imagine that the Vice President, given a crisis confronting our country—if we don’t have a crisis, it’s another thing—and the Vice President, for all intents and purposes, is non compos mentis, he would catch unshirted hell. I think they would make it impossible for him to serve, because he’s not capable of serving.

Electoral Succession

FORDHAM L. REV.: There are several gaps at various points in the system of electoral succession—for example, if a presidential nominee were to die before Election Day or were to die before the vote of the Electoral College or were to die between the vote of the Electoral College and congressional certification.41 Would abolishing the Electoral College reduce these gaps?

SENATOR BAYH: Yes.

But, shoot, you could have a President who got the popular vote dying before the votes are counted, before Election Day. After Election Day, he

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could die before he is sworn in. All of those things are possible, no matter how you choose them, it seems to me.

Isn’t there a general consensus that the Vice President would be the one who would be chosen or not chosen? What is the law on that? Do we have any law on that?

FEERICK: Once there’s a President-elect, you have the Twentieth Amendment. But a gap arises before the votes are counted and declared by Congress. Then there’s some debate, whether Congress, in a joint session in early January, can count electoral votes for somebody who has died between the casting of the votes and the declaration of the votes. Some people say Congress can’t. But I think there is a lot of authority that, once the electors voted, as long as people were alive at that point, you have, presumptively, a President-elect and a Vice President-elect who had the votes. Therefore, even in advance of Congress declaring it, if the electoral votes that were cast in early December have identified a President-elect and Vice President-elect, I think there’s good authority in the reasoning and constitutional provisions to say that it has to count the vote. If the President-elect died in that gap period, the Vice President-elect takes it, based on the Twentieth Amendment.

FORDHAM L. REV.: The reasoning seems sound. So, Senator Bayh and Dean Feerick, the gaps in succession all arise before the vote in the Electoral College?

FEERICK: My argument had been—and I think there are other arguments that I didn’t deal with—that the Twelfth Amendment specifically mandates Congress counting the votes. If a Presidential candidate who died is counted, under the Twelfth Amendment, there would still be a Vice President-elect.

But some people say there is legislative history in a committee report for the Twentieth Amendment, and the committee report assumed that once the votes were cast, even before the count, you would have had a President-elect and Vice President-elect, unless you had a situation where nobody got a majority at all.

So there is support for the view that when the electoral votes are cast, if everybody is alive, that’s the point, one can argue, that you have a Vice President-elect. So if anything happens to the President-elect between that point and Inauguration Day, the Vice President-elect becomes President.

But then the question is, what happens when somebody dies after the election and before the electors meet? The electors now have a substantial role. They have to decide what they’re going to do in the electoral proceedings—who they’re going to vote for.

SENATOR BAYH: They’re perfectly free to cast them for John Brown if they want to, or Wayne Morris—Ronald Reagan, at one time.

FORDHAM L. REV.: If that’s what could happen, maybe someone could argue that it is good thing that we have an Electoral College that

42. U.S. CONST. amend. XX.
43. U.S. CONST. amend. XII.
could decide the issue. On the other hand, one could argue that, in fact, that is exactly the reason we should get rid of the Electoral College, that it shouldn’t be up to electors, who are not representatives—

SENATOR BAYH: Not bound to anybody.

FORDHAM L. REV.: Exactly.

SENATOR BAYH: That’s sure one of the reasons.

FEERICK: There would probably be some other views on this area, I expect.

FORDHAM L. REV.: With the Electoral College, some would argue that you are creating stability. Yet that’s at the expense of legitimacy and democratic voice. The balancing of legitimacy, on the one hand, and continuity and stability, on the other, raises an interesting issue. Any reform of the Electoral College will undoubtedly have important consequences for presidential succession.

SENATOR BAYH: Suppose the President dies after being elected. Do electors have the capacity? I think they do. The question is which slate of electors Congress accepts, which goes back to the old Tilden-Hayes situation.

If the Congress is Republican and the Democratic candidate dies—

FEERICK: The question there would be, “How would the electors cast their votes?” The President dies after the election, taking his question, before the electors meet.

II.C. LINE OF SUCCESSION AND CONTINUITY IN GOVERNMENT

The Nation’s Sentiments About Succession in 1963

FORDHAM L. REV.: Can you describe the sentiment of the nation around the time of the passage of the Amendment, the reactions to that iconic photograph of Johnson standing in front of an aged McCormack and Hayden, and the role of the media at the time in facilitating these conversations and catalyzing some of the initial steps that were taken?

SENATOR BAYH: For those of us involved, we thought it was a real testimony to the need to do what we were doing. The population generally, I don’t think, thought, “One of those fellows is going to be the next President of the United States.” But those in news did, and the people in our universities and in our law firms that were conversant with the issue, they sure did.

I think they were with us, but it just convinced them that they were right.

