

What Roman Mars Can Learn About Con Law The Leaked Draft

Roman Mars [00:00:00] We received your messages and heard your cries. So, Elizabeth and I got together earlier today to talk about the leaked draft majority opinion that threatens to overturn Roe. Let's go. This is What Roman Mars Can Learn About Con Law--an ongoing series of indeterminate length, where we take current events in the world of politics and the Supreme Court and the politics of the Supreme Court, and we 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 your fellow student and host, Roman Mars. As another election season ramps up, it can be tricky to sort through all the noise in the news. That's where Slate's Political Gabfest comes in. Each week, hosts John Dickerson, Emily Bazelon, and David Plotz decipher the headlines, break down the races, and tell you what issues really matter. They don't always agree--in fact, it's really fun when they don't agree--but they do always deliver thoughtful debate and have a good time doing it. Think of Political Gabfest as having after hours drinks with three journalist friends who can unpack the underlying issues and broader effects of the latest election headlines. I never miss an episode. Listen and subscribe to Slate's Political Gabfest wherever you get your podcasts. So, it is Tuesday at 3:15 p.m. About 24 hours ago, a draft majority opinion was released by Politico that shows the Supreme Court is poised to overturn Roe v. Wade. It was a draft written by Alito. And here we are. It is really sort of earth-shattering news in lots of ways. And so, I just wanted to talk to you about it, so you can tell me what I should be thinking right now.

Elizabeth Joh [00:02:14] Yeah. I mean, we should be thinking about a lot of things. It's an explosive scoop for two reasons. One is really big. And the other one is interesting but not nearly as important. So, the interesting one is that it looks like this is the first time we've seen a leaked draft of a major case pending before the Supreme Court before it's come out. There have certainly been leaks of other kinds about the Supreme Court, such as how the Justices think or whether or not they've changed their minds in a particular case. And we've even known about the results of a case before it was officially released. So, we've had leaks before, but nothing quite seems like this particular leak. And that's pretty significant because the whole process of opinion writing at the Supreme Court is pretty secretive. We don't even generally know when the Supreme Court will release its opinion for any particular reason. And usually, the blockbuster cases tend to be released at the end of the term in June. But again, we're always just watching for those dates. So, the whole process is typically shrouded in secrecy. But here's why the story is really important. As you mentioned, the Supreme Court looks like it is going to strike down the constitutional right to an abortion that's existed for almost 50 years. And that's a radical change both for abortion and for constitutional law.

Roman Mars [00:03:45] Yeah. And so, this relates to the Mississippi case that we have talked about in various ways, correct?

Elizabeth Joh [00:03:53] That's right. So, Dobbs is a challenge to a Mississippi law that bans almost every abortion after 15 weeks. The law has no exceptions for rape or incest--and it's already pretty restrictive in Mississippi because as a practical matter, there is only one abortion clinic in the entire state. And you're right, we've talked about this case before. But I also want to clarify, this is different than the Texas case we've also talked about, which lets private individuals sue abortion providers or anyone else who helps a woman obtain an abortion. Now, the Mississippi case is the one that we're going to be talking about. It's not the only state with an extremely restrictive law like this. And in a way,

the particulars of this state law almost don't matter at all. All of these various cases around the country have been asking the Supreme Court to overturn Roe. So, the basics of this go all the way back to Trump, again. So, Trump, of course, successfully nominated three Justices--Gorsuch, Kavanaugh, and Barrett. So, with those three Justices, there is now a very comfortable six-person, conservative supermajority on the Court. So those three Trump appointments, plus Justice Thomas, Justice Alito, and the Chief Justice make up this supermajority. So even though we have a new associate justice designee--Justice Ketanji Brown Jackson--that doesn't change anything. She simply replaces Justice Breyer in the three-person minority of liberal Justices. So that means that there's this solid majority of Justices who have expressed skepticism or just outright hostility to the Supreme Court's cases on abortion. So why don't we talk a little bit as a refresher about what all that means first?

