

Jacobson and COVID

Roman Mars [00:00:00] Liberate Elizabeth Joh!

Elizabeth Joh [00:00:02] All right.

Roman Mars [00:00:21] This is What Trump Can Teach Us About Con Law--an ongoing monthly series of indefinite length, where we take the tweets of the 45th president and his critics and use them to examine our Constitution like we never have before. Our music is from Doontree Records. Our professor and neighbor is Elizabeth Joh. And I'm your fellow student and host, Roman Mars. Hey, how's it going?

Elizabeth Joh [00:00:54] Oh, okay. This is a little bit weird. We're not even in the same room right now.

Roman Mars [00:00:59] No, not at all. It is very weird. The first Trump Con Law under quarantine. We're being compliant and responsible.

Elizabeth Joh [00:01:07] And staying really far apart from each other.

Roman Mars [00:01:10] Very far apart at this point. Okay, so as we're talking, it is Thursday morning--Pacific Coast Time--April 23rd. And so, where are we in the world of quarantining and what's going on in the world?

Elizabeth Joh [00:01:27] So you and I are both in California. We're still in a shelter in place order, like a lot of Americans. Well, the president has had a lot to say, sometimes conflicting and sometimes strange. And maybe it's useful to talk about a couple of tweets he had all in a row on April 17th.

Roman Mars [00:01:44] I think I know the ones you're going to talk about. Okay.

Elizabeth Joh [00:01:48] Exactly. He tweeted first, "Liberate Minnesota." Then he tweeted, "Liberate Michigan." Then he tweeted, "Liberate Virginia and save your great Second Amendment. It is under siege." The Trump is tweeting about states trampling civil liberties. And the real question is: How far can states go? And what kinds of individual rights do we retain, even in this state of a pandemic?

Roman Mars [00:02:17] Okay. So, we talked about this a little bit on the last episode when it comes to quarantine, in the case of Chinatown. And so how does that relate to what we have today?

Elizabeth Joh [00:02:30] Yeah. So, when we were talking in our last episode, it was really early on, and we weren't exactly sure what the states were going to do. And we talked primarily in terms of some prior historical experiences we had, such as the Chinatown and San Francisco episode. And if people recall, that involved literally locking down a geographic area where people couldn't leave. So what actually ended up happening was not quite that kind of quarantine, but a lot of states deciding that it would be best if people would not leave their homes except for a very limited set of circumstances--like having to go to the doctor, buying groceries, going outside for exercise--and also requiring that people have what's called "social distancing," which was really just staying physically apart from one another unless you're all members of the same household. So that's not quite the traditional kind of quarantine that we'd been talking about, but it is a pretty severe set of

restrictions. And now most Americans, though certainly not every state, has done this. Most Americans are living under some of these kinds of restrictive conditions.

Newscaster #1 [00:03:36] Well, as of today, all but a handful of states have issued stay at home orders in an effort to keep people safe during this pandemic. Governors in states originally against the order, like Georgia and Florida, have now joined after the increase of COVID cases there.

Elizabeth Joh [00:03:49] Now, one lesson to think about from our previous conversation is that, well, why can states do this? States have always had what's called "police power." So that means that they can regulate for the health and safety of their citizens, and they have really broad powers. So those broad powers extend to things like even these shelter in place orders. So, every governor that's decided, you know, "Hey, we're going to have even for some temporary period of time a lockdown order. So, you have to close down your business. You have to stay in place, people, and mostly stay in your homes except for very limited circumstances." That is done as a matter of the state's police power.

Roman Mars [00:04:30] So they really are mandatory. It's just like any sort of police order that you would get to, you know, pull over if flashing lights were behind you or any other sort of police action as an individual.

Elizabeth Joh [00:04:40] That's right. So, it's a little bit different when you think about police powers. It sounds like the professional police, and they do have the same kinds of coercive authority. But when we talk about police powers of a state, we're really talking about a longstanding power that sovereign governments like states have had since even before there were professional police. So that's the sense of police power. But you're absolutely right that these are mandatory. So, what's a little confusing here is that some of the governors have said, "We're highly recommending that you do this." But when you actually look at the text of the executive orders, they have the force of law. And in fact, if you fail to comply with them, you can be fined. In some cases, you might be arrested. At least potentially, that's true. So, these are all laws. They're orders that have coercive backing by the state. So, if states want to use their police officers to enforce it, they certainly can. So, they weren't sort of up to the citizens; these were clear mandatory orders. And why is that the case? Because there's been an emergency. And sure, we've always assumed that in emergencies, states can have sort of these broad reaching powers. The real question is... We still have our civil liberties. We still have our rights that are protected by the Constitution. And now that we're several weeks--particularly as in California--into the shelter in place order, people are starting to ask, "Well, wait a minute. I have these rights, right? I have these constitutional rights. Shouldn't I be able to exercise them? And wait a minute." Now that people have had a lot of time to think about this, they're wondering, "How can the state really do this to me? And isn't there anything I can do as a legal matter to challenge this?"

