

[00:00:00] **Jeffrey Rosen:** I'm Jeffrey Rosen, President and CEO of the National Constitution Center. And welcome to We The People, a weekly show of constitutional debate. The National Constitution Center is a nonpartisan, nonprofit chartered by Congress to increase awareness and understanding of the constitution among the American people. This episode marks the 50th anniversary of the 26th Amendment, which lowered the voting age to 18 and was ratified on July 1st, 1971. We'll discuss the history and significance of the 26th Amendment and how it has been invoked in the courts. First, let's hear from one of the principle architects of the 26th Amendment Senator Birch Bayh.

[00:00:43] **Senator Birch Bayh:** Right? It's those questions if, if they're old enough to fight aren't they old enough to vote? Well that's okay, but fighting is more a physical thing that is a matter of plan, but they also pay taxes and they also have the responsibilities, many young people starting homes. So that to me was a part of the whole package that said, "Okay, they ought to have a right to determine the laws that govern their lives, the lives of their families and their neighborhoods."

[00:01:23] **Jeffrey Rosen:** On today's episode, I'm joined by two of America's leading scholars of the 26th Amendment. Jason Berman spent over a decade as a close advisor to US Senator Birch Bayh who is one of the principle architects of the 26th Amendment. He later served in the Clinton White House and held many important positions in the private sector. Jay, thank you so much for joining.

[00:01:45] **Jason Berman:** Happy to be here.

[00:01:47] **Jeffrey Rosen:** And Yael Bromberg is a constitutional litigator and Principal of Bromberg Law, LLC. She is the author of Youth Voting Rights and the Unfulfilled Promise of the Twenty-Sixth Amendment, which was recently published in the University of Pennsylvania Journal of Constitutional Law. Yael, thank you so much for joining.

[00:02:05] **Yael Bromberg:** Thank you for having me.

[00:02:07] **Jeffrey Rosen:** Jay Senator Birch Bayh was the founding father of three and nearly four constitutional amendments during his pathbreaking service on the Senate subcommittee on constitutional rights. Tell us what those four amendments were and how the Senator Bayh became such a dynamo at proposing constitutional amendments.

[00:02:33] **Jason Berman:** [laughs]... It's quite a story in and of itself. The previous Chairman of the Senate subcommittee on constitutional amendments had been Estes Kefauver Senator from Tennessee, very, very well known at the time. Unfortunately Senator Kefauver actually died on the floor of the Senate, collapsed from a heart attack. Jim Eastland, who was Chairman of the Senate judiciary committee and Senator from Mississippi long standing chairman was getting ready to abolish the subcommittee because obviously it doesn't do a lot of work. There haven't been that many amendments. I think if we were to average it out, it's about take the Bill of Rights out, it's about one every 13 years. But Birch Bayh went to a Senator Eastland and said to the chairman that he was prepared to pay for the subcommittee out of his Senate office allowance if a chairman Eastland keep the subcommittee going.

They had a very nice personal relationship aside from the fact that they disagreed on virtually every issue that came before the Senate judiciary committee. And after a few days, Senator Eastland actually called up and said and I'll, I'll go, this is about how the conversation went, "Birch, I decided to let you have that subcommittee." and so that committee was in a converted men's room on the third floor of the old Senate office building, but it gave birth to some amazing, amazing things. And as you point out, he was the author of four proposed constitutional amendments, three of them, which were passed by Congress which are the 25th Amendment having to do with presidential inability and succession, which Donald Trump brought back to life.

The 26th, which we're going to talk about today 18 year old vote and Yael can tell you why it is not the Forgotten Amendment anymore, because it was very important in the context of 2020. He was also the author and principal sponsor of the Equal Rights Amendment, which passed Congress, but unfortunately is in limbo in regard to ratification. And his baby, the most, the, the one who was most attached to because he came to it, not in the, in the beginning, but he was transformed by the hearings was direct popular election of the President which we failed to secure passage of because we could not break a filibuster in the United States Senate.

But I will say, and that's an amazing, amazing record, but it doesn't touch on the fact that the one piece of legislation, which was not a constitutional amendment, which he sponsored and probably has had more impact on American life than anything other than the Civil Rights Act of not of the 1960s, is that he was the proud author of Title IX.

[00:05:39] **Jeffrey Rosen:** It is indeed an extraordinary record of constitutional achievements. The electoral college amendment story by itself is remarkable. As you say, it was thwarted only a threatened filibuster from Southern senators. And had it been reported out of Congress likely would have been ratified since it was supported by both President Nixon and Democratic leadership and by super majorities in the country as a whole. Yael, at least one other Senator is called a Father of the 26th Amendment who was pressing for youth suffrage during the darkest days of World War II and continued to do so throughout his career.

[00:06:16] **Yael Bromberg:** Yeah. So Senator Jen-Jennings Randolph, he was a Small-d-democrat and member of the Democratic Party representing West Virginia. And he was, as you say, Jeff, the father of the 26th Amendment, when FDR first proposed sending the troops to fight in World War II, it was Randolph who noted that he said, "Who will say they are old enough to use bullets, but too young to use ballots." And that launched him into multiple proposals for ratifying the 26th Amendment to lower the voting age and outlaw age discrimination and access to the ballot. And he also supported like Senator Birch Bayh who is a champion for democracy. Senator Randolph also supported multiple suffrage amendments. So he saw this as a part of the nation's expansion for democratic inclusion as well.