Roman Mars [00:05:47] Yeah. Please.

Elizabeth Joh [00:05:48] So remember, Roe is that case in 1973. And in that case, the Supreme Court decided that the Constitution protects a woman's right to a legal abortion under some circumstances. Now, after Roe was decided, we saw a very vocal and highly organized conservative movement to overturn Roe v. Wade. And in the early 1990s, it looked like there were enough Justices on the Supreme Court to overturn it. In 1992, however, the Supreme Court said that Roe is the law of the land--and that's the Supreme Court's decision in a case called Planned Parenthood versus Casey. Now, Casey decided that states could not totally ban abortions before the point of viability--that's when a fetus can live outside of the womb. Now, states could regulate abortion, and many responded to the Casey decision by imposing increasingly harsher restrictions on the ability of women to obtain legal abortions. Now, there are two key points from Casey, which are important for today's news. And Casey--the most important part of it is a joint opinion written by three Justices. So, here's the first point. Casey said, and I'll quote, "It is settled now that the Constitution places limits on a state's right to interfere with a person's most basic decisions about family and parenthood." So, in other words, the right to abortion doesn't stand alone. It's part of a family of constitutional rights about controlling your own life--having the decision-making power about your own life. Second important part about Casey, the Justices in Casey said that the Supreme Court should be very careful about the idea of stare decisis--that's the legal concept of a court being bound by its prior decisions. And the Court in Casey said, "We should be very, very careful with what is called a 'watershed decision.'" And Roe was such a case. In other words, when you have a really important decision, we should be especially reluctant to overturn it. "Otherwise," the Court said in 1992, "it wouldn't have any legitimacy in the eyes of the public." So, let's go back to the leak, right? So, since the leak, the Supreme Court has confirmed that the document is, in fact, authentic. And the Chief Justice has announced that there will be an investigation into the leak by the marshal of the Supreme Court. So, there's going to be something about that. But now we have this draft opinion.

Roman Mars [00:08:23] So what does it mean that it's a draft opinion versus an opinion-opinion?

Elizabeth Joh [00:08:27] Okay. So, this reflects the very long process of the Supreme Court coming to a decision and explaining its reasoning to us. Now, the Supreme Court has a procedure that works typically like this. After there is an oral argument, the Justices take a vote in secret. It's not binding, it's among themselves, but they kind of go around a literal table and decide, you know, who's going to be in the majority and who's going to be in the minority. And the most senior Justice who is in the majority gets to assign who writes

the majority opinion. And that draft opinion--in other words, the first take--is circulated among the Justices. Then, if there are going to be dissenters who will write opinions, they will circulate their draft dissents, if there are any. So, it's kind of a back-and-forth process that often leads to changes in both opinions--the dissents and the majority opinion. And very occasionally a draft opinion in the majority or the dissent can even lead a Justice to change their vote entirely. It doesn't happen that often, but it sometimes happens. So here, because there's a Chief Justice, the Chief Justice is the most senior Justice. And for that reason, it looks like he's not part of this majority. It looks like Justice Thomas--who is the most senior person in that majority--he probably assigned the majority opinion to Justice Alito. Why do we think that? Presumably because Chief Justice Roberts--he loves the Court, he loves the institution of the Court--if he had been part of the majority, almost assuredly he would have assigned it to himself. He would be the author of the opinion, but he's not. So according to Politico's reporting, the initial vote in Dobbs is Alito, Thomas, Gorsuch, Kavanaugh and Barrett. So, it doesn't look like Roberts is currently in the majority. And here's the important point. It doesn't matter. When the Supreme Court decides to overturn one of its prior cases, you don't need a supermajority. You can overturn a decision on a 5-4 basis. So that's what it means. We have this draft opinion. Things could change, but it's pretty clear that this is the direction that a majority of the Justices are going to be going on. And that's why it's worth talking about.

