

What Roman Mars Can Learn About Con Law A Jurisprudence of Doubt

Roman Mars [00:00:00] So it is Friday, December 10th at 9 a.m. Pacific Time. And I am so eager to find out what we're going to talk about today.

Elizabeth Joh [00:00:10] Well, Roman, it's December 2021, but we're still talking about the pandemic, and still all things Trump are on people's minds. So first, the pandemic. The Biden administration, of course, has taken a number of steps to address the pandemic. And one especially controversial step has been Biden's mandate that all companies with more than 100 workers require vaccination or weekly testing starting in January. Now, that affects a lot of American workers--something like more than two-thirds. And, of course, a lot of private employers have already required their own employees to be vaccinated because they want them to. But this new mandate would impose that requirement even on unwilling employers. And, of course, that mandate was immediately challenged in court. But in November, a federal appeals court put the mandate on hold while the case proceeds. And there are more than two dozen other challenges to the mandate in other courts. Now, it's kind of confusing to have so many different cases about the same thing, so the cases have now been consolidated or put together in one case before one federal appeals court in Ohio. So, I would expect the loser of that case to ask the Supreme Court to hear it eventually.

Roman Mars [00:01:27] Right. Right.

Elizabeth Joh [00:01:28] Then there's the ongoing investigation into the Capitol riot. Steve Bannon, Trump's former advisor, of course, refused to comply with the House January 6th committee to provide documents or to testify. That was pretty brazen because even though there are other folks who don't want to comply with these kinds of requests, he didn't assert any privilege or any other legal basis for not cooperating. He just didn't comply. So, remember, the House voted to hold him in contempt and referred the matter to the Justice Department. So, he is now facing two misdemeanor charges for being in contempt of Congress, and his trial is scheduled for next July. Now, the January 6th committee has also subpoenaed Mark Meadows. And Meadows, of course, was Trump's White House Chief of Staff. Now, Meadows did hand over some documents, but then he changed his mind and said he wouldn't comply anymore. But in the meantime, Meadows did turn over some interesting documents, including an email that referred to a PowerPoint of alternatives for Trump to pursue, so he could be declared the winner of the 2020 election. Now, one slide refers to something that you and I have talked about before, and that is having Vice President Pence play a central role in changing the Electoral College vote count because of some alleged vote fraud, of course, which is nonexistent. And of course, we know that that is part of the design of the memo written by John Eastman, an adviser to Trump, who laid out this whole plan in some detail. But there's another interesting slide, though, that suggests the possibility of Trump declaring a national security emergency--presumably because of some alleged foreign manipulation of electronic voting. So, you declare a national security emergency. It's all over. Trump wins, game over. But the amazing thing to me is that this is done through a PowerPoint. It's a slide deck of how to overturn a legitimate election. So that is, you know... I hate PowerPoint even more after that.

Roman Mars [00:03:33] It is really just kind of a stunning document to see--this PowerPoint presentation of, you know, illegal flailing to try to undermine an election is just stunning to me. You can just, like, pick a thing out of a hat, and you just go, like, "Foreign

interference. Election fraud." You know, like, before any of that stuff is proven or anything has happened, it's just this collection of, like, pretenses to do something extremely anti-American. It is just stunning to see it. Putting it all into PowerPoint really brings the phrase the "banality of evil" to a new level.

Elizabeth Joh [00:04:12] Absolutely. I mean, it has all of the chilling banality of "Let's get our fourth quarter sales numbers up."

Roman Mars [00:04:18] Exactly.

Elizabeth Joh [00:04:19] You just replace it with "Overturn democracy."

Roman Mars [00:04:21] It's just stunning.