I would hope that the time doesn’t come when—as you point out, what happens if the Senate or the House refuses to go along with the President’s choice? I would hope they would catch hell from the people back home, because the press writes editorials in all the newspapers that we can’t play politics with this, just to protect the Speaker of the House or the President Pro Tem of the Senate.
I think the Ford example is as good an example as you’re going to find of the Twenty-Fifth Amendment working well. Gerry Ford was a man of his time. He happened to be the right kind of person to play a role that ultimately would become increasingly significant, and which he was exactly well-qualified to fulfill.

I’m glad I was there and I’m glad he was there, more importantly.

*The Political Sensitivity of Reforming the Line of Succession*

FORDHAM L. REV.: You talk in your book about the need to be cognizant of that situation in which we had specific people in line under the status quo, and, in calling for reform efforts and change, there was the need to be tactful and measured.

SENATOR BAYH: We’re talking about two different things here, succession in the constitutional structure and succession by statute, which is only relevant if the constitutional provisions aren’t followed. I think Johnson was right that the best way to handle that was to wait until John McCormack was not in the chain of command. That’s what happened. I’m sure I had more than one conversation with the Speaker, letting him know what we were doing and why we were doing it. Never a peep about, “Don’t do that yet. Wait a year,” or something. None of that.

I like to think that in times of crisis—let’s say, at a time of great crisis—great men step forward and do the right thing. Maybe that’s being naïve, but I think that’s the case. All of us love our country, regardless of how we might vote. Amen.

*Line of Succession & State Appointment of Members of the House of Representatives in Response to an Attack on Congress*

FEERICK: With regard to the line of succession, there have been a lot of proposals advanced to change the line of succession beyond the Vice Presidency, as you know. You made reference to focusing on the Majority Leader of the Senate. But there are a number of scholars, really from the beginning of debates on this issue, who have felt that the legislative offices should not be in the line of succession, from a constitutional standpoint and a policy standpoint.

Then there are proposals that the line of succession is not large enough. If you had a terrorist attack that had a devastating effect on Washington, it would weaken the country. So there should be a longer line of succession that includes governors and others.

What are your thoughts on the matter?
SENATOR BAYH: The issue of the line of succession surely provoked
my thought processes. I assume that the House rules set forth a succession
plan if something happens to the Speaker.44

But just as when there is a joint session there is always one cabinet
member that’s never there, I think that whoever would follow if both the
Speaker and the next officer in line are taken out—long before we thought
about a nuclear explosion—I never thought about somebody driving an
airplane into the Capitol Building during a joint session.

I think there’s something to be said, John, for having a law that says that
in the event there is a tragedy, the governor of each state shall immediately
appoint members of the Senate and House that are of the same political
disposition as those who were killed, and that they will meet at a point to be
determined.

That could be handled pretty quickly, in a matter of days. Of course, in
the world in which we’re living, a lot can happen in a matter of days. So
maybe that’s not quick enough.

FEERICK: Some constitutional scholars would say that there’s no power
in the Constitution to deal with a vacancy in the House of Representatives.
You have a provision in the Constitution for the governor to fill a vacancy
in the Senate.

But you’re focusing, again, this question of state law. I really haven’t
studied that subject—whether the governor of a state could, under state law,
just fill a vacancy in the House of Representatives.

But maybe not to bog down my question by the legal analysis, the idea of
having a law, assuming it’s constitutional, that would enable governors to
fill positions in Congress obviously has appeal to you in the kind of tragedy
we’re talking about.

SENATOR BAYH: I don’t think we should get involved in the normal
appointment process. Some states require a special election for members of
Congress. We’re all now familiar with the situation of back and forth in
Massachusetts [in the aftermath of Senator Edward M. Kennedy’s death and
the vacancy of his seat]. I think under normal circumstances, that can be
left to the individuals, and you won’t get involved. You have a real states’
rights question.

But when you have a matter of national consequence, like a terrorist act, I
think a national statute is appropriate—and it ought to hold each governor
accountable to the same standard, it seems to me, and this standard is to
maintain the status quo. Don’t let a governor try to go packing the
Congress one way or another. We can say that the respective party
chairmen of each state shall make recommendations. In other words, you
don’t want a Democratic governor to appoint Republicans that are all
subservient to him.

The thing about the purists that say Congress shouldn’t get involved in
making decisions in the executive branch is that they ignore the need to

44. Rules of the House of Representatives, 111th Cong., R. 1(3)(A), available at
have democratic legitimacy. The reason Harry Truman wanted to change the Succession Act was that he thought whoever was President ought to be elected by somebody. Those Cabinet officials aren’t elected by anybody. They just say, “You’re it.”