He supported DC statehood, which was ratified at least in part through the 23rd, through the 23rd Amendment extending the right to vote for presidential elections for DC citizens.

He supported abolishing the poll tax, the 24th Amendment, and of course the 26th Amendment too. And he himself was heavily influenced by his State's fight for ratification of the 19th amendment. He remembered as a young man listening to the debate among in his State for expanding the suffrage for women. And so this heavily informed his perspective about what evolution of the right to vote should look like and what a democracy and democratic inclusion look like.

[00:08:01] **Jeffrey Rosen:** Thank you so much for that. And for reminding us that all of those suffrage amendments that Senator Randolph supported the 23rd Amendment giving DC citizens the right to participate of the amendment abolishing the poll tax, the 24th Amendment, as well as the 26th Amendment all were part of a wave of constitution making in the Civil Rights era that some have ranked with the progressive era and the post Civil War era as among the most fertile sources of constitutional amendments. Jay Berman, let's dig into the remarkable story of the passage of the 26th Amendment. Yael mentioned Senator Randolph's slogan, "Old enough to fight, old enough to vote."

During World War II, that slogan became all the more urgent during the Vietnam War when many resurrected it, and it wasn't only the Vietnam War, but a series of hearings that led to the passage of the Voting Rights Act in 1970, that led Congress to try to limit the voting rights age to 18 in federal and state elections. And then a Supreme Court decision saying that Congress lacked the power to do that for state elections and then the proposed amendment. So, so take us back to the years proceeding 1970.

[00:09:15] **Jason Berman:** In the early 1960s, President Kennedy establish what was called the President's Commission on Voting and Registration and the impetus, the impetus for that came from a pretty low turnout, not just among young people, but in terms of the general population as well. In early 1967, that commission reported to President Johnson and it reported as a series of recommendations that the states should consider implementing lowering voting ages. And at that time only four states had lower voting ages.

Kentucky and Georgia both had 18 year-old vote, Alaska and Hawaii had 19 and 20 year old vote. And that was sent up to the subcommittee on constitutional amendments, that recommendation by President Johnson. But the thing that president Johnson did not include in the recommendation was the fact that it should be state, a state initiative. So we took that, interpreted that to mean that the course of action should be what most people expected, which would be a constitutional amendment.

It ended up in ourselves subcommittee. And if you go back to the context in which that came to us. So in 1968, the Voting Rights Act was in force, the war in Vietnam was raging. Hence, as you pointed out it's, "Old enough to vote old enough to fight." There was in addition to that from people who are not consumed or interested in the war, what was often described this campus unrest. Camp... Students on campus were concerned about the war.

And so there were massive demonstrations. And in our state, we have a number of colleges, including Indiana University, Purdue University, Notre Dame Evansville Indiana State and so it's something that we were responsive to. And Senator Bayh often in the hearings would say about 18 year old vote, that it was one of the answers to student unrest, that students to

have a way to have their voice heard at the ballot box. And the third was, I think, I think this was pointed out also, you said earlier about the democratization that took place in the 1960s and that, that involved the franchise, one of the most important ingredients in that process.

And Senator Bayh saw this as a logical step in that process. So that was the context in which it happened. The problem was for us that Senator Eastland and Senator Thurman had no interest in letting this come out of the Judiciary Committee. And so we had hearings and we made a conscious choice after the subcommittee held its hearings not to report it to the full committee because chairman Eastland had told us he had no intention of letting it come to a vote. And our political decision was we didn't want it to suffer that kind of defeat, we wanted to keep it alive.

So we just held the hearings. But as we went into 1969 and 1970, all of those factors that I just talked about became more intense. And that was all of it, kind of got wound up in the extension of the 1965 Voting Rights Act. It was up and there was a pretty strong clash between the Democrats in the House and the Senate and the Nixon administration, particularly over literacy tests. And there was 12 for how you would craft the compromise to make sure that the, that the Voting Rights Act was extended. At that time, there was a... I would say young fellow, because I remember myself as being young back then named Carey Parker who worked for Senator Kennedy, Ted Kennedy of Massachusetts.

And Carey Parker had, had, had clerked for Justice Potter Stewart and, and he was a legal scholar in his own right, but he read a law review article written by Archibald Cox who had been the Solicitor General, the United States, and was a pretty well-known Harvard Law Professor. And in that article, Professor Cox in explaining the Katzenbach versus Morgan decision noted that it would be possible for the federal government to legislate lowering the voting age. And Carey Parker pic... I don't think he, it took a lot to convince Senator Kennedy [laughs] that this was something that should be explored and that the vehicle for doing that without having to start from scratch was the extension of the Voting Rights Act.

Why not just offer it as an amendment? There were in those days, a lot of bipartisanship and people did reach across the aisle to get support from, from one another. But this was a lot of backdoor going on and the Nixon administration made it very clear that while the president strongly supported, supported 18 year old vote, he would not support it as part of a legislative effort. He believed it needed to be a constitutional amendment. And that sat with Senator Eastland and Chairman Celler in the House very well. They had no interest in this at all, but Chairman Celler, Manny Celler who also interestingly opposed the Equal Rights Amendment and eventually was defeated by Liz Holtzman for that very reason. He was an ardent civil rights supporter, and he didn't want to do anything to jeopardize the extension of the Civil Rights Bill.