Elizabeth Joh [00:04:23] And then the Supreme Court just issued its decision in the Texas abortion case. Now, remember, the state banned abortions after six weeks, but said we won't do anything about violations of the law. That was the one thing that was so unusual about what's been called "SB 8"-- that's the name of the law. Instead, Texas said, "We'll let private individuals sue to enforce the law." It turned individuals into bounty hunters of a sort because you could actually receive cash for successfully suing. But it also turned out that this Texas law made it very difficult to sue over the constitutionality of the law. Who exactly can you sue? So, there was a lawsuit brought by abortion providers in Texas and one brought by the federal government against the state of Texas. Well, there has been a set of opinions today. And the takeaway here is that, first, with respect to the federal government's lawsuit, the Supreme Court dismissed their original agreement to hear that case as, quote, "improvident granted." So that's just another way of saying that it's not going to hear this case; they're going to kick the case back to the federal appeals court in Texas. And that court has not yet decided what they think of the law. At the moment, anyone can still sue, still file a claim in court. None of those individuals is enjoined or prevented from suing. And, of course, we haven't yet gotten to the core of the issue and that law--and that is they've crafted this scheme which protects a law that is very much unconstitutional when compared to the Court's current precedence. And Justice Sotomayor certainly understands the stakes. In her dissent, she points out that this isn't just one state law about abortion. This Texas law threatens the nullification of constitutional rights and basically invites other states to follow the blueprint that Texas has created. When I mention current precedence, that's because today I thought we'd talk about what those precedents are and how solid they feel for the moment.

Roman Mars [00:06:30] Let's do it. This is What Roman Mars Can Learn About Con Law--new name, same show--an ongoing series of indeterminate length, where we take the maelstrom of current events in the world of government and politics, still reeling from Trumpism, and use it to examine our Constitution like we never have before. Our music is from Doomtree Records. Our professor and neighbor is Elizabeth Joh. And I'm the person who is never getting out of the first semester of law school, Roman Mars.

Elizabeth Joh [00:07:21] So, Roman, we've talked about the constitutional basis for a woman's right to choose to have an abortion before. And remember, that right can be traced back to two important Supreme Court cases, Roe versus Wade, which was decided in 1973, and Planned Parenthood versus Casey, decided by the Court in 1992. And, of course, we've discussed abortion law in some detail. But the short summary here is that the Court's current understanding is that a woman has a constitutional right to a lawful abortion before the fetus can live outside of her body--a legal standard that the Supreme

Court has termed "viability." Before that, the states can't ban abortion completely, but they can regulate it so long as it's not what the Court considers a so-called "undue burden." That's another part of the law today. And the Supreme Court has decided many, many cases about abortion. But Roe and Casey are the very most important cases that define that right. But there's another aspect of abortion and the Constitution that's really important here for context: where the right comes from. Many of the rights that you're familiar with can be found because there's some clear reference to it in the Constitution. So, take the Second Amendment. It talks about the right of the people to keep and bear arms, right? And we can disagree on how that right should be interpreted, but it's clearly about firearms. It's there in the text.

Roman Mars [00:08:48] Yeah. You don't really have to be a constitutional scholar to know that abortion isn't specifically mentioned in the Constitution.

Elizabeth Joh [00:08:54] Right. So, there's the question. Where does it come from? Well, the 14th Amendment--one of the post-Civil War amendments--says that no state shall deprive any person of life, liberty, or property without due process of law. And since the early 20th century, the Supreme Court has decided that that reference to liberty, that one word, does a lot of work--that the liberty referred to in the 14th Amendment protects certain rights that are related to our privacy, our autonomy. And these protect important individual rights that the government can't interfere with unless it has some really important reason to do so. And there are some times where the government can't interfere with them at all. Remember Obergefell versus Hodges?

Roman Mars [00:09:39] Yes.

Elizabeth Joh [00:09:39] So that's the 2015 case where the Supreme Court decided that the states couldn't ban same-sex marriage. If same-sex marriage was not considered an important fundamental right that was protected as part of the liberty of the due process clause, then states would be free to ban it. But in the Obergefell decision, the Supreme Court said, "No. Constitutional liberty includes, quote, 'marrying someone of the same sex and having those marriages deemed lawful.'" So as a result, after that case, states can't ban same-sex marriage. So, let's take another really famous case. You've probably heard of Loving versus Virginia, right?

Roman Mars [00:10:19] Indeed, yes.