Roman Mars [00:10:51] When you and I talked about Dobbs and other cases that have come up recently, you were pretty realistic about the fact that these restrictive abortion bans would be upheld by the Supreme Court. You didn't know for sure, but you presented that as a likely possibility. But there does seem to be a tone to this draft opinion, which is even more extreme than maybe you were expecting or I was expecting. Is there something about it that is different than the decision that you anticipated?

Elizabeth Joh [00:11:26] Yeah, I mean, in two ways, right? One, you're right--I was really skeptical that things were going to stay the same. They're clearly not going to be. It could have gone--just in terms of the substance--in two directions. A majority on the Court might have said, "Look, this extremely restrictive state law is okay, but you can still have such a law. And it can coexist with a constitutional right to abortion." That's one version of how things could have gone. Or they could have gone much further. And Alito's majority draft opinion goes much, much further. There's no reading between the lines here. The draft opinion clearly says, "We hold that the Constitution does not confer a right to abortion. Roe and Casey must be overruled, and the authority to regulate abortion must be returned to the people and their elected representatives." So, does it go pretty far, as you suggest? It does. So, let's take a look here; let's take a look at the right itself. So, Alito says in the draft opinion that the Supreme Court originally found a constitutional right to a legal abortion, even though the Constitution makes no mention of abortion. This is a favorite line from legal conservatives. "Tell me where the word abortion is in the Constitution." Of course, it's not in there. But, you know, the Supreme Court has said in many, many cases that the liberty that we have that is guaranteed by the 14th Amendment also protects a number of rights that aren't in the Constitution itself. These rights have to do with marriage, family, parenting, and abortion. So, Alito's response here is to say, "Sure. In theory, there are some constitutional rights that aren't specifically mentioned in the Constitution. But if there are such rights, they have to be," what he says are, "deeply rooted in this nation's history and tradition." So, is there a long historical right to legal abortion? No. Justice Alito goes through this extremely long historical discussion, going back to the 17th century, in the draft opinion. But the short answer for Alito is there is no firmly established historical right. And as far as extremism, this is a chance to mention one really bizarre footnote in the draft opinion. Alito says, "Maybe there are some really bad and nefarious motives behind legal

abortion, and that's another reason the Constitution shouldn't protect it. Maybe it's about deliberately shrinking the Black population." Where does this come from? Well, in a 2019 decision on an abortion law in Indiana, Justice Thomas wrote separately to raise this very issue. He said, "Well, states might want abortion regulations or restrictions so that abortion doesn't become a tool," of what he called, "modern day eugenics." He specifically uses the word "eugenics." So, it's really important to point out why Justice Thomas is just dead wrong here. Eugenics was a 20th century movement and a kind of pseudoscientific theory supporting the idea that the government is going to tell people who can and can't have children supposedly to improve the gene pool. That was the theory behind eugenics. But when a woman decides that she doesn't want to continue a pregnancy for whatever reason, she's not thinking to herself, "I'm being forced to do this to improve the gene pool of the country." Not at all. And besides, as a historical matter, eugenics-supporters--what they most wanted was forced sterilization. They didn't want abortion. It was really not the right way of thinking about what the movement was about at all. And historians in general have really been appalled by this mischaracterization of history. So that's really important just to point out. You know, Alito takes this concurrence from Thomas in this earlier opinion and drops it in here as well. Anyway, let's go back to Alito's main analysis. So, he says, "Look, a right--even if it's not mentioned in the Constitution--if it's going to be protected by the Constitution, it has to be deeply rooted in our nation's history." So, two problems here. First, the Supreme Court has certainly said, "Sure, we can use historical analysis to find whether a fundamental but an unwritten right exists under the Constitution." Some Justices wish that were the only way. But the Supreme Court as an institution has never said it is the exclusive way--that it's the only way that you can find a right protected that is unwritten but still protected by the Constitution. So as a matter of constitutional doctrine, this part is just distorted. It's just not good doctrine. Second of all, let's accept Alito's premise. And this answers a little bit about "Is this opinion pretty extreme? Yes, it is." The only fundamental rights that the Supreme Court can recognize, according to Justice Alito, are the ones that have long been with us. So, if that's the standard, then not only should Roe go down, so should a lot of other rights. So, for decades, the Supreme Court has said, "Look, these rights exist, even though it'd be harder for us to say they have always been with us." A right to access to birth control. The right to engage in consensual sexual activity without fear of criminal prosecution. Interracial marriage. Same sex marriage. I think it's fair to say that these rights are more vulnerable now than they were before.

Roman Mars [00:17:11] Yeah.

Elizabeth Joh [00:17:12] Now, the opinion doesn't come out and say that. And in fact, the draft opinion does try to make a distinction. Birth control, interracial marriage, the right not to be forcibly sterilized by the government--"Don't worry," says Justice Alito. "Overturning Roe doesn't affect these cases." You know why?

Roman Mars [00:17:32] Why? I have no idea why.

Elizabeth Joh [00:17:35] "Because abortion is just different." But is it? So last March, Senator Mike Braun from Indiana just came out and made that connection. Braun was talking about abortion, and he said, "It was wrong that the Supreme Court delved into abortion in the Constitution. They should have left it to the states." Then he made the next step and said, "It was also wrong for the Supreme Court to step into interracial marriage." He said that the Court should have left that to the states, too. Now, he eventually walked that back, but he just went out and said it. There's the connection, right? What's the real distinction?

Roman Mars [00:18:12] Yeah. I mean, he's an idiot, and he's a bigot, but it's intellectually more consistent to say that than it is what Alito is doing.

Elizabeth Joh [00:18:19] I mean, it's hard to find that there's any real way to distinguish the two. Absolutely right. And I think maybe most worrying, though, in the draft opinion is what's missing from the cases that Justice Alito says are supposedly safe. So, he goes through a list of cases and says, "No, these are no problem. Just because we overrule Roe and Casey doesn't mean that we were going to overrule these other cases all in one fell swoop." But what doesn't he mention? Obergefell--that's the case recognizing a constitutionally protected right to same sex marriage. And also, not part of that list--Lawrence versus Texas, a case that recognizes a constitutionally protected right to sexual intimacy. That was the case that decided that states couldn't make sodomy between consenting adults a crime. So, Justice Alito does refer to these cases. But again, to go back to your question, it's part of the opinion where Alito is critical of rights that are not deeply rooted in history. So, the question is: Of course, there's Roe itself, but is abortion really that different from these other fundamental rights that aren't spelled out in the Constitution? Well, Justice Alito says, "Well, of course, because abortion involves," what he says is, "a question of profound moral and social importance." But what about issues like same sex marriage, consensual sexual activity, parenting? Those also are hard moral questions for a lot of people. And so, once you accept Alito's reasoning, it's hard to see how limited this is only to the question of abortion--how it just stops at abortion and doesn't touch on any of these other important rights. And frankly, if this majority is ready to dump Roe after 50 years--after the Court already said before that Roe is the law of the land--why would Justice Alito think that any future Court would feel that it would be bound by his own limitations in this opinion either, right? I mean, the whole idea that we're going to stick to what prior decisions have said--it's hard to think why he has any realistic limit in the draft opinion. And that gets us to the other big problem in this draft opinion. And that's the idea of stare decisis--the idea of the Court sticking to prior opinions because it's good for the law, it's good for the institution, it's good for the country. So, Justice Alito says Roe should be overturned because it was wrong when it was decided--or as he puts it, "It was egregiously wrong from the start." That particular language is important because it is lifted from a concurring opinion written by Justice Kavanaugh in a 2020 case. That 2020 case was not about abortion, it was about juries. But Justice Kavanaugh was writing about why the Supreme Court should ever overturn a case. Justice Kavanaugh said in that 2020 case, "Some cases are just terrible the moment they are decided." And the examples he uses? The 1944 decision in Korematsu, which permitted the internment of Japanese Americans during World War Two. And the other example Kavanaugh uses is Plessy versus Ferguson--that's the 1896 case deciding that government imposed racial segregation was okay, that it was constitutional. That's the so-called "separate but equal" doctrine. Plessy's principle, of course, would later be rejected by Brown versus Board of Education in 1954. But let's pause for a moment. Really? A woman's right to a legal abortion is as bad as the government interning Japanese Americans? That is as bad as government approved racial segregation? It was bad the moment it was decided? That's very hard to accept.

Roman Mars [00:22:14] And it seems to be hard to accept for the general public at large, which the vast majority supports legal access to abortion.

Elizabeth Joh [00:22:22] You're right. Poll after poll suggest that most Americans want women to have some access to legal abortion. Now, there may be differences about the particulars--about, you know, when that right exists and under what circumstances. But there's never been any majority, at least in public polling, that says, "Yes, we should

criminalize every form of abortion and make it completely inaccessible." And of course, Roman, this is not a question about the ability to have abortions. It's about the ability to have legal abortions. I think that's an important point. I mean, no one is suggesting that abortions will go away. They won't go away, whether they are protected under the Constitution. It's really about having a right even in a state that has decided women should not have legal access.

Roman Mars [00:23:08] The thing that's sticking with me when it comes to considering Plessy or Korematsu in comparison to Roe, is that this idea of the fundamental wrongness of the initial decision, you know, is the case for Korematsu and Plessy. But that's never been the case for Roe. There's always been a majority support. So, you can't say that it's a fundamentally wrong decision in a democratic republic whose opinion should be considered about the rightness and wrongness of laws.

Elizabeth Joh [00:23:37] And I think that's right. I mean, it just suggests that, you know, there has been strong support. There was strong support when it was decided. There's strong support now. It's not uniform, certainly. I mean, we're pretty divided, at least if you watch a lot of news. And the division over abortion has certainly driven a lot of political division. That's certainly true. But it's really hard to say that it falls in the same category as those two decisions, which we, I think, universally agree we're just terrible from the moment they were decided. I don't think we can really put it in that category at all.

Roman Mars [00:24:12] No.

Elizabeth Joh [00:24:14] So that really gets to what Alito seems to think about women. Another point from the 1992 decision in Casey is worth noting. In Casey, the Supreme Court said one of the reasons you don't overturn an especially important decision is because of what the Justices said was a "reliance right." So here, "reliance" means that when you have a right, people know, and plan, and organize their lives around the rights they have. So that means that when you have courts that are considering whether or not to get rid of those rights, they should be reluctant--especially when people have been kind of organizing their entire social and economic lives around their belief that this right exists. So, in 1992, the Court in Casey said that having a constitutionally protected right to an abortion has allowed women to participate equally in the economic and social life of the nation. But in the draft opinion in Dobbs, Justice Alito dismisses that concern entirely. He says, "Look, reliance on the existence of reproductive rights--that's just too hard to measure. It's not concrete authority. It's not like property or contract rights." So, this part of the draft opinion is especially bad analysis. It's especially bad because Justice Alito spends so much time trashing the Court's previous analysis in the Roe and Casey decisions. And then he just goes straight to policy. He says, "Don't worry, women. You have electoral power. You want your own legislature to legalize abortion? Just vote." Now during the December oral argument in Dobbs, Justice Kavanaugh really focused on this. Remember, he said, "If we strike Roe down, don't we just return to a state of neutrality? It just goes back to the states." But of course, if you strike down Roe and Casey, it's not as if we turn back the clock as if Roe and Casey never existed. So, telling women, "Don't worry, just vote," I think is pretty galling. And it's especially rich coming from a majority that has been so restrictive on voting rights, too.