So Senator Kennedy's position was, "Let's add it in the Senate and Manny's got no place to go and nothing to do. He's going to have to accept it." So that was the strategy. What happened was that its prospects in the Senate were very uncertain, particularly because of Chairman Eastland. And I'm going to give you a name that has not appeared in connection

with the 26th Amendment at all, but who was as pivotal to its success as Birch Bayh and Jennings Randolph. And that man was Mike Mansfield of Montana, the Democratic Senate Majority Leader. Mike Mansfield believed ardently in 18 year old vote. And he thought rather than have Senator Kennedy who occasioned a lot of opposition just by virtue of anything he did... rather than have Senator Kennedy try to add this to the Voting Rights Act, he would.

He would work it out with Hattie and he would take charge of it. And it would be Mansfield the Senate Majority Leader, the guy who determined what went on the floor and under what rules he made it his crusade to add 18 year old vote to the Voting Rights Act. And part of the rationale which both Senator Mansfield... I think he enlisted, I'll give you another name. He enlisted in this effort, Barry Goldwater, a Senator from Arizona, the leading Conservative in America. Senator Goldwater for whatever reason, also strongly believed in 18 year old vote. And in their statements, both Senator Mansfield and Senator Goldwater, neither of whom could find a reason to be on... support anything I could imagine founded in 18 year old vote, both noted that amendments like 18 year old vote go to die in the Senate Judiciary Committee. And that was the rationale for adding it to the Voting Rights Act.

[00:17:27] **Jeffrey Rosen:** Thank you so much for telling that remarkable story of the inclusion of 18 old Voting Rights in the 1970 amendments. Yael you tell that story as well in your article on youth voting rights in the Penn Journal on Constitutional Law. Tell us more about how the decision to include the provision was a response to the 1966 Katzenbach and Morgan decision, how there were doubts expressed, including by President Nixon when he signed the law about whether Congress had the authority to lower state voting age as a statutory matter, and how the Supreme Court in the 5-4 Oregon V Mitchell decision held that Congress lacked the power to lower the voting age for states, although it had the power to do so on a federal level. What was the Supreme Court's reasoning and what was Congress's response and proposing the 26th Amendment?

[00:18:23] **Yael Bromberg:** Thanks. So the idea to lower the voting age by statute, rather than amendment, as you know, Jeff, it came out of Katzenbach the 1966 Seminole 7-2 Supreme Court decision. The focus in Katzenbach v Morgan was about literacy tests, but it wasn't so much about interpretation of literacy tests pursuant to the Equal Protection Clause. But it more so focused on whether or not Congress had the authority to legislate regarding literacy tests. And so this idea really bore out through about legislating, Congress legislating on effectively the 26th Amendment to lower the voting age came through through this kind of inspiration in Katzenbach.

And so Congress acted, it amended the the vote the 1965, Voting Rights Act with in, through a 1970 amendment. And there in you know, Congress legislated on the literacy test and it also lowered the voting age. And this kind of led into what was inevitable an inevitable constitutional fight. Jay mentioned the role of Archibald Cox there. And then there were of course folks across the aisle that said, "No, Congress can't legislate on this," but the popular will had, had been so sufficient at that point. As you know, Jay did a great job of remarking, what was happening outside of the halls of Congress that led to this kind of popular will to



do anything even by legislation to lower, lower the voting age. And at that time enfranchise 11 million voters, new voters into the population.

And so, although de-despite the reservations around the constitutionality of legislating on this bill they did, and the president signed that into law. And this set the stage essentially for the next Supreme seminal Supreme Court decision called *Oregon V Mitchell*, which essentially which was the litigation with regard to whether or not Congress had the right to act on both federal and state and local elections with regard to expansion of the franchise to youth voters. And many, many states participated in interven-intervened in that litigation.

It resulted in an extremely split Supreme Court decision [laughs] with many concurrences and many dissents and many perspectives around this issue. And but the, but the takeaway from all of it was, was that Congress had the authority pursuant to the 14th Amendment and specifically Section 2 of the 14th Amendment, which grants Congress the authority to apply and implement the rights afforded pursuant the equal protection rights afforded pursuant to the 14th Amendment that Congress had the right pursuant to the 14th Amendment to legislate and expands access to the franchise for young people at least with regard to federal elections. And there, that was one of the piece that there was unanimity with regard to, or at least the majority decision with regard to it. The question about expansion of the franchise and Congress's right to legislate with regard to the state and local races was split.

And so that set the stage essentially for the urgency for ratification because we were faced with the 1972 federal election that was presidential election that was coming around the pike. And essentially there was a question around the fact that the Supreme Court had upheld access to the ballot free of age discrimination for those 18 plus as per federal races. But that, that right, did not co, co-extend to state and local races. Essentially what they were facing was a bifurcation of the ballot that young people could only vote on federal races and non-state races, which would really complicate the balloting system that would take place. And that ushered through a lot of the popular will once they looked at the bureaucratic issues [laughs] for for ratification of the amendment. But what's really important to note through all of this, you know, we can talk about what was happening within Congress and within the Supreme Court and you know, how folks were kind of strategizing, but that popular rule came out and was born out by youth leadership outside of Congress.