Secret Order for Shadow Government

FORDHAM L. REV.: Related to what Dean Feerick said about this being one issue where Congress could act, Senator Bayh, you identified a plan and a process that might work. It calls to mind a secret executive order that was allegedly issued by President Reagan, which may or may not have been in effect since then. President Reagan allegedly issued a secret executive order that creates a means for re-establishing the executive branch in the event of the President and Vice President’s death.45 This alleged process bypasses the Succession Act of 1947, therefore precluding the Speaker of the House and President Pro Tem from succeeding to the Presidency. What are your thoughts on this? Is there a potential rallying point for future action in this area?

SENATOR BAYH: Well, I’m not for secret government. I have no problem with having a plan for a shadow government to protect the country from a disaster. But we ought to know who they are and we ought to know how they’re chosen. I assume this would be the hand from the grave continuing to write on after death.

Something has to be done. We have a normal process now for what happens if the President dies, if the Vice President dies. It goes to the Speaker. What happens if the Speaker dies? If we’re talking about a mini-terrorist act, that shadow government, I would assume, would all be going up in smoke. Those people are close enough to the throne that they’re going to be in Washington, and everybody would—isn’t that terrible to think about?

It’s not beyond belief. I’m not pooh-poohing the idea. But I think we need to be careful. We are a democracy, after all. The President is not a king. Whatever framework he sets up ought to be a matter of public knowledge. If it has any credibility, then it needs to be signed off on, it seems to me, by Congress.

What do they do? Do they also have Justices of the Court, shadow Justices of the Court? You can imagine that this is ripe for litigation of all kinds, as to who gets what.

The more public knowledge there is in advance, and acceptability, the better off we are.

I assume most states have succession acts, so that if the governor is at the State of the Union message and it all goes up, the lieutenant governor then becomes governor. Reconfiguring a Congress very much in light of the one

that is no longer with us—that can be done—I was going to say “as a simple matter.” It isn’t a simple matter or anything like that, but it could be done rather expeditiously, provided that you have it carefully enunciated as to what you want to happen, and where, under what circumstances it is triggered, and how the members are chosen.

Once you have a sitting Congress, then you are able to come to grips with laws that are written by the representatives of the people, generally not somebody who is President, who is no longer there.

I still like the idea of someone like Steny Hoyer being at the Greenbrier when the State of the Union is given.

With regards to the secret plan, with everything else the President has to do, I could understand completely if nobody has thought about that. A young President—he’s going to live forever.

FORDHAM L. REV.: Even if a law providing for the President to set up a shadow government was passed on to President Obama, there is still the issue of transparency that you hit on, and also separation of powers. What has Congress’s role been in approving this plan? What is their knowledge of this plan?

SENATOR BAYH: The question is, what is the plan? If it is a plan to deal with presidential disabilities, which is the immediate matter of concern, I don’t think that needs to be a matter of public knowledge. In fact, it’s probably better that the public doesn’t know about it, because some character can take advantage of a weakness in it.

But one of the important things is that the President’s wife needs to be sitting in on all this, so that she will be able to attest to the fact that that’s what her husband would have wanted to do. The Vice President’s wife too—so Jill and Michelle.

II.D. REFORMING CURRENT SUCCESSION LAW

FORDHAM L. REV.: You have spoken in the past of the need to be proactive about the issue of succession, in other words, the difficulty of taking this issue on absent a crisis situation. What are the difficulties in being proactive? What would need to happen in the media and in Congress to lay the groundwork for such an initiative?

SENATOR BAYH: These are very real issues. I guess it’s hard for me to be totally objective. Maybe it’s hard for John to be totally objective. We’ve been there and we’ve explored all these alternatives. The Miller Center brought up all these hypothetical situations and alternative succession structures. All of us came to the conclusion that this isn’t perfect, but if you try to fill one little gap, you’re going to create a larger problem someplace else.

My concern is that you can’t really control what the beast is going to look like by the time it gets out of Congress and back to the states. If you have a little, noncontroversial gap that you’re going to fill, that doesn’t
mean other people can’t piggyback on that and open up a whole can of worms. Hopefully such a piece of legislation wouldn’t pass.

FEERICK: I was a commentator at the recent Continuity of Government Commission meeting, where they issued their report on presidential succession,\textsuperscript{46} in early July. The members of the Commission seemed to express a lot of frustration that Congress doesn’t seem interested in taking up these issues in any significant kind of way.

How do you get Congress to be proactive about issues—like those the Continuity of Government Commission deals with—that are bipartisan in nature? How can we build a meaningful proactive process in Congress?

SENATOR BAYH: There are thinkers and then there are doers. Sometimes there are thinkers that are also doers.

I don’t know who is on the Continuity of Government Commission or who chooses it, what qualifies somebody to serve on it. But they ought to have a sitting member—two or three, one from the House and one from the Senate or two from Republicans and Democrats in the House and the Senate—on the body that makes these recommendations.

I had never heard of the Commission. That’s no criterion for their credibility. I don’t know what effort they have made. With the Twenty-Fifth Amendment, we were fortunate to be able to take people in our study groups that really were movers and shakers, as well as thinkers.