Roman Mars [00:26:30] There is no "just voting" anymore either.

Elizabeth Joh [00:26:32] And then there's the legitimacy issue, right? That was another big deal in Casey. "Look, if we just overturn precedents right and left, the public is not

going to accept this as a legitimate institution." That was a big deal. Now, in Dobbs--in Justice Alito's draft opinion--he says, "Sure, the Supreme Court shouldn't be swayed by outside influence." And that's where things get kind of strange. Justice Alito says Roe didn't end the divisive politics of abortion. It made things a lot worse. And he says, "But now, 26 states are asking us to overrule Roe and Casey." And he says, "Look, the Supreme Court can't settle," what he calls, "a rancorous national controversy by deciding that there is a right to an abortion under the Constitution." So, his conclusion then is to settle it by saying there is no right to a legal abortion under the Constitution. I'm not sure how that solves it. It just simply creates a new, rancorous national controversy, right?

Roman Mars [00:27:33] Yeah. Because there's 24 states who don't have those trigger laws that will ban abortions immediately after this decision is released. And so, it just substitutes one problem for another.

Elizabeth Joh [00:27:44] Exactly. And, you know, you get to the very next point, and that is the future. This isn't the future yet. We've got maybe another month or two before the actual decision comes down. But assuming that this is a pretty good indicator of what's actually going to happen, then every state is going to be left on its own. You mentioned these trigger laws, right? Trigger laws have already been passed and written in several states. These are laws that greatly restrict or even just outright ban legal abortion--and they actually have in the terms of the law. As soon as the Supreme Court overturns Roe and Casey, this law is meant to go into effect. So, they're just waiting to be triggered by the overturning of these cases. And, of course, there are other states that are going to protect a woman's right to have a legal abortion as a matter of state law. So, in our state in California, Governor Newsom and the state leadership announced--just hours after this leak--that they were going to propose a right to an abortion under the state's constitution. Some other states have done this already. But that doesn't help if you're a woman living in a state where there is no legal access to an abortion. And it looks like about half of the states will have extremely restrictive or no legal abortion at all after this Dobbs decision comes down--assuming that we're seeing what it's going to look like, more or less. And the bottom line then is that having access to an abortion in the United States--after this decision--is going to be determined a lot by where you live and whether or not you can afford to go and obtain a legal abortion.

Roman Mars [00:29:28] Yeah. I mean, you've said that over and over again to me--which is these types of restrictions in different states do not limit a rich person's ability to have an abortion. It really just limits the poor and people without the means to get somewhere else. I mean, the Texas law does seem to limit getting somewhere else as well, so there's a new tactic in this fight. But this is mostly about controlling the people who don't have the means to overcome it.

Elizabeth Joh [00:29:55] Yeah. And then there's the larger picture about the future, too, right? I mean, because of the way Alito has drafted this opinion, the extremely broad terms in which not only he criticizes Roe and Casey, but he also criticizes the kind of rights that we're talking about. Let's imagine that once Roe and Casey are formally overturned--in June 2022--let's say that the attorney general of Texas says, "Okay. Obergefell." That's the same sex marriage case. "You know, that doesn't really apply to us anymore. It doesn't apply in Texas." And then let's say the governor of Texas, Governor Abbott, says, "Okay, fine. You know what? Let's not allow marriage licenses to be issued to same sex couples." So maybe there are some challenges as there would be in this hypothetical, but maybe some Texas courts would agree "Yeah. You know, Obergefell is kind of weak as a decision

after the Mississippi abortion case, Dobbs." And then it ends up before the Supreme Court. Now what?

Elizabeth Joh [00:31:06] I don't know. Yeah. I mean, it puts everything on shaky ground, which is something that everyone who cares about the legitimacy of the Court has mentioned--that stare decisis is essential because if you're completely on shifting ground at all times, then you don't know where to stand, you don't know what your rights are, you don't know what you can do, you don't know what you can do as a citizen. It's a real mess.