And that, that youth leadership, it didn't just start with the anti-war protests at the end of the 1960s. For example, you can track it back all the way to 1960, which was the first effort by HBC. Four very brave HB... BCU students in Greensboro, North Carolina, to desegregate the lunch counter there, and that spread to HBCUs throughout the South who were very targeted at the desegregation movement. And so we had an example throughout the '60s of youth leadership in pushing for integration and for pushing for democratization. And, you know, of course we had the assassination of Andy Goodman, James Chaney, and Mickey Schwerner in 1964. A month after that Congress gains the will to to, to legislate and finally pass the Civil Rights Act, which had been long languishing.

The following summer, you had John Lewis who was then a young man himself, the late great John Lewis, who was the President of the Student National Non-violent Coordination

Committee. He led the march on Selma and just weeks after that, the Voting Rights Act had finally been introduced. So we had an example of youth leadership through all of the movements that through all of the efforts. And it was really at the end of the '60s that they s... They turned and they looked at themselves and they said, "Wait, we're, we're working on everyone [laughs] and it's time to enfranchise ourselves." So the pressures that were taking place within Congress and within the Supreme Court has to be understood with regard to this larger, popular push for democracy.

[00:24:58] **Jeffrey Rosen:** Thank you so much for that context. Thanks for reminding us of the role of youth in passing the 26th Amendment. And also about the fact that the Oregon and Mitchell decision didn't make anyone happy in its ruling that states and the federal government had different constitutional ability to set qualifications for elections. Jay, tell us about Senator Bayh's reaction to the Oregon and Mitchell decision. How did he mobilize to draft the amendment and how on earth was it possible that an amendment could be ratified six months after it was proposed? Tell us that incredible story.

[00:25:40] **Jason Berman:** I'll tell you even better story. It was it was ratified in three months. Well I Senator Bayh was an amazing legislator. He had been the youngest Speaker in the history of the Indiana legislature. And one of his great tools for legislating was to figure out how you could bring pressure to bear on the institution from outside. And we learned an amazing lesson in the passage of the 25th Amendment, which was incredibly complicated, but we had the support on the national level of the American Bar Association and for, for ratification of the State Bars. And that proved to be an enormously important ingredient, both in getting two thirds vote in the House and Senate, but in getting 38 states legislatures to ratify something that complicated.

And so as he looked at this in the wake of Oregon versus Mitchell, because we had prepared, even though we were supporting the effort to, to add it to the Voting Rights extension, the, the president had already said, he's signing this bill with all these caveats, he doesn't support it. There was the expedited procedure to get a ruling on its constitutionality. It came back as you and Yael pointed out with this amazingly crazy decision. Every... It was tied four, four on everything, and then it was 5-4, "It's okay to do it on federal elections, but 5-4, you can't do it on state elections." So it was a, it was a nightmare, but in advance of that Senator Bayh had the idea of, "What if we do have to go the route of a constitutional amendment and what if it is a complicated situation? Why don't we survey the secretaries of state as to how incredibly difficult it would be if they had to administer two different sets of rules?"

And so that's what the subcommittee did. And we issued a report and the report said, "You know, our estimate is based on the responses given to us by the secretaries of state and we're estimating anywhere from 10 to \$20 million, just to do the mechanical operation. Forget about what impact that might have actually on the system, just the mechanics of voting machines and ballots and stuff like that and that would be a mess." And so that added impetus to the constitutional amendment route. We talked to Senator Randolph, Senator Randolph and Senator Bayh putting an S.J.Res.7 right after the Oregon versus Mitchell decision. So it was in January 1970... 1971, I'm sorry.

And we went to see Senator Eastland. And as I said earlier, he had a really great relationship with Senator Eastland. It was very much a personal one because certainly wasn't a policy one. And we laid out what we saw as, as the path and said to Senator Eastland, "Look, we can have hearings again, but this is a colossal waste of time. We're going to report this and all I want from you is yes, that you let it come to a vote in the full committee." and he did, he gave us that opportunity. And we were on the floor in very short order, obviously because Senator Mansfield wanted it on the floor in very short order. And it passed without a vote against it which was quite amazing.

But we still had Manny Celler to deal with. And, and for whatever reason because the Voting Rights Act was not an issue now Senator... Congressman Celler was prevailed upon to let this wind its way through the House, as it normally would. And once he gave the okay procedurally, we knew it was a done deal because as Yael pointed out that it was overwhelming support so it was not get it... There was no question of getting two thirds vote, neither the House or the Senate. That really wasn't going to be an issue if we could overcome the procedural questions. But I should point out also that it was much more important to get it as a constitutional amendment because if one goes back and looks, there is quite a difference in language between Title III of the Voting Rights Act of 1970, which empowers 18 year old vote and the language, which is very brief, short and powerful in the 26th Amendment and is that way deliberately.

The most important being that there is a word in the 26th Amendment, which said, "Abridged." So you can't deny or abridge based on age, and that's not the way Title IX is formulated. So we, we always felt that it was a much stronger embodiment of the right to vote and that it had a more meaningful application than just lowering the voting age to 18 and, and someone can not be denied that.

[00:31:09] **Jeffrey Rosen:** Fascinating, thank you so much for that. Yael tell us about that crucial language the right of citizens of the United States who are 18 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," based on your studies of both the debates over the proposal of the amendment and the debates over ratification, how broadly do you think that the proposers and the ratifiers intended those words to be interpreted and, and tell us the story of how this amendment was ratified so quickly after it was proposed?