FEERICK: The one thing that was present at the time—there was a young Senator from Indiana by the name of Birch Bayh, who was chairman of a very important subcommittee and who had a very strong interest in the Constitution and issues such as succession and direct popular election. I’m not sure, without that kind of force of one person that galvanized an entire body, some of these reforms would ever have happened.

SENATOR BAYH: If that is the case, then we were lucky to be there.

People are so busy up there now, but I think there are still some with interest—something like the continuity of government is pretty heady stuff. Everything has gotten so polarized now, but you ought to be able to get the Democrats and Republicans in the House and the Senate that could agree to disagree on everything else. They’re all going to try to do something that’s in the best interest of the country in case of a disaster.

III. OTHER LEGISLATIVE WORK OF SENATOR BAYH

Involvement in Electoral College Reform

FORDHAM L. REV.: To step out of succession for a moment, would you mind discussing your involvement in the Electoral College reform, both at the amendment stage and since then. You have been extremely active

since you left office. As we understand it, it has been a major project of yours.

SENATOR BAYH: We got the Bar Association to get together a blue-ribbon panel. It worked so well once, with the Twenty-Fifth Amendment, we decided to try it again. The interest involved in that panel was much more diverse. We had the labor unions and the Chamber of Commerce and the League of Women Voters and other people involved in that panel.

There again, there was a little duplicity, because, in my heart of hearts, I concluded that any extensive, reasonable discussion of the subject would conclude that the direct popular vote was the best way to go. Interestingly enough, that’s exactly what happened.

So we, armed with that, did what we wanted to do anyhow. But we had that kind of momentum behind us and those organizations supporting us. We were able to get it out of the House by a large vote. I had sixty Senator sponsors for it in the Senate, and I figured I would get the other six when the debate got going. Then the most unlikely of all experiences, I think, that have happened to me while I was in the Senate—Strom Thurmond, who was anti-Semitic and anti-black along with everything else, was also anti-direct popular vote. He got the idea of sending telegrams to all of the prominent black leaders and Jewish leaders. He played on something that always frightened me about direct popular vote—despite the small states feeling they had the advantage, the large states were the ones that really had the advantage.

He told these groups, “What you’re going to do is, you’re going to give up your advantage to have influence to sway these large electoral votes if you have a direct popular vote. It will just be confined to one person/one vote. You won’t be able to sway that whole group of electors,” which is true, of course. A couple of these guys—Eddie Williams, who ran the study group for the Black Caucus, and one of the top Jewish leaders in the country—came to my office and said, “You’re going to have to back away from this.”

I said, “What do you mean?”

They said, “Well, it would give us less power.”

I finally said—the only time while I was there, in my eighteen years—I said, “Look, I busted my tail to see that each of you and your constituencies got one person/one vote. Now you’re telling me that if you have 1.01, you want to keep it? Get your rear ends out of my office and don’t come back.”

It was clear they were going to pursue it, and they were able to call off enough of the liberal votes—I lost four or five votes in the liberal section. I think we ended up with maybe fifty-two or fifty-three votes, fifty-five maybe. I forget what it was. I didn’t even have my sixty.

I asked myself, “What in the world did I do wrong?” That was one of the times I questioned—I asked myself, “What could I have done differently to keep that from happening?” I suppose, if we had had more time to get around and educate individual Senators—and perhaps, as I look at it, maybe that’s what I should have done. I just had to take this off the floor.
But as I recall, we were under a lot of pressure to get it out of there. Other things had been backing up because of this popular vote thing. I guess I was afraid, if I ever took it down, they would never bring it up again.

Anyhow, I think that’s what I should have done. But I didn’t. Whether that would have affected them or not I don’t know.

Then you had somebody like Vernon Jordan—“I can’t be with you on this. It’s hurting my people.”

I think what Vernon was saying was, “It wouldn’t give me as much clout when I sit down with my member of Congress or my Senator, because he knows that I speak for somebody who can sway the whole bloc in New York or California or New Jersey,” or wherever it might be.

That was a tough one to lose, particularly to lose that way, from that hypocritical approach.

There’s a fellow in California by the name of Dr. John R. Koza. He is a computer scientist. He came up with the idea of using Section 1 of Article II, which basically says the electors shall be chosen by the state legislators. The manner in which the electoral votes shall be cast in the state shall be determined solely by the legislators thereof. So the theory is—I guess two years ago now, I spent the whole month of January in Annapolis, and Maryland, for the first time, went on record as saying that they would cast all of their electorals for whoever got the most popular votes, contingent on enough states joining an interstate compact with them that would constitute a majority of the electoral votes. It would not take effect until enough states had signed on.

We [Maryland] have been joined by New Jersey, Illinois, and Hawaii. California passed it twice, but it was vetoed by the Governor both times. In Hawaii, they overrode the veto of the Governor there. There are several states—Arkansas, New Mexico, even North Carolina—close to doing it. And, since New York has a new Senator, we thought we could give another try in New York.