Elizabeth Joh [00:10:19] Yeah. So that's the case about interracial marriage. In 1967, the Supreme Court struck down Virginia's ban on interracial marriage. And there were other states that had similar kinds of bans. And in Loving, the Supreme Court said that marriage is a, quote, "fundamental freedom." The state couldn't ban Richard Loving, who was white, from marrying Mildred Jeter, who was Black. So, the marriage cases are a very good example of how the Supreme Court has protected rights that aren't specifically mentioned in the Constitution. But the Court agrees that they exist because they are part of the liberty that's guaranteed to all of us.

Roman Mars [00:10:58] It's kind of stunning that the word "liberty" in the 14th Amendment is, you know, the hook on which so many hats are hanging, you know?

Elizabeth Joh [00:11:07] Exactly right. I mean, on the one hand, you could say that there is a long tradition at this point of the Court doing it. But, you know, if you also take that to be true, you still can feel somewhat uncomfortable about how do courts--really, how does

the Supreme Court in particular--find these rights to begin with? How did they decide, "Well, this is a fundamental right, and this isn't a fundamental right"? And, of course, that very basic question has engendered a lot of controversy.

Roman Mars [00:11:33] For sure.

Elizabeth Joh [00:11:34] But it's absolutely the case that the Supreme Court has found these unwritten fundamental rights in other areas--not just marriage--including how to raise your children, the right to engage in consensual sexual activity between consenting adults, the right to have access to birth control. Lots of these different areas--they all relate to having control over our private lives. And the Supreme Court--and this is an important thing--has decided these cases not because they took a Gallup poll or anything like that. And of course, lots of times they've decided these cases extending new rights about sexuality, marriage, or relationships in the face of a lot of opposition. So, all of this means that the basis for a constitutional right to an abortion, which is also part of this family of rights, is not at all unique, or unusual, or strange, or out there. If you are going to level criticisms at where the right to abortion comes from, you're going to have to grapple with a lot of other decisions that the Supreme Court has made about very important individual rights. So, Trump's appointments to the Supreme Court--that's, of course, Justices Gorsuch, Kavanaugh, and Barrett--have created this very solid conservative majority now on the Court. And that has raised the stakes for any abortion case. Now, we've just talked about the Texas case, but we still have another one--and that is one called Dobbs versus Jackson Women's Health Organization. And the Supreme Court heard oral argument on that case on December 1st. And unlike the Texas case, which is kind of a complicated procedural one, the Dobbs case poses a direct challenge to the Supreme Court's prior decisions. So, Roman, here's the law. Under the Mississippi Gestational Age Act, most women can't have access to a legal abortion after the 15th week of pregnancy. So, here's a quiz for you, Roman. Is that law constitutional under the Court's current cases?

Roman Mars [00:13:35] Well, if the test is viability, then 15 weeks is not viable to my understanding of ontogeny. And so...

Elizabeth Joh [00:13:43] Absolutely right. I mean, that's just the plain answer. The Mississippi law is clearly unconstitutional under current Supreme Court law, right? Because as we talked about, part of what the Court has held is that the states can't ban abortions--ban legal abortion access to women--before viability. Now, whatever the line of viability is today--and that's roughly around 23 or 24 weeks--this law bans abortions long before viability. The law never went into effect because of the lawsuit. So, this case is brought by Jackson Women's Health Organization in Mississippi. This isn't just a clinic in the state that provides legal abortions. It's the only clinic in the state that provides abortions.

Roman Mars [00:14:31] Oh, my goodness.

Elizabeth Joh [00:14:32] So the stakes are very high. So, the Supreme Court's very decision to hear the case at all--a case where the law is clearly unconstitutional--is a signal that the Supreme Court's willing to take another look at a woman's right to an abortion as a matter of a right that's protected under the Constitution. So, when you see the legal question that the Court formally wanted to hear arguments, you might think, "Well, this is about a challenge to a particular state law regarding abortions, right?" Well, the answer is no. It's much more than that. The state of Mississippi is asking the Court not just to uphold their law--the one that we just talked about. It's asking the Supreme Court to overturn Roe