[00:31:45] **Yael Bromberg:** Well, one of the main reasons as Jay pointed out that the amendment was ratified so quickly was because of the widespread bipartisan support for this. There was, it was just an extremely popular. It wasn't a polarizing issue, people across the aisle really understood this. They understood youth voting rights specifically in a democracy lens and not in a partisan lens. And I think that, that's really helpful for us to remember when we think about those abridgments today. But going back to your direct question, Jeff, you know, the 14th Amendment heavily influenced both the inclusion of lowering the voting age in Title III and the ratification of the amendment.

It was all within the context of the 14th Amendment. It comes up time and again, through the legislative history. And so in Title III for example, Congress had declared that the 21 age

21 year age cutoff has the effect of denying those, those disenfranchised, "The due process and equal protection of the laws that are guaranteed to them under the 14th Amendment." And we see that language again, introduced in the Senate report that Jay worked on [laughs] in 1971. And in the Senate report, you see repeated influence of the 14th Amendment and the Voting Rights Act. And specifically, I'll just, I'll just read, it's a short paragraph within the Senate report.

This is a really critical piece because it's what everyone rallied and focused around when they agree to the ratification, both in Congress and as it was sent out to the 38 plus states that ratified the amendment. It provided that, "Forcing young voters to undertake special burdens, obtaining absentee ballots, or traveling to one centralized location in each city, for example, in order to exercise their right to vote might serve to dissuade them from participating in the election. This result, and the election procedures that create it, or at least in consistent with the purpose of the Voting Rights Act, which sought to encourage greater political participation on the part of the young such segregation might even amount to a denial of the 14th Amendment, Right to Equal Protection of the laws in the exercise of the franchise."

And so this is actually really important to the way that the question is presented today and this powerful aspect of abridging the right to vote as included within the 26th Amendment, because it tells us that we're not only talking about a straight up denial of the right to vote on account of age, we're also examining special burdens and Congress and the ratifying states contemplated what those special burdens look like. Explicitly identifying absentee ballots and off-campus polling locations, just as an example. And it also contemplates the idea of political participation and encouraging political participation. And so that's even broader than this idea of simply abridging the right to vote.

Now we're talking about expanding and access to, to the vote. And of course it finds us the foundation this expansion within the Voting Rights Act and the 14th Amendment. And why this is really important today Jeff, is because there's this conversation that's taken place around what the 26th Amendment protects today. And there's an emerging jurisprudence around what that looks like. And some folks will take a look at it for example, and say that try to minimize this idea of abridgment of the right to vote free of age discrimination and focus on denial. And that's also consistent with the ways in which the right to vote is being construed, not just for the 26th Amendment, but in general. That's a conversation that's happening across the spectrum with regard to protected classes.

[00:36:00] **Jeffrey Rosen:** Before we talk about the current issues, let's discuss how the 26th Amendment has been interpreted in the courts. Yael, as you note in your Pennsylvania Journal piece, the Supreme Court has only ruled once on a 26th Amendment claim. The case was *Sims versus United States*, which summarily affirmed without an opinion, a district court challenged to requirements that voter registers have to be screened for proof of permanent residency. And the question is whether a student was married or living with a spouse. And the, the, the court said that this was unlawful discrimination against students who were being singled out in administering this questionnaire. And then most of the lower court cases in the, in the first decade after the amendment was passed, also mostly involved to

student residency requirements. Jay what can you tell us about how the 26th Amendment has been interpreted in the courts, especially in the decades following its ratification, and as one of the staffers for the founding father of the amendment is the way it's been interpreted in the courts consistent with what you and Senator Bayh and the ratifiers intended?

[00:37:12] **Jason Berman:** Well, firstly, I'll comment on the fact that it's often referred to as the, as the Forgotten Amendment. The fact that it had [laughs] one case in the Supreme Court is quite staggering. But as Yael will, will, will tell you more, more about that. To speak for Senator Bayh and for Senator Randolph, who was equally involved in securing passage of a 18 year old vote. I believe both of them would have said that the way the 26th Amendment is written and particularly in contrast to the way Title III exist-existed in the Voting Rights Act of 1970 was to embody the most expansive interpretation of what age discrimination was about. So that at this, it didn't just say, "You can't deny the vote to 18 year olds." It also actually implies that you can't discriminate against 80 year olds.

That is and in particularly as Yael pointed out all based on the fact that it was born out of what the 14th Amendment was supposed to do and did do. So that's all I'll say, because I think she Yael can explain more about what has happened in terms of litigation though, I'm sorry to say that one of those decisions was Indiana decision and would not have made Birch Bayh very happy.

[00:38:43] **Jeffrey Rosen:** Yael please do tell us the story of the Sims case. What, what, what did the Supreme Court hold? Tell us about this Indiana decision that Jay mentions and more broadly about this decade or so of decisions, mostly in the lower courts. Most of which involves student residency requirements and the 26th Amendment.

[00:39:03] **Yael Bromberg:** Sims was a case that went up to the United States Supreme Court in 1979. So the Supreme Court had the benefit of several years following ratification. And at that time there were State Supreme Courts and federal courts across the country that firmly upheld the right to vote free of age discrimination, following ratification. These included the California Supreme Court, the New Jersey Supreme Court, actually, which had a great quote in it. It provided that the New Jersey Supreme Court in Warden looked at the legislative history of the 26th Amendment and said, "It clearly evidences the purpose, not only of extending the voting rights to youth voters, but also of encouraging their participation by the elimination of all unnecessary burdens and barriers."

And so this set the stage because it was really throughout the '70s that the courts essentially following ratification many registrars on the local level and states try to curtail access to the ballot for young people, because they were scared about what that might look like for disrupting the status quo. And so this ushered in kind of a ton of jurisprudence of the 1970s and in all of those decisions that the judges, they applied strict scrutiny to these infringements, which is actually extremely significant, strict scrutiny as the, the most focused review by the courts that, that specifically it's, it's, it ends up not serving as essentially a rubber stamp when they're scrutinizing the constitutionality of a restriction, but it



specifically is doing a searching review for a compelling state interest, which is hard to find and has to be specifically narrowly construed.

And so the state, it puts the state on its heels of having to justify what this restriction was. And as you've noted Jeff, many of these strictions took the form of residency questions. So for example, in the Supreme Court decision *Sims v United States*, in which the three judge district court summarily was summarily affirmed 7-2 by the Supreme Court. That three judge district court found that the registrar had unlawfully discriminated against students when he falsely presumed the student's inability to establish residency to vote.

And so you had these registrars looking for some proactive searching measure to examine whether the students had a justification for showing that they were a resident of the state and that they were not simply a temporary transience within the state. And the Supreme Court found that that was unconstitutional. That's extremely important today because that actually even 50 years later continues to be a fight. But importantly that wasn't the only type of restriction that was taking place. There was a decision out of Colorado also arising out of the 1970s, which restricted young people's ability even to serve as petition circulators. For, for example, like referendum questions to, to garner enough petition signatures to pose a referendum question on the ballot and there the Colorado Supreme Court similarly discredited that and said that, that this, this restriction although it's not a residency test serves to deny their access to equal political participation.

And so it undid that that restriction. And so this was a very clear signal that was coming from the state courts and by the federal courts that said no pursuant to strict scrutiny, you cannot impose these unconstitutional barriers for youth voters. But then what we were met with in the jurisprudence was largely a silence throughout the '80s and '90s and early 2000, you had basically a 30 year silence about this amendment, which is why I believe most people don't know about it [laughs]. And as Jay says, it's the, it's the Forgotten Amendment today. And that's because everyone was so focused on it and then they want it. And there were these restrictions in the '70s and strict scrutiny was applied and then it just, there's a, there's a silence. And it's really more recent and more recent years that the 26th Amendment has been and is in a revitalization project, I believe. Especially as we see increased voting barriers as being introduced today.

And the Indiana example that you offer is a good one. Because this, this looks to the ways in which the amendment can serve as you know, be it a sword or a shield against unconstitutional restrictions. And specifically in Indiana, just like in Texas, actually in seven states in the country. There's there's restrictions with regard to who might, may avail themselves of access to no excuse vote by now. So 16 states in the country require that voters provide an excuse in order to vote by mail. And in seven of those states that require an excuse there's an extension provided that says "Actually, but if you're age 60 or 65 plus, you don't have to provide an excuse. You can just go ahead and vote by mail. We'll, we'll just allow you to do so."

And this came about most recently two, two cases wound their way up to the Supreme Court, just this term. And actually just three weeks ago, there was an oral argument in Ninth

Circuit on a similar different, but similar question which took a look at these restrictions and said, "Well, if you're not requiring an excuse for those 60 or 65 plus, but you are for those for voters below those age ranges, then isn't this isn't this a violation of the 26th Amendment?" And so there's been a new conversation taking place about in the courts about what the 26th Amendment is and what it means. And of course, this is all in the context of an unprecedented global pandemic and particularly several of the states that don't automatically grant an excuse to voters above a certain age also don't allow for the pandemic to qualify as an excuse.

And that includes Indiana and Texas. And so these questions went up on appeal to the United States Supreme Court. And, and the one, the argument on one side is that expansion of the right to vote free of age discrimination is, is violated when you don't allow voters an equal opportunity to avail themselves of no excuse vote by mail, particularly during a pandemic. What if you are 55 years old and not 60 years old or you're immunocompromised, or if you're 18 year old, isn't this a direct restriction on access to the ballot on account of age, which is the language and the 26th Amendment? And then the other side says actually this is not an abridgment because what we're looking to and what we're focusing on is not a right that's already guaranteed to those who are 50 years old or 18 years old, we're focusing on the way in which the right applies to those 60 and 65 plus."

And so they're essentially interpreting the 26th Amendment as only applied to restrictions to the right to vote, but not to expansions of the right to vote. And that's the question, and there's been a lot of robust conversation of what that looks like with regard to whether or not this restriction/expansion [laughs]/privilege/right, is actually construed as an abridgment pursuant to the 26th Amendment.

[00:47:19] **Jeffrey Rosen:** Thank you so much for summing up so, well, the arguments on both sides of these two cases from Indiana and Texas that have gone the Supreme Court and the Supreme Court has refused to hear at the moment. As you suggest the court has said that it may consider the cases later in her separate statement in the Texas case, Justice Sotomayor said, "This application raises weighty, but seemingly novel questions regarding the 26th Amendment. I don't disagree with the decision to refrain from addressing them for the first time here, but I hope the Court of Appeals will consider the merits of the legal issues in the case well in advance of the November election," she said in that 2020 case.

And the Indiana case rejected the argument that the 26th Amendment was violated as the Texas court did too, on the grounds, as you suggest that, "The fundamental right to vote means the ability to cast a ballot, but not the right to do so in a voters preferred manner, such as by mail. The 26th Amendment only protects the right to vote." Jay it's rare that we have a chance on We The People to interview the close aid to the James Madison of an amendment. And of course, constitutional channeling is a hazardous exercise, but as Yael summed up the arguments on both sides of these ballot qualification cases.

Many of which in, in, in 16 states, as she said, voters have to provide an excuse to vote at home and seven of those states being a certain age as a permissible predicate to voting at home. Do you believe that Senator Bayh would have thought that these laws making a

certain age, being a predicate to voting at home would have violated the 26th Amendment or not?

[00:48:58] **Jason Berman:** I, I think he would have been very disappointed in both the Texas and Indiana actions. He, he had tried as a state legislator in Indiana to get the vote lowered and didn't succeed. And I would say one of the defining characteristics about why the amendment both passed the House and Senate and was ratified so quickly, which was a show of overwhelming support was, as Yael mentioned, it's bipartisanship. It didn't have anything really to do with parties. No one sat around and try to mathematically determine "Are we going to benefit from, from having these people enfranchised or are we not going to benefit? Is it good in this state or bad in that state? Whatever."

But I think the defining characteristic of the litigation that goes on today as a result of the 2020 elections and what's happening in some of the states is defined, "The first order of business is to determine politically as a party, do I benefit or am I harmed and to make an assessment of that." And I think that would have troubled Senator Bayh even than any of the constitutional questions, because we thought those were resolved by nature of the 26th Amendment passing the way it did and the fact that the word abridged is added to deny. And the reason that it was added again, based on all of the history of the reconstruction amendments and particularly the 14th and 15th Amendment is to give it its broadest meaning. So the right to vote by itself is a very critical ingredient, but how you get to vote is a predicate to that. And therefore he would have been very saddened by this kind of a development. It was part of a decade of expanding the franchise and that's what it was meant to do.

[00:51:14] **Jeffrey Rosen:** Yael, in the spirit of the, We The People podcast, you thoughtfully summarized the arguments on both sides of the question of whether voting at home requirements constitutes age discrimination but in your article on youth voting rights and voting at home requirements and in your report on age discrimination in voting at home, you argued that in fact, they do violate the 26th Amendment. Tell us why you think they do. And then tell us how you think the 26th Amendment can and should be invoked in future cases involving voting rights.

[00:51:50] **Yael Bromberg:** So if we're to take the way that access to vote by mail is being construed and applied it to any other class of voters, the answer would be very clear to us. And I can go into the technical art examples and I will in a moment, but simply just, I think the easiest way to think about this is if we were to say that no excuse vote by mail would only apply to men and not to women as for the 19th Amendment, right? We would say that, that's unconstitutional, but that's clearly unconstitutional. And if we were to say that that only white voters could avail themselves of no excuse vote by mail, we would say that's obviously a violation of both the 14th Amendment and the 15th Amendment which prohibits discrimination on account of age. So why is that not also extended in the context of the 26th Amendment, which, which similarly prohibits denial or abridgment of the right to vote on account of age?

And so that's the question is, why would we apply it, not apply it one group and apply it to others so easily? And the reason for that I believe is that we've forgotten the promise of the 26th Amendment because it hasn't been litigated in the courts. And it hasn't been very widely discussed until most recently, because we're now celebrating the 50th anniversary and we're reflecting back on what the 50 past 50 years have brought us and what the next 50 years might bring us. And so that's kind of my, like boiled down most obvious answer to me when I try to explain this issue, this particular issue to others. But also the way that the courts went around one about their reasoning in justifying the restriction. So in Texas, the, the lower court judge, the district court judge ruled with the plaintiffs and granted a preliminary injunction and said, "No, access to no excuse vote by mail has to be equally applied to all voters."

And that was reversed by the Fifth Circuit and the Fifth Circuit's reasoning in reversing that decision looked to the way that they had to reach that conclusion was by saying that the right to vote does not apply to absentee voting. And that's not my interpretation of the decision, that's right there in the decision. And that's an impossible argument to raise. Tell that to all of the voters that voted by mail this election, regardless of what age they were. Obviously the right to vote extends to vote by mail opportunities particularly in today's climate. It would be ridiculous to think otherwise, and yet th-that's, that's the implied assumption and actually explicit assumption that the, that the Fifth Circuit relies on.

And so now we have a situation in which the, the appeals were raised by both the Fifth and the Seventh Circuit from cases arising from Texas and Indiana. The Supreme Court has denied so. And so those restrictions on access to BBM free of age discrimination, continue to remain on the books in seven states. And in the midst of all of this young people in particularly are voting by mail at incredible rates. 70% of young people in the 2020 race voted early or vote by or voted by mail. 70%, so there's an over-reliance on this mechanism of voting. And we also know that that applies actually across the age groups, right? That applies to 55 year olds as well. So why is this arbitrary cutoff at 60 or 65 today? And we also know about election modernization and the need to modernize our elections in general. And the pandemic has opened our eyes as a great equalizer.

Everyone is, is susceptible in today's health environment. And for those reasons we shouldn't force them to have to appear in person if they are immunocompromised or if they live with immunocompromised individuals. And that applies independent of partisanship and it should apply independent of age as well with regard to ability to avail themselves to vote by mail opportunities.