Elizabeth Joh [00:31:31] That's right. And a lot of things seem to have just flown out the window. And in the Court's official statement today, Chief Justice Roberts said that the document that was part of the leak is authentic, but it was not a decision by the Court or the final position of any member on the issues in this case. So, sure, it's not final; that's formally true. Chief Justice Roberts could always join the majority in this case. And the majority opinion itself will almost certainly change in some ways. We will certainly see some very, very strident dissents. But this leak makes pretty clear what a majority on the Supreme Court wants. I think that Roe is lost and maybe more.

Roman Mars [00:32:17] Do you think that this leak coming out before the official decision--does it change the dynamics of it at all? Like, are we getting that letter stuffed in Doc's jacket that he's going to die, you know, during Back to the Future--that you can do something about it? Does it matter at all? Or is it just we learned a thing early that we were just going to learn in June, and there's no way to change it, or there's no way to affect the future?

Elizabeth Joh [00:32:49] Well, you know, as far as the internal workings of the Court, we can't really know what's going on. I mean, there's been some speculation about why a leak now since the draft opinion is dated from February. It wasn't a conservative Justice, or someone who's working for a conservative Justice, or a liberal Justice, or someone who's working for a liberal Justice who leaked it. You could see it go either way. There may actually be a stronger case that the leak came from a conservative Justice's chambers or from a conservative Justice--simply the idea being that having these positions out there kind of solidifies the majority--that you're not really going to have major changes after this public exposure because that would just suggest that the Court's backing down after all of this criticism. And they don't want to do that. As far as the larger ramifications? Sure, the midterms are coming. If Roe and Casey are gone by the end of this term, you may see two possible kinds of proposals. Nationally, they actually are in opposite ends. There's been some talk about a national federal statutory right to a legal abortion for women. There's also been talk of a national ban--a statutory ban--so that no women in the United States can obtain a legal abortion. And it kind of makes the politics of it so much worse. So, I'm not sure that there's much that can be done to affect what's going to happen at the Court, but I do think that it will affect something about the politics that are to come in the next several months.

Roman Mars [00:34:44] Would you expect the final decision to be substantially different from the leaked draft?

Elizabeth Joh [00:34:51] I don't think so. I mean, I think that the lines of how this has shaken out--the reasoning here--is shocking about how broad it is. But in a way, none of it is surprising. This is not a rogue Justice writing with a rogue theory. These are some longstanding legal arguments that have been pushed by legal conservatives literally for decades--that we should not have courts recognizing these kinds of rights, that it is a

mistake to go down the road of recognizing abortion. And to be fair, there are certainly legitimate critics on the right and the left, saying, "It makes people uncomfortable to say that the Court recognizes rights that you can't find." Which rights are there, and which ones aren't? It's up to Justices on the Court who are unelected? That's a fair criticism. I think the real problem here, and the most alarming thing, is this specific context--that for the first time we're having the Court retract rights, constitutional rights, that two generations of women have relied upon.

Roman Mars [00:36:02] Is there something substantively different about us having this conversation based off a leaked draft now than the discussion we would be having in June after the opinion was officially released?

Elizabeth Joh [00:36:18] I think what is different about this particular case is you wonder about the motivations for the leak because part of what has happened--which is entirely predictable--is you find people seizing upon the leak, and whether it was criminal, and that we should get to the bottom of this, and find the people responsible, and of course, prosecute them to the fullest extent of the law. And it's a major distraction. That is not the main story. It's a story. It's not the story. If it had come out in June without any leak at all, we would be focusing entirely on the end of a constitutional right to an abortion. So, if the leaker intended this to create this distraction, it was entirely successful because we are as much consumed by who did it, why, and whether it was a crime as much as we are focused on the end of Roe itself.

Roman Mars [00:37:16] Do you think that it further undermines the legitimacy of the Court--to have a leak--that it adds to this general feeling that if stare decisis is sort of thrown out and the body seems more like a political body--that this kind of adds to that and destabilizes the Court as an authority in U.S. politics?

Elizabeth Joh [00:37:41] Well, I think we've been kind of on this road for a while in terms of moments and actions in which our supposed belief in the legitimacy of the Supreme Court was supposed to be solid and unquestioning. So, this isn't sort of the last blow. It's one of many cuts that we've seen to this purported legitimacy. And it's kind of hard to see how we can backtrack from here, right? I mean, everything from this leak, to the ridiculous, silly questioning of soon-to-be Justice Ketanji Brown Jackson, to all kinds of matters in the past several years--and tied entirely to the same world of Trumpism, social media disinformation--none of it is separated. They're all kind of connected in a larger way about a falling away of shared expectations and norms.

Roman Mars [00:38:44] I'm just kind of left with this weird uneasiness for what could happen during this period of time when we--99.9%--know what's going to happen but don't completely know what's going to happen.

Elizabeth Joh [00:38:59] Yeah, I think that's right. I mean, there is some uncertainty. I mean, I suppose if there's such a thing as being hopeful about uncertainty, this is it. You could think that perhaps a mind could be changed, or the harshness of Alito's opinion could be softened. You know, it is a draft opinion from February. Who knows what's happened since then? But because there is no way for the general public to simply weigh in on a Supreme Court case to say, "This has to change"--I think you're right--we're kind of left in this strange position in which we fully expect now that a constitutionally protected right is going to be ended, but just not yet.

Roman Mars [00:39:46] Yeah. And do you think that potentially if the final opinion is softened somewhat and you see these guardrails put on other rights that we hold dear--even if it is blunted somehow and not as extreme--the fact that this extremism undergirds its logic would mean that these cases will just be thrown up at the Supreme Court over and over again because they know that the sentiment is there to erode all of them? You know what I'm saying?

Elizabeth Joh [00:40:24] Yeah. I mean, I definitely think that it's a signal--you're right--that even if this isn't exactly-- Or maybe if it's significantly different--it's a case that gets rid of Roe and Casey in some way or another. Even if it's quite different, the fact that those sentiments are there, I think, is a kind of warning to a whole variety of different groups in the United States--to say, "Those rights that you thought you had are maybe on shaky ground. And you should expect there to be strategic challenges lining up right now based on essentially a leaked strategy--a leaked view of constitutional law." So that's really the significance of this, even if it's not exactly--or very much not--the opinion that we see in June.

Roman Mars [00:41:18] Yeah. Well, a warning to some people and an invitation to others.

Elizabeth Joh [00:41:23] Correct? Absolutely right. But, you know, in the case of abortion rights, kind of both a warning and a very strange paralysis over the next two months to half of the population, knowing that this right is not going to exist anymore in half of the states, very likely. And the irony, I think, of the Chief Justice announcing that there's going to be a formal investigation into this leak because it's a big breach of Supreme Court ethics is pretty ironic, given that one of the Justices on the Court already--Justice Clarence Thomas--happens to have a wife who was directly involved in a pretty serious ethics breach herself.

Roman Mars [00:42:10] Right. And that is an episode that we've already recorded but are releasing after this one because we wanted to get this one in. But we will talk about the Ginni Thomas case and what it means to have an ethics violation on the Supreme Court. So that's on the next episode, which will be coming out in a couple of days, probably.

Elizabeth Joh [00:42:29] Yeah. And I'm pretty sure it's fair to say the Chief Justice will not be ordering the marshal.

Roman Mars [00:42:35] I do not think so. The marshal of the Court has one job right now, and it is not that one.

Elizabeth Joh [00:42:38] Exactly.

Roman Mars [00:42:39] Thank you so much. This show is produced by Elizabeth Joe 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.