and Casey completely just to get rid of those cases--no more constitutionally protected, fundamental right to a legal abortion. And so even though we don't have the case and we only have the oral argument, it's still really interesting to talk about the questions asked by the Justices in the Mississippi case. And there's a note of caution here. The Justices can ask anything they want, and sometimes they talk about things or express concerns that never make it into the most important result--and that's the legal opinion, which we won't have for months. But in the meantime, we do have the oral argument. So, let's go back to one of the two important abortion cases--the 1992 case of Planned Parenthood versus Casey. And that case was one that involved a challenge to a group of Pennsylvania laws regulating abortion. And in Casey, the Supreme Court established the current standard for how courts evaluate the constitutionality of a state's abortion laws. It's called the "undue burden standard." Now, that's what Casey is generally known for and what you see it written up as. But what you might not know is that a very large part of the Supreme Court opinion is kind of a meta opinion. It's a really long discussion about a very basic question. And that question is: When do you overturn a Supreme Court case?

Roman Mars [00:16:38] So what is that about? Like, what is that meta opinion discussing?

Elizabeth Joh [00:16:43] Well, at this point, Roe was a 19-year-old opinion. And abortion opponents felt that there were enough votes on the Supreme Court at that moment to overturn Roe. So, the lawyers all were thinking, "This might be that case." But interestingly enough, the clinic lawyers who challenged the law took a gamble. They wanted to pressure the Justices to clarify whether Roe was still good law or whether the Court was actually going to squarely overturn the case. So, the Casey opinion does two things. The familiar part--actually confirming that Roe was indeed the law of the land. And maybe the less familiar part--how and when the Supreme Court should overturn one of its prior decisions. So, it's for that reason that this 1992 case, which is on the one hand a case about state abortion laws, begins with this sentence: "Liberty finds no refuge in a jurisprudence of doubt." A case about abortion that doesn't mention the word "abortion" in the first sentence. So, in our legal system, we start out with the doctrine that courts generally follow the decisions that came before. And the corollary, of course, is that it should be extremely reluctant to overturn prior cases--to declare them no longer good law. Lawyers call this *stare decisis*, but that's the basic idea. And the beginning of Casey--the opinion--as I said, is an extended discussion of this question. And the Court in Casey says, "Well, sometimes there are reasons both in favor of overruling a prior case and against overruling a prior case." With Roe, the Supreme Court in Casey spends a lot of time thinking about things like reliance. And reliance means if we overturn our Roe versus Wade decision, will there be a special hardship to those affected? And of course, those affected are women. And ultimately, the Court's answers go in favor of upholding Roe. They talked about, even in the relatively short life of the Roe decision up until 1992, the impact on women had been enormous. Here's what they said in Casey. "The ability of women to participate equally in the economic and social life of the nation has been facilitated by their ability to control their reproductive lives." What's notable about this is the Court is not saying, "Let's talk first about direct access to legal abortions." But really there's more of a structural component here--that access to legal abortion helps women organize their lives, right? They're not in fear of what might happen with an unplanned pregnancy. And on the other hand, nothing seemed to have changed in the reasons for why Roe was originally decided in 1973. Nothing about the factual basis for Roe or "No other reason emerged," said the Court in 1992, "to say that Roe was just wrongly decided." But then in Casey, the Supreme Court said something even more significant about Roe versus Wade. They said that if the Court was going to overturn a prior decision, it should be reluctant--but it should be especially reluctant for very important decisions. And the Court

in Casey has said Roe versus Wade was one of those very important decisions. It was a, quote, "watershed decision." So, among all of the important Supreme Court opinions, there are some star opinions. And Roe versus Wade is one of those. So, Roe is both so important and so controversial that in Casey--that 1992 case--the Supreme Court says, "Look, let's compare this situation to another historical example--the change from the 1896 case of Plessy versus Ferguson to the 1954 case of Brown versus Board of Education." Now, Brown overturned Plessy's doctrine that government approved racial segregation was constitutional. After Brown, separate was constitutionally unequal. "Now, Brown's decision to overturn that prior case made sense," says the Court in Casey, "because Plessy was both wrong on the day it was decided in hindsight." And by 1954, everybody understood that racial separation approved of by the government was just plain wrong. So, in Casey, they say, "By contrast, you can't say these things about Roe." That's a really important part of Casey.