Roman Mars [00:06:23] Right. So, I mean, what are they doing? How are they pressing against the mandatory orders?

Elizabeth Joh [00:06:30] So we've seen a couple of different kinds of challenges so far. Maybe the best way to start talking about this is to think about what are these claimed rights? Generally speaking, you can sort of divide the world of rights into economic regulations and non-economic regulations. So, when the states regulate businesses and purely businesses in terms of economic regulation, states are generally easily upholding those laws. In other words, they'll just say, "Sure, the state can do that." Where it's a

harder case for states and governments in general under our system is when it comes to fundamental non-economic rights. These have to do with privacy and autonomy, not business regulations. So that's a big dividing line right there. Maybe the best way to think about it is to bring up two areas where there's been a lot of attention. One is with abortion rights, and one is with religious liberty. And a good way to frame this actually, is to go back to a case we mentioned really briefly. Do you remember the smallpox case that we talked about last time? Sort of?

Roman Mars [00:07:37] You know, Elizabeth, a lot has happened since the last time we spoke.

Elizabeth Joh [00:07:43] All right. So let me refresh your memory here. So, in 1902, there was a smallpox outbreak in Cambridge, Massachusetts. The city of Cambridge decided, "Well, since there's this smallpox outbreak, let's vaccinate everyone. Let's have a mandatory vaccination order." And Henning Jacobson was a resident in the town, and he said, "No, you can't do this. And this actually violates my liberties under the Constitution." That case, which is called Jacobson versus Massachusetts, goes all the way up to the Supreme Court. And the Supreme Court pretty easily says, "It's pretty easy to see that here, the government has police powers unless there's some narrow exception. Let's say you've demonstrated that you're actually going to be deathly ill as a result of getting a vaccination. And that wasn't the case here. You kind of have to submit to the mandatory vaccination." So, Jacobson versus Massachusetts, which was decided in 1905, is kind of widely recognized as this Supreme Court decision of the extent of the government's powers for public health purposes, right? So that's a case that gets referred to again and again and again for how far can states go in deciding, "You have to submit to our regulatory authority because we're having a public health problem here." And you can think of smallpox as being one of those extreme cases where, "Boy, we want the government to do something about this. We don't want them to just stand back and do nothing." So, then you fast forward. Now it's 2020, and we have this coronavirus problem or COVID-19 problem. Well, you can start in Texas as an example. In Texas, Governor Abbott signs an order towards the end of March, and he says, "Look, we've got to make sure we don't have these nonmedically necessary surgical procedures. We've got to save equipment and resources for hospitals." So, in the abstract, that sounds pretty reasonable, right? I mean, we want to save all this stuff, so our medical workers are going to be able to fight COVID-19.

Roman Mars [00:09:41] I can see where this is going.

Elizabeth Joh [00:09:43] You can definitely see where this is going. It immediately looks like, "Wait a minute, this is also going to impact women who are seeking abortions that are usually legal in Texas."

Interviewee [00:09:54] My guess is it'll go to the Supreme Court either way. If they take it, we'll either repeal it or Planned Parenthood repeal it. So, my guess is that's where it ends up.

Interviewer [00:10:04] Really? You're expecting to go to the Supreme Court with this?

Interviewee [00:10:07] It wouldn't surprise me. You know, they have a very busy schedule right now...