This has become such a Democratic issue, and I think it’s because, when we first started it, it was right after Bush, and the Republicans look at this as us getting our pound of flesh in exchange for Bush being chosen President. Of course, it’s not a Republican or Democratic issue at all. You could argue one party benefits or doesn’t, depending upon the circumstances.

To get this crazy thing, we have had to concentrate on those legislative bodies that had both houses controlled by the Democrats, as was the case with Delaware, and I think New Jersey went with us.

The cause is motoring along.

The fact of the matter is that most states have a state law that says electorals shall be chosen by the unit rule, that they all go for whomever carries the state. That is not a national law. That is a law in the individual states. Indiana has that. Maryland had it until they changed it. The idea is to change that law so that the state legislators say, “Hey, we want a President who is the majority in the country.”
FEERICK: One memory. The year might have been 1977. I think there was a vote on the merits of the amendment in either 1977 or 1978, whatever that year is. That was, in my recollection, the first time in the Senate that there was a vote on the direct popular election and the merits amendment. But before that vote, it could have been someone in your office, it could have been someone with the ABA who was in touch with your office who asked me if I would meet with Senator Javits and talk to him about the ABA position on direct popular election. It was very important—it was communicated to me, as I recall, to you, where Senator Javits might be on the issue. I did meet with him.

SENATOR BAYH: I remember that.

FEERICK: Somebody may have been with me. I just don’t recall. But what I remember about the meeting was, he said that his major constituent groups were opposed to the amendment, for the reasons that you mentioned, but it had a lot of merit, and he would think about it. I was trying to express support from the Bar of New York and the ABA. Then I remember hearing from someone in your office after the debate about how he stood up for the amendment in that final debate.

SENATOR BAYH: In his own pontifical way, he did. Among a group of smart people, he probably had more intellectual capacity than anybody else. But he could take forever to discuss a point. There’s such a thing as knowing too much about the subject matter. It was never A, B, C; it was A2 plus B2 plus whatever.

I thought that was pretty courageous of him, given what we learned.

FEERICK: That’s what came back to me, what you felt about that.

SENATOR BAYH: I have to believe that your meeting with him had an impact on him.

FEERICK: I’m not sure. But what I remember about the meeting was that he was torn.

SENATOR BAYH: It gave him cover to do what was right.

Passing the Twenty-Sixth Amendment & the Effort To Pass the Equal Rights Amendment

FORDHAM L. REV.: Would you describe your involvement with two more amendments—one that passed and one that didn’t—the Twenty-Sixth Amendment and the Equal Rights Amendment?

SENATOR BAYH: The Twenty-Sixth Amendment: we produced that shortly after the Twenty-Fifth Amendment was adopted, as you know. There were lots of reasons that the vote of young people should be considered, I thought at the time. Given this last presidential election, its promise came to fruition.

47. U.S. Const. amend. XXVI.
The chief selling point was that you had young men over there that were dying in the jungles, who weren’t old enough to vote for the people that sent them there. That was a compelling feature.

We had a young fellow who was the Mayor of Cincinnati. He was responsible for having almost an immediate ratification process as soon as we got this passed. It was bang, bang, bang. I think maybe at the time that was the shortest period of ratification. I don’t know what has happened since. Certainly it was ratified more quickly than the Equal Rights Amendment was.

I became involved in the Equal Rights Amendment, having grown up on a farm where my grandmother worked as hard as my grandfather. There was never an important decision made without Aunt Kate’s having a voice in it. Most of the time her voice was controlling. I never even knew what discrimination against women was. I certainly didn’t have evidence of it in my family.

But then I fell in love with a wheat farmer’s daughter from Oklahoma, who I met at a speech contest. She had been governor of Oklahoma Girls State, president of Girls Nation, got Harry Truman’s autograph in the Rose Garden between her junior and senior year. She was the first girl chosen as student body president in high school, a straight-A student. Her dream was to go to the University of Virginia. Her application was returned, “Need not apply.” That was the first time this young person had realized there was one thing she couldn’t do because she was a woman.

She won the speech contest, by the way.

Once I was married to Marvella, it became a driving force in my public life. The only vote I cast as Speaker of the House when I was in the legislature—the Speaker doesn’t normally vote, but you need fifty-one votes to pass, and we had this equal-pay-for-equal-work bill. I saw it had fifty votes, and I said, “The Speaker votes aye,” and the bill passed.

Interesting. I guess it’s nice to be smart, but it’s probably just as important to be lucky. I just about did myself in on the Equal Rights Amendment issue. We were having hearings, I think, on—probably, on lowering the voting age. Suddenly in the back of the room right by the door, a bunch of women held up signs—“ERA, ERA”—and started jumping up and down and yelling, just totally destroying the environment in the hearing. I just about ordered the police to clear the room when we voted on the bill—I told my staff person, “Find out what those damn women want. If they want to talk to me, I’ll give them all the time they want. Let’s get this hearing over with. Let’s not disrupt the normal proceedings.”

So I went over and voted and came back and met with those women for probably an hour and agreed that I would support the Equal Rights Amendment. I didn’t know what “ERA” meant. It was Betty Friedan and Gloria Steinem and all those—Bella Abzug, one of the champions.

So I was introduced to the Equal Rights Amendment and got it through both houses by two-thirds vote. It fell three votes short of ratification. Indiana was the last state to ratify. I’d hate to tell you some of the things I did to convince some of those members of the legislature that they really
didn’t want to be against this. I never did trade anything off, but I sure let people know I was going to watch how they voted on the Equal Rights Amendment.

In the end, sometimes the women were their own worst enemies. Prior to my getting involved, they would carry a pen with a pig in it into the State House: “This is a member of the House and the Senate. They won’t vote for women’s rights.”

I said, “Wait a minute.” I finally got them to be sensible about it. But this was going to be voted on on the first day of the—whether it was a Monday or a Tuesday, the first vote. I found out on Saturday that they had planned to have a big rally on the steps of the State House.

I said, “I don’t think you ought to do that.”

“Why? We want to show them that people are supporting women’s rights.”

I said, “First of all, you have to remember that all but one of those legislators who is going to be voting in the House is a man. Basically, you’re appealing to men, and you don’t want to offend them. Now, you’re going to have a rally. If you have a rally, one of two things can happen. What happens if you plan a rally and nobody shows up?”

“Well, we’re going to take care of that. We’re going to bus in a lot of people from Chicago.”

I said, “Wait a minute. If you bus in a lot of people from Chicago and you have a bunch of people there, you’ve got a big crowd of people. For sure, somebody’s going to make a fool of themselves. And that’s what’s going to be on the news. That’s what these men are going to see just before they go to vote the next day.”

They cancelled the rally. But they just weren’t thinking. Anybody who really is familiar with the situation, as I was, would have come to the same conclusion. But the people wanted to do everything they possibly could, refusing to recognize that sometimes the best thing to do is nothing. That was one of those cases.

I sure was sick about not being able to get Illinois. Phyllis Schlafly killed us—a housewife that descended on the Illinois legislature with women carrying loaves of bread into the legislature: “They want to take me out of my home. I like being a mother. I like being able to bake and cook for my children. This would keep us from doing that”—ignoring the fact that there were a lot of mothers that had to work and aren’t getting equal pay for equal work. Obviously, this was not destroying the opportunity for mothers to stay at home, if that’s what they wanted to do. It was just bogus. But she did it to us, I must say.

I debated her a couple of times. I loved it. She had a great habit of throwing out a lot of figures that she had no basis for whatsoever, bragging about her daughter: “My daughter can do this and do that.” I said, “Ms. Schlafly, what you’re doing is denying other women’s daughters the same opportunity that your daughter has.”

It was interesting.
I was going to go to Idaho to give a speech up there at a big public meeting. Idaho was a state that had rescinded their earlier ratification of the Equal Rights Amendment, which, of course, constitutionally you can’t do. You have the power to ratify and then you’re discharged. You don’t have the power to rescind. But, anyhow, they were going through this. The matter was before the Court. I thought, “Man, oh man, these crazies are going to pass the thing.”

Role in Quashing Proposed Amendments in Committee

FORDHAM L. REV.: A big role—and you touched upon it before—as Chairman of the Subcommittee on Constitutional Amendments was not only to frame and push forward proposed amendments, but to prevent other amendments from going to the Senate floor for a vote. That role is arguably just as important.

SENATOR BAYH: I didn’t know what I was getting into when I wanted to be Chairman of the Subcommittee. I got there, and that Committee was a graveyard of amendments that had been proposed as a result of people not liking a Supreme Court decision. The Miranda decision, they came down with one. The prayer decision, they came down with one. Somebody wanted to elect federal judges. The busing, the abortion proposed amendments—all those were the result of a Supreme Court decision.

Judicially, the first busing order came out in the Southern District of Indiana. Man, oh man, it was rough there.

So I think I did two things. One is, I didn’t let any of those things get out on the floor where, maybe in the heat of responding to what looked like a quick fix it would get passed. The prayer amendment is the best example I can think of, but also election of federal judges—congressmen might just say “Why shouldn’t we elect federal judges? We elect everybody else.” Or with Miranda, “Why don’t we give our policemen the best powers they have to defend us? We don’t need to worry about some things that may be done as far as individuals are concerned, as far as the Miranda warnings are concerned.”

Nobody in that Senate—unless there were one or two that were in favor of the amendment—the body as a whole didn’t want to have to deal with those out on the floor. So I was providing a service to the Senate to keep those bottled up where they belonged.

We talk about the ones that came out. Fortunately, nothing is said about the ones that didn’t come out, because they just sort of lay there.

CLOSING

FEERICK: Can I tell you one of my war stories that I’m very proud of, because it involved you, obviously? I was asked by Orison Marden, when he was President of the ABA, when the ABA came out with direct popular

IREVIEW WITH FORMER SENATOR BIRCH BAYH

2010]

election, would I draft something? Everett Dirksen and, I guess, Emanuel Celler—

SENATOR BAYH: Celler was all for it.

FEERICK: They wanted a draft proposal that would reflect the ABA recommendations, with the runoff and the forty percent, things like that. So Orison Marden asked me if I could—I have to try to find the document.

So I got together in a hotel room in Texas, at a meeting of the ABA, with Jim Kirby, your good friend Jim Kirby.

SENATOR BAYH: Is he still alive?

FEERICK: No. Jim died about ten years ago. He was a great guy.

He was on the succession group, as you know. Jim and I sat in a hotel room, with the Constitution, and said, “What should a direct popular election amendment with the ABA recommendations look like?” We drafted up something, gave it to Orison Marden. He gives it to Dirksen and Celler. That was the proposal they introduced.

Dirksen, in the Congressional Record, said that, in talking about the proposal that he was introducing on direct popular election, “We thank the ABA,” and I think he specifically mentioned Jim and me. Even though that went down—despite your great leadership, it didn’t make it—I often viewed that particular experience—it may be the one that stands out for me. It didn’t make it, but it was—

SENATOR BAYH: We were doing the right thing.

FEERICK: We were doing the right thing.

This has been terrific, and your participation, really, more than anything, gives this program credibility.

SENATOR BAYH: I have a good sidekick here.

FORDHAM L. REV.: We’re so grateful for your time, for your participation in this.

SENATOR BAYH: I’ve enjoyed it. As you can tell, it’s a subject that’s near and dear to my heart.

49. See 113 CONG. REC. 9615 (1967).
Bayh-Dole Act

“Possibly the most inspired piece of legislation to be enacted in America over the past half-century”

_The Economist_

The Bayh-Dole Act allows United States universities, small businesses, and non-profit organizations to retain intellectual property rights of inventions developed from federal government-funded research. Senator Birch Bayh was its principal author.

Prior to Bayh-Dole, billions of tax dollars invested annually in government research and development were being squandered by ineffective federal patent policies. Products, technologies and potentially life-sustaining drugs were sitting idle on government shelves because there were no incentives to take them to market. Bayh-Dole changed all that, allowing the entrepreneurial spirit in the public and private sectors to join together turning early stage research into products benefiting the American people and many across the globe. The U.S. is currently the recognized world leader in turning publicly funded R & D in our universities and federal laboratories into new products, jobs, and companies and health care advances.

The University and Small Business Patent Procedures Act, generally known as the Bayh-Dole Act, was signed into law by President Jimmy Carter on December 12, 1980.

**Economic Contribution of Bayh-Dole 1995 – 2015**

A Report by the Biotechnology Industry Organization (BIO), June 2017:


During this twenty year period, the numbers are truly astounding—academic patent licensing contributed as much as $1.33 trillion to U.S. gross industry output, $591 billion to the gross domestic product, while supporting 4,272,000 American jobs. No other nation comes close to matching these numbers:

- U.S. gross industry output: $1.33 trillion
- U.S. gross domestic product (GDP): $591 billion
- U.S. jobs: 4,272,000

Additionally, the FY 2015 survey of Association of University Technology Managers found that in one year:

- 1,012 startup companies were formed, _averaging 2.75 new companies created every day of the year_— up 11.3% from FY ’14;
- 879 new products based on academic inventions were introduced into the marketplace, _averaging 2.4 new products every day of the year_;
- Products based on academic patent licenses generated more than $28.7 billion in net product sales; and
- 7,942 new licenses and options were executed, up 15% from FY ’14
The Biotechnology Industry Organization (BIO) often points to two historic events that created and spurred the phenomenal growth of the biotechnology industry and life science innovation in the United States. First, the U.S. Supreme Court decision in Diamond v. Chakrabarty enabled inventors to patent biotechnology inventions, thereby facilitating the investment of capital to advance those inventions into commercial products.

Second and just as critically, the Bayh-Dole Act ended the failed policies under which the results of substantial government-funded research sat idle on laboratory shelves due to uncertain ownership and transfer rights, and ushered in a new era in which our massive taxpayer investment in basic research has been leading to the commercialization of thousands of new and beneficial products and technologies for patients and consumers worldwide.

The genius of Bayh-Dole is that it grants ownership of inventions arising from government-funded research to the university inventors themselves, who have the knowledge – and under the Act the inventive as well – necessary to further develop and commercialize those inventions into valuable products, whether through licensing to industry partners or through the creation of entrepreneurial start-ups backed by investors.

In this new eco-system, the university serves as a unique market actor that can balance the interests of ongoing university research, development of useful products, and the overall public interest. Biotechnology companies rely heavily on our university partners to take the initial steps in discovering the next medical, agricultural, and environmental breakthroughs that benefit people around the world.

The Bayh-Dole Act serves as the strong legal framework under which such partnerships can flourish, as it provides a clear chain of title to support the massive investment needed to advance high-risk biotechnology inventions through development and approval – a process that often takes a decade or more and can cost up to $1.2 billion per biotech product.

—James C. Greenwood, President & CEO, BIO
Press/Testimonials

“Possibly the most inspired piece of legislation to be enacted in America over the past half-century was the Bayh-Dole act of 1980. Together with amendments in 1984 and augmentation in 1986, this unlocked all the inventions and discoveries that had been made in laboratories throughout the United States with the help of taxpayers’ money. More than anything, this single policy measure helped to reverse America’s precipitous slide into industrial irrelevance.”

_The Economist_, December 2002

“Senator Bayh’s foresight and determination in promoting what ultimately became the Bayh-Dole Act transformed the U.S. life sciences community into a global leader that it is today, providing the United States with its greatest competitive advantage in the global marketplace . . . .

“But its impact on the lives of real people – patients who have been cured of cancer through revolutions in biotech healthcare, or children who no longer go to bed hungry due to incredible innovations in biotech crops – is the Bayh-Dole Act’s most lasting achievement. Through his leadership, former Senator Birch Bayh truly has helped BIO and our members achieve our collective mission to help, heal, fuel and feed the world.”

James C. Greenwood, President & CEO, Biotechnology Industry Organization

“Senator Bayh’s sponsorship of the Bayh-Dole Act launched nothing short of a revolution among America’s research universities and colleges, unleashing a flood of talent, creativity, and resources. By allowing institutions and their faculty to participate fully in the free-enterprise economy, his legislation continue to make American higher education the world’s leading incubator of scientific, medical, and technological innovation.”

Adam Goodheart
Hodson Trust – Griswold Director
C. V. Starr Center, Washington College

“Sponsored by Sens. Birch Bayh of Indiana and Bob Dole of Kansas, [the Bayh-Dole Act of 1980] clarified murky intellectual property rights so that universities and professors, especially, knew they owned their own ideas and could sell them. That knowledge gave professors and lab teams an enormous incentive to put to commercial use plans and ideas for inventions that they had long ago shelved in their minds and offices.”

_The Wall Street Journal_, October 2011,
“Three Policies That Gave Us the Jobs Economy”

“Because of Senator Bayh’s commitment to our great nation, countless companies and products like Google, the hepatitis B vaccine, the prostate-specific antigen (PSA) test, the nicotine patch, once-a-day human immunodeficiency virus (HIV) medication and the human papilloma virus (HPV) vaccine might not be here to improve countless lives in our nation and around the world.”

Robin L. Rasor, President,
Association of University Technology Managers
“The Bayh-Dole Act, sponsored by former U.S. Sens. Birch Bayh of Indiana and Bob Dole of Kansas, turned the laws dealing with the ownership of inventions upside down. Back then, if the government funded research, the government owned the resulting inventions. But the return on investment was dismal. Less than 5 percent of government-owned patents ever were licensed.

“The Bayh-Dole Act unleashed American economic competitiveness and is lauded as one of the most effective policies ever to emerge from Washington.”

*Columbia Daily Tribune,* November 2011

“The Bayh-Dole Act has made substantial contributions to the advancement of scientific and technological knowledge, fostered dramatic improvements in public health and safety, strengthened the higher education system in the United States, served as a catalyst for the development of new domestic industries that have created tens of thousands of new jobs for American citizens, strengthened States and local communities across the country, and benefited the economic and trade policies of the United States.”

*Sense of Congress Resolution*
*U.S. House of Representatives*
*December 2006*

“The United States is currently the recognized world leader in turning publicly funded R&D in our universities and federal laboratories into new products, jobs and even companies growing the economy while improving the lives of our citizens. This success is largely the result of the Bayh-Dole Act of 1980. . . . Because the U.S. funds more public sector research than any of our rivals, moving federally funded research into the marketplace provides a tremendous competitive advantage to our economy. Every state looks to its research universities and federal laboratories as key parts of a successful economic development strategy. However, these assets were not being maximized before passage of the Bayh-Dole Act in 1980. . . .

“Before Bayh-Dole not a single new drug was developed when the government took patents away from the inventing organizations, making them available through non exclusive licenses while destroying the intended incentives of patent ownership. Since Bayh-Dole ended this waste of taxpayer supported research, more than 200 new drugs and vaccines arising from academic inventions are combating the scourge of disease both here and around the world.”

Joseph P. Allen, Allen & Associates

https://www.bio.org/Patents

http://www.ipwatchdog.com/2017/06/20/academic-patent-licensing-helps-drive-u-s-economy/id=84778/