Roman Mars [00:21:11] So why in the case decision did they feel a need to have this long metatextual explanation of itself?

Elizabeth Joh [00:21:19] Well, in this portion of Casey, the Supreme Court is really looking at itself. In Casey, the Court says, "Look, if we're seen as overturning a prior decision--that's Roe--just because it's controversial--just because there's enormous political pressure to do so--then we lose the only power that we have: our legitimacy. And it's not just about us." The Court says in Casey, "The Court's concern with legitimacy is not for the sake of the Court but for the sake of the nation to which it is responsible." It's kind of a "It's not about me, it's about you" kind of answer, right? So, when you know all of this about Planned Parenthood versus Casey, the Justices' questions on December 1st make a lot more sense. Why are they talking about Plessy? Why are they talking about marriage? The Justices heard from a lawyer representing Mississippi, a lawyer representing the clinic, and the solicitor general who represents the interests of the federal government siding with the clinic. And these kinds of questions were peppered throughout the oral argument. So, to begin with, the lawyer arguing on behalf of Mississippi straight out asked the Court not just to uphold their law, but to overturn Roe and Casey altogether.

Roman Mars [00:22:36] Wow.

Elizabeth Joh [00:22:37] So when he says to the Justices at oral argument, "Look, it's not a workable decision. Women have lots of other ways to organize their lives. Birth control is available very widely. Adoption isn't a big deal." Why is he saying this? These are cues that he's taken directly from Casey about when you should overturn a case. Now, Justice Thomas, who's never been a fan of Roe or Casey, is big on things that are specifically mentioned in the Constitution's text. So, Roman, even without having listened to it, I bet you can guess the kind of question he asked.

Roman Mars [00:23:15] Did he say, "Is abortion listed in the Constitution as a right?"

Elizabeth Joh [00:23:19] Pretty much, right? He says, "I understand we're talking about abortion here. But what is confusing is that if we're talking about the Second Amendment, I know exactly what we're talking about. If we're talking about the Fourth Amendment, I know what we're talking about because it's written. It's there. What specifically is the right here that we're talking about? Now, the solicitor general's answer, of course, in support of the clinic was the liberty of the due process clause. Now, Justice Thomas is no fan of the Supreme Court's recognition in general of these fundamental rights that you can't see listed in the Constitution. But this is a potentially perilous path. So, if you take Thomas's

approach, why should we ever recognize a right to an abortion when there's no mention of it in the Constitution? Remember, it's not just the right to an abortion that the Supreme Court has said is a core constitutional right that is not specifically mentioned in the Constitution. There are lots of other ones.

Roman Mars [00:24:16] Yeah. Including interracial marriage, of which he is part of.

Elizabeth Joh [00:24:20] Exactly. So, this is a huge can of worms that the Supreme Court has opened. If you overturn Roe, that opens the possibility to argue that maybe none of these rights really should exist--opens the way for challenges to all kinds of rights. And Justice Sotomayor at oral argument in this Mississippi case was pretty blunt. She said to the lawyer for the state.

Justice Sotomayor [00:24:44] There's so much that's not in the Constitution, including the fact that we have the last word. Marbury versus Madison. There is not anything in the Constitution that says that the Court--the Supreme Court--is the last word on what the Constitution means.

Elizabeth Joh [00:25:03] The Court has said that there is inherent in our structure certain personal decisions that belong to individuals and the states can't intrude on them. She refers to cases like marriage again in this abortion case. Now, Justice Barrett, one of our more recent Justices, tried to address this. She tries to rescue this by saying to the lawyer from Mississippi.

Justice Barrett [00:25:27] Would a decision in your favor call any of the questions-- any of the cases--sorry--that Justice Sotomayor is identifying into question?

Elizabeth Joh [00:25:35] And his answer is "No, it's just... Abortion's just different. It's just different." It's a pretty weak distinction. But Justice Sotomayor is pretty upfront about it. She says, "Look, let's take Loving." That's the case we talked about before--the interracial marriage decision. She says, "Look, if you overturn Roe, that's going to have effect on other cases. None of these rights are spelled out, and yet the Court has recognized them as important, constitutionally protected ones. You can't just decide that one doesn't exist anymore. You bring the others into question." But of course, Justices Sotomayor, Kagan, and Breyer--the three so-called liberal Justices--no matter what they think, are just three Justices. There is a solid six conservative majority opinion potentially waiting out there. And the comments of those Justices suggest that they're at least willing to entertain the possibility of overturning Roe and Casey. On the other hand, let's imagine what it's like to be the Chief Justice of the Supreme Court. Now, there's that part of Casey, which is about thinking about itself as a Court. Now, if you take that concern seriously--that Roe is a watershed case and it really only should be overturned under the most extremely special circumstances--then the Chief Justice's questions at oral argument in this Mississippi case also make sense. He says to the state, "Well, what if we uphold Roe and Casey but we also uphold the Mississippi law, too? Let's have our cake and eat it." What the Chief Justice is getting at is: What is the core of the constitutional right to legal abortion? Remember, the viability is that test in the 1992 case. Could you still take away that viability test and still have a Roe constitutional right? Roberts asked this question both to the lawyer representing the clinic and the lawyer representing the federal government which is siding with the clinic. They push back and say, "No, no. If you let states ban abortions before viability, you've destroyed that right and abortion law becomes a mess."

Roman Mars [00:27:43] So what is Roberts trying to do here? Because it sounds kind of like one of those classic law school hypotheticals that you've schooled me on, you know?

Elizabeth Joh [00:27:51] Right. I mean, Roberts is testing the possibility of having a right that formally exists by Roe and Casey right. So, avoiding formally overturning those cases and having a compromised position by saying, "Well, we can take away that viability test, but that compromise would still drastically limit legal abortions. So, if you uphold Mississippi's law--no abortions after 15 weeks--why not ten? Why not six?" And then is anything really left? You don't really have to formally overturn those cases if you just gut the right all together. And in fact, just a few months after the federal trial court declared that the Mississippi law was unconstitutional--before this oral argument--the state of Mississippi enacted an even more restrictive law, which bans abortions six weeks into a woman's pregnancy. So that's the path that they were already going on.

Roman Mars [00:28:48] Does the existence of this law being proposed at six weeks kind of undermine this as a case in front of the Supreme Court? You know what I mean? Like, if they rest on this notion that, "Okay, what's our compromise here? Well, Roe and Casey are fine. 15 weeks is on the edge, and not an undue burden, and we can eliminate the viability part of it. Nothing more is going to happen." You know what I mean? But then this other one comes up behind it. Does it undermine that argument a little bit and kind of hurt the notion that this is just a limited slice of rights being taken out and not, like, just an ongoing erosion of rights? You know what I'm saying?

Elizabeth Joh [00:29:32] Yeah, absolutely. And that's exactly the position that the lawyer for the clinics took. And what they said is "You either, you know, draw a hard line here, saying you have to craft a ban on the states, saying you have to respect viability." In other words, make it clear when women can have a legal right to an abortion. Or in the absence of that line, if the line's taken away, then you have a lot of uncertainty, right? Where states can change that line any time they want. And then suddenly you're a woman in a position where you thought one day you had that right, and then all of a sudden, your state takes that right away. Nominally, the state can say, "Look, you have a right. You can have it in the first three weeks of your pregnancy." But remember, again, these are really complicated circumstances. Many women often don't realize for quite some time that they're pregnant. And so that is a way of de facto overturning Roe and Casey without formally overturning it.

Roman Mars [00:30:27] It seems to me if you were an opponent to abortion and trying to gut Roe by proposing a 15 week law, that you would allow that to play out before you'd propose a six week law because part of what you're relying on is the Supreme Court putting blinders on--that this will be a further march of erosion over time and inevitably lead to a complete ban on abortion. But now the Supreme Court, you know, can't put blinders onto this because there's already been a law proposed that will do just that. I just don't understand how the Supreme Court could ignore the reality that the next law is just going to be worse--that if they go down this path, it's just going to be more and more of the same until it goes to nothing.

Elizabeth Joh [00:31:13] Well, I mean, the truth is that, you know, a lot of states have already had these so-called "fetal heartbeat laws"--six-week bans--and they're typically struck down because the lower federal courts understand that Roe and Casey are the law of the land. And that's the measure by which they have these rulings. So, the mere fact that the Supreme Court says, "Well, maybe we'll take another look at these cases" is a signal. And I think whatever the Court does, the other courts around the country will take

that as the standard by which to either weaken that right in the case that Roe and Casey still survive, at least in name only, or if it's overturned altogether. Of course, that's a dramatic difference. And the states are certainly poised to do that. Oh, and then let's turn to this alarming argument from Justice Kavanaugh. He introduced this theme during oral argument. "Let's say," he suggested, "that Roe was wrong when we decided it..."

Justice Kavanaugh [00:32:12] I think the other side would say that the core problem here is that the Court has been forced by the position you're taking and by the cases to pick sides on the most contentious social debate in American life, and to do so in a situation where they say that the Constitution is neutral on the question of abortion--the text in history--that the Constitution's neither pro-life nor pro-choice on the question of abortion. And they would say, therefore, it should be left to the people, to the states, or to Congress. And I think they also then continue, because the Constitution is neutral, that this court should be scrupulously neutral on the question of abortion--neither pro-choice nor pro-life--but because they say the Constitution doesn't give us the authority, we should leave it to the states, and we should be scrupulously neutral on the question. And that they are saying here, I think, that we should return to a position of neutrality on that contentious social issue rather than continuing to pick sides on that issue.

Elizabeth Joh [00:33:33] So not only does Kavanaugh introduce this idea, he returns to it. And it gets picked up by the state of Mississippi's lawyer. He says, "I think that's a very good description of what we're asking for here."

Roman Mars [00:33:45] And so what are the flaws in this idea of neutrality when it comes to abortion in the Constitution?

Elizabeth Joh [00:33:51] Well, don't be fooled. It's absolutely disingenuous to call overturning Roe and Casey a return to neutrality. It's impossible. We can't start anew. We don't begin a new conversation about reproductive choices that women have in the state legislatures. You know, imagine the Supreme Court overturning Obergefell versus Hodges--the decision that prevented the states from banning same-sex marriage. Would that mean that the states return to a position of neutrality? I don't think so. I mean, if anything, the states on both sides of the abortion issue are ready for whatever comes next. So at least a dozen states already have what are called abortion trigger laws. And these are laws that are ready to greatly restrict or completely ban abortion as soon as the Supreme Court lets them. So, here's an example. Tennessee's Human Life Protection Act bans abortions in the state. And the language of the law says it will take effect 30 days, quote, "after any decision of the United States Supreme Court overruling in whole or in part Roe versus Wade as modified by Planned Parenthood versus Casey, thereby restoring to the states their authority to prohibit abortion." So, there's no sense in which an overturning of Roe in Casey brings us back to a blank slate, which we all can agree to start anew and have a fresh conversation.

Roman Mars [00:35:21] Yeah. Is it customary for a Justice like this to kind of present an argument to the lawyers to then run with in this way?

Elizabeth Joh [00:35:30] Absolutely. They raise something to see, you know, if that is something consistent with what the lawyer on one side wants. And remember in oral argument, it's also kind of a performative conversation that, you know, for instance, Justice Kavanaugh is having with one of the lawyers. But it's really for the benefit of his fellow Justices to hear. So, you know, that "return to a position of neutrality" line--I wouldn't be surprised if that would become some part of an opinion. He writes. Maybe not in the

majority. We don't know. But it could be something that he authors in some portion of what's to come in the Mississippi case. And so, of course, that leads us to what's going to happen. We have no idea. We don't know how the Supreme Court will rule in Dobbs. But it definitely seems that the six conservative Justices are trying to find a way for Mississippi to win one way or the other. I should note, though, that, you know, the Supreme Court has just issued its decision in the Texas case--SB 8--right? And that case is about procedure. It's allowing the case brought by the abortion clinic in Texas to go forward. Why am I bringing that up here? Because here the Chief Justice wrote a partial dissent in which he described Roe and Casey as a, quote, "right protected under the federal Constitution." That was joined by the three liberal Justices. So that's four Justices. So, the question is, if four of them think that, can they persuade one more to uphold Roe and Casey by June? But it's the possibility of the Supreme Court overturning those cases that led Justice Sotomayor to ask in the Mississippi case...

Justice Sotomayor [00:37:18] Will this institution survive the stench that this creates in the public perception that the Constitution and its reading are just political acts.

Roman Mars [00:37:39] Yeah, she's totally right. It will not.

Elizabeth Joh [00:37:43] We'll have to find out.

Roman Mars [00:37:44] I know. We'll have to find out. You know, this is not always the case because there's Plessy, and then there's Dred Scott. For the most part, when it comes to interpreting the rights of people in the Constitution, this is a march towards the expansion of rights. It's really kind of stunning to think that there would be a case in the modern era in which it would be the curbing of rights.

Elizabeth Joh [00:38:09] And that may be the one thing that gives Justices pause. But the thing that gives them pause may not end up with a result that makes anybody happy. And that could be, as I mentioned, this kind of compromise, where five Justices agree that Roe and Casey survive. But when you actually read the details, not much of it has actually survived in practice.

Roman Mars [00:38:30] So you mentioned that this opinion is scheduled for June?

Elizabeth Joh [00:38:35] Well, they're the Supreme Court; they get to do whatever they want. But if we look at past practice, you know, when it comes to the blockbuster cases--the ones where everyone is really eager to find out the result, usually because it involves individual rights or some other very politically sensitive issue--the Court typically waits until June. Not because they like to hold us in suspense, although maybe that's part of it, but because they often have a long, long, and hard time hashing it out among the nine Justices. You know, what exactly is the majority going to be? You know, what will be persuasive and actually end up in the opinions--things of that nature. So, if we're going to make bets, it's not likely that we're going to see the opinion until at least sometime later next year in the Supreme Court's term.

Roman Mars [00:39:20] Yeah. And it's going to the end of the term. They like to, like, give the blockbuster opinion and then be like, "We're out," you know, so they don't face the sort of scrutiny of the action of the Court.

Elizabeth Joh [00:39:30] That's right. They go on vacation and let us figure out what's going on.

Roman Mars [00:39:36] Yeah. Oh, it's so stunning to watch it happen and watch it be so effective to watch the addition of these three Justices be so effective. Could you tell me the--? What's the line? What's the first line again from Casey.

Elizabeth Joh [00:39:50] "Liberty finds no refuge in a jurisprudence of doubt."

Roman Mars [00:39:54] I mean, a compromise of holding part of the Mississippi law--how does that do anything but sow doubt if there's any sort of sense that that opinion or that sentence has meaning? It seems hard to believe that any of this stuff could happen. But here it is happening.

Elizabeth Joh [00:40:10] Absolutely. And remember, you know, to be honest, no matter what happens with the abortion cases and particularly the Mississippi case, of course, if that rate is no longer something like the one that we recognized today--and maybe that's already happened, frankly--it will have direct effects on some lives more so than others. So, for some people, you know, there will always be states like California that will provide abortion access to women--legal abortion access. And so, if you have the means to do so, you'll be able to travel to those states to obtain an abortion. But it will affect the millions of women who are low income, who are in positions where they really cannot travel, either for economic reasons or for other reasons--they have small children. And it's that population that's really at risk of losing that right immediately and directly. And, of course, you might say, "Well, some people get to exercise that right." But that's never how we think about constitutional rights. We don't think, "Well, some of you get to exercise it, so it's okay."

Roman Mars [00:41:14] Right. Well, thank you again for talking with me. Appreciate it.

Elizabeth Joh [00:41:17] Thanks, Roman.

Roman Mars [00:41:33] This show is produced by Elizabeth Joh, Chris Berube, Jeyca Maldonado-Medina, and me, Roman Mars. You can find us online at learnconlaw.com. All the music in What Roman Mars Can Learn About Con Law is provided by Doomtree Records, the Midwest Hip Hop Collective. You can find out more about Doomtree Records, get merch, and learn about their monthly membership exclusives at doomtree.net. We are part of the Stitcher and SiriusXM podcast family.