Elizabeth Joh [00:10:12] So an abortion provider or group of abortion providers--they file a lawsuit in federal district court, trying to get a judge to say, "Hey, you can't enforce this when it comes to abortions because these women are seeking legal abortions. They normally would be able to get legal abortions in Texas. And you can't just decide that they can't get them." So basically, a lot has happened in this case, which has bounced around between the federal district court and the federal Court of Appeals, which--covering Texas--is the Fifth Circuit. So going up and down, back and forth. First of all, the district court says, "Yes, we're going to stop enforcement of this so women can get legal abortions." That first time it's appealed, the federal Court of Appeals says, "No, actually, you're going to have to--with very few exceptions--stop providing all abortions, even though they would normally be accessible and lawful in the state of Texas." The Fifth Circuit Court of Appeals decides to take a look at this, I think, at least three times, if I'm keeping track of it. Yeah. So, what's interesting here is that the Fifth Circuit keeps rejecting the federal district court judges' rulings that, "Hey, you've got to have access or permit access to women seeking abortions or most women seeking abortions." So, these are both medicine abortions and surgical procedure abortions. Now, to go back to constitutional law, normally, in non-emergency times, courts that are asked to review a regulation about abortion use what's called an "undue burden standard." That's from a Supreme Court case called Casey. So, when it comes to legal abortions before the point of viability, states can't impose laws that are considered an undue burden. That's the kind of legal test here. So, you'd think in the normal run of cases, when you have a challenge to an abortion law--and there are lots of abortion regulations--a court would look to that first. But instead, in this case, in the Texas challenge, the Fifth Circuit--the very first time, they have a rather long opinion--they kind of mention Roe versus Wade. That's the first abortion Supreme Court case. They certainly give some lip service to Casey because they say, "Sure, that's the standard." But the thing that they rely a lot on is the smallpox case. They say, "Well, Jacobson tells us that in these kinds of times of emergency, states can do things that really impact individual liberties." And, in fact, they quote Jacobson, and they say that "when it comes to these public health emergencies, constitutional rights can be reasonably restricted." So, they use that case to say, "That is why--because we're undergoing this coronavirus epidemic--we can say, 'No, women. Even though normally you can get these lawful abortions in Texas, because of this pandemic, you're not going to be able to get them.'" Again, with some exceptions. They permit some exceptions. But a big chunk of normally lawful abortions are prohibited. So that's pretty amazing because in the smallpox case, there's kind of a direct correlation between people just refusing to be vaccinated and spreading smallpox, right? Here, there's not as much of a direct connection. The state's argument was, "You know, we have to limit the number of non-medically necessary medical procedures because we want to save PPE, we want to save bed spaces, and things like that." And that kind of makes sense in the abstract. But the problem here is that, well, there's not really a direct connection between spreading coronavirus and women getting legal abortions, particularly if they're getting medicine related abortions and not surgical abortions. And it's not as if obtaining an abortion would actually lead to the further spread of COVID-19--or at least not in any direct way. So, it's kind of interesting that the Federal Court of Appeals relies so heavily on that smallpox case to say, "And this is why we are going to ban a whole bunch of abortions that are normally things that are not problematic." Then on the other side, for the people bringing the lawsuit, you can see that maybe if I needed knee surgery for my running injury, I can delay that for a couple of months, right? I understand why you would do that. But abortion is one of those things that's really time sensitive. And if you aren't able to get one in a certain window of time, it's really problematic. And you might also say, "Well, if Texas doesn't allow it, maybe women can go somewhere else." That's really problematic. If you can't afford to do that, you can't afford to take off work. You don't have the resources to do those things. So, at first, the

Court of Appeals says, "Well, you know, people who are going to get close to the line--the last date at which you could get a legal abortion in Texas--maybe those people can get it." So, they concede a few things. But even in this ping-ponging back and forth between the two levels of federal court, they still are banning big chunks of lawful abortions. So that's the abortion case.

Roman Mars [00:15:17] Wow.

Elizabeth Joh [00:15:17] So here's an instance where the normal way courts typically look at these kinds of cases kind of gets really altered, at least in this particular court's point of view. So that case gets a ton of attention.

Roman Mars [00:15:31] And where is that right now in the sort of ping-ponging?

Elizabeth Joh [00:15:34] There was a lot of ping-ponging. And actually, the case kind of came to this very abrupt end this week. Relatively recently, Governor Abbott said, "Well, you know, it's time to reopen Texas. So, we're going to start slowly thinking about ways to relax the restrictions that we've had for shelter in place in Texas." One of those things is that he decides to loosen restrictions on surgeries in Texas. Of course, when he says that on April 17th, he says, "I don't know about abortion, I'm going to leave it to the courts." He does that. The Fifth Circuit right after that says, "Nah, we're still going to ban some abortions." But by April 22nd--that's yesterday for us--the governor in Texas says, "I'm going to allow more procedures to take place." And the litigants in this case say that includes all of the abortions we've been fighting about. And the state's lawyers say, "Yeah, you're right. We're not going to argue about that." So, it looks like that case is effectively over.

Roman Mars [00:16:36] Have there been other cases that people have used the 1905 smallpox case to affect people's rights in this time?

Elizabeth Joh [00:16:44] Yeah. So, here's a very interesting and totally different context. So, let's talk about religious liberty.

Roman Mars [00:16:49] Okay.

Elizabeth Joh [00:16:50] We have seen a lot of news articles and reporting about how different groups have wanted to meet. They wanted to have their church gatherings, etc., despite all kinds of governors of varying political stripes saying, "You people cannot meet in person. This is going to spread COVID-19."