[00:56:24] **Jeffrey Rosen:** Well, it's time for closing thoughts in this extremely informative discussion of the history and meaning of the 26th Amendment and Jay, the first thoughts are to you. How should We The People listeners celebrate the 50th Anniversary of the 26th Amendment and why is it important?

[00:56:47] **Jason Berman:** Well as as I noted, it has unfortunately often been referred to as the Forgotten Amendment. And I think one of the fortunate byproducts of being able to celebrate its 50th anniversary is to go back and look at it and understand why it passed,



what it means. And that, that's going to take a long time because as Yael pointed out for over three decades it simply existed in written form as the 26th Amendment.

It was not the subject of controversy or litigation or anything else. It, it was there. And, and as I said earlier, I think what distinguishes what we're seeing today, as opposed to the spirit that gave birth to the to the 26th Amendment. And remember it was a pretty hectic time in the United States of America. W-we were still involved in the war in Vietnam, there was still student protest. There was a lot going on, but this past, so overwhelmingly ratified in three months a record, that'll never be broken principally because we'll probably never have another amendment given the political context in which we live getting two thirds in the House and Senate and three-fourths of the state legislature is a monumental, almost impossible task.

But again, what, what defines what's happening now is a political calculation as to who benefits from what and that's what I think is at issue in both the Texas and Indiana case. And I'm sorry to say that, because it would have made a Senator Bayh and Senator Randolph very, very sad.

[00:58:43] **Jeffrey Rosen:** Thank you so much for that. Yael, last words are to you. How should We The People listeners celebrate the 50th Anniversary of the 26th Amendment and why is it important today?

[00:58:56] **Yael Bromberg:** Well, we should celebrate it by talking about it. I think that even just understanding what it is and being able to identify restrictions through an age-based lens is a huge service to us. So Jeff, thank you for allowing us to have the space to talk about this topic. And of course, it's an honor to join in conversation with Jay Berman on this. It's such a unique opportunity and, you know, there are, it's very easy to look at voter restrictionists that don't want to expand access to the ballot because they're doing their political calculation. What I found when I was researching and writing about about this amendment is that even constitutional rights scholars and litigators have forgotten what this amendment is.

And they have children who are college age, and they don't think about the way... They hadn't construed the ways in which their children had unique, specific issues accessing the ballot. They thought that, you know, taking a trip without access to public transportation, far off campus they didn't think about that in a 26th Amendment lens. They didn't think about these access to vote by mail or the increased mobility of this class within the 26th Amendment lens. But the numbers actually bear this out young people when they go to vote by provisional ballot, they have to do so at outsized rates compared to all other groups. And that's the last stop, right?

The last stop is the provisional ballot. Everything else that you tried before failed you, and now you have to vote provisionally. Young people, they, they end up voting provisionally. The number is one in four million millennials had to vote provisionally in the 2016 presidential race. And you have to compare that with 6% of baby boomers and 2% of members of the greatest generation. So there's obviously structural obstacles in place. So the best way Jeff, that we can celebrate the 26th Amendment is by talking about it by talking

with our, our young kids about it, or with our peers about it, and trying to remember the fact that something happened 50 years ago, the nation came about in the quickest amendment to be ratified in us history, through cross partisan lines to celebrate access to the ballot.

And there are ways in which, as I said earlier, it's easy to look at this within the context of obstructionists, but there's another way to look at it, which is what's also happening in the Blue States. We need to have access to same day voter registration for young people. Same day voter registration is a tool which has shown that young people will vote at a rate of nine percentage points higher than in those that live in deadline oriented states. And you don't see that uniformly in the Blue States, for example, and even in the Blue States, you don't see access to on-campus polling locations. So there's a good reason, I understand. I, and Jay's point is very well taken that, you know, there might be a political calculation taking place, but I see that political calculation is taking place across partisan lines as well.

And that's not really what democracy is about. We want to encourage young people to participate. Voting is habit forming, like anything new. You have to learn how to do it. And that requires certain information obstacles and the big, like the first time around, but the next time around is substantially easier. And so we have to celebrate, first of all, I'm going to get a stiff drink one day with Jay [laughs] and treat him to a drink. But we have to talk about it and that's the best way that we can do it. We have to be able to identify what obstacles are and where the opportunities are present for the next 50 years.

[01:02:46] **Jeffrey Rosen:** Thank you so much. Jason Berman and Yael Bloomberg for that illuminating deep and a surprising discussion of the history and meaning of the Forgotten Amendment, the 26th Amendment. We The People listeners let's make this, the beginning of a conversation that will involve more reading, learning, and growth. And happy birthday, 26th Amendment. Jay Berman, Yael Bloomberg, thank you so much for joining me.

[01:03:14] **Jason Berman:** Thank you.

[01:03:16] **Yael Bromberg:** Thank you.

[01:03:21] **Jeffrey Rosen:** Today's show was produced by Jackie McDermott and engineered by Greg Scheckler, research was provided by Mac Taylor, Amy Lu, Olivia Gross, and Jackie McDermott. Special thanks to the Youth Franchise Coalition and Project Vote 18 for the audio of Senator Birch Bayh that you heard at the top of the show. Please rate, review and subscribe to We The People on Apple Podcast and recommend the show to friends, colleagues, or anyone anywhere who is eager and hungry for a weekly dose of constitutional illumination and debate.

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appreciated. And you can do that at constitutioncenter.org/donate. On behalf of the National Constitution Center, I'm Jeffrey Rosen.