

OPINION

APPRECIATIONS

The Man Who Changed the Constitution, Twice

Birch Bayh, 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.



Birch Bayh in 1971. Credit...Charles Bennett/Associated Press

Jesse Wegman, *The New York Times* Online Edition, March 14, 2019.

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Changing the United States Constitution is like winning an extremely long, slow-motion lottery.

Since 1788, 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?"

[Birch Bayh, 91, Dies; Senator Drove Title IX and 2 Amendments](#)
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