Newscaster #2 [00:17:11] In an empty St Peter's Basilica, just the pope kissed the crucifix at the end of the Good Friday ceremony rather than all of the clergy. And in Jerusalem, only a few, rather than a procession, followed the presumed path Jesus walked before his crucifixion.

Elizabeth Joh [00:17:28] So in general, in a nonemergency world, if you have a law that applies generally across the board to everybody, you can't claim a religious exemption on federal constitutional grounds. You can't say, "Well, we're exempt because religion." That's not how the court looks at those laws. The problem here is that what governments can't do is they can't single out religion for regulatory reasons, and you can't treat a religious group differently than you would treat a secular group, let's say. So that's a big distinction in constitutional law. So, there was a church case in Louisville, Kentucky, that implicates all of

what we've just talked about. So, here's a case where the governor in Kentucky decides that there is going to be a set of restrictions, a shelter in place, and social distancing, stuff like that. The problem comes about when the mayor of Louisville gets on social media and says, "Look, you can't get together. And you guys who think you're going to have drive-in services for churches, where you don't even get out of your car? You can't have that. And we're going to send our police officers out to arrest people, cite them, whatever." So that seems pretty harsh. The problem here is that under the shelter in place law, you can have things like drive-in liquor sales. You can drive by your liquor store and get a six pack of beer. But here's the Louisville mayor saying, "You guys who want to meet for church? Don't even think about it." So, in this case, you have a church that brings a lawsuit. They ask a federal district judge to stop enforcement of what they think the Louisville mayor is threatening. And the judge here basically grants the temporary restraining order. He issues an opinion, and he uses the basic framework that I started out with. And that is the problem here is you're treating a religious group differently than a secular group. So, it's not a law that seems to be applying generally, at least the way the Louisville mayor interpreted it. He's saying, "Okay, you want to get drive-in liquor? That's fine. You want to have drive-in church? You can't." And the judge says, "That's not allowed because here in these kinds of cases, if you're going to treat a religious group differently, the general test is that the government has to have a compelling governmental interest to do so. And the law has to be sufficiently kind of narrowly tailored to meet that interest. And it's not narrowly tailored here because why can you get beer going through a drive-through, but you can't meet for church by sitting in your cars together?" And so, he decides that this is not okay. It's an infringement on religious liberty, the kind of guarantee we have under the free exercise clause under the Constitution. That is not an unreasonable reading of law. A lot of First Amendment scholars would say, "That kind of makes sense." The problem here is that if you read the opinion, which was written by a Trump appointee--a federal judge--it's written in this completely purple prose. The beginning and the end of the opinion read like an op-ed for religious liberty. Putting that aside, the actual legal reasoning there--it's not marginal, it's not fringe, it's, like, a totally reasonable reading of the law. Now, the interesting part here is that this case--the Louisville case--cites the smallpox case. And they cite the smallpox case. And they say, "Look, even under Jacobson--that's the case name--constitutional rights still exist." And they cite Jacobson not once, but several times in the opinion, to say, "We understand that there is a pandemic going on. We understand that governments have to do some things. They cannot go this far. They've gone too far in this case. And the Louisville mayor cannot decide, "Drive-through liquor--okay. Drive-through church--not okay." So, what's remarkable here is that you have two contexts of civil liberties. One is about abortion rights. The other one is about religious liberty. They seem kind of different, right? They both involve civil liberties. They come to totally different conclusions about restrictions and not restrictions. But they both rely on the very same 1905 Supreme Court decision on smallpox and the fact that it's okay, the court said in 1905, to impose a mandatory smallpox vaccine. So that kind of shows you one thing. Number one, the Fifth Circuit says, "Well, this case means that rights are different in emergencies. So that's why you can't have all the lawful abortions you normally have." The other case says, "Look, even in an emergency, you don't give up every single right you have." That kind of tells you how differently courts can interpret the exact same Supreme Court case, where you rely on that case for very different kinds of purposes. So that's what's been fascinating. You know, religious liberties normally don't talk about smallpox, abortion cases don't talk about smallpox, but both of these very different courts--very different cases, really different contexts--have decided it's this public health emergency smallpox case that's going to drive our conclusion. But they come to opposite conclusions. And that's what's really interesting here.

Roman Mars [00:22:45] That's so interesting. It reminds me of how the normal polarized sides have flipped on the whole notion of federalism in general. It can be used on both sides of an argument, independent of liberal conservatism. You can kind of use it in different ways, which actually gets me to this... The next point is, like, if Trump is saying these things like "Liberate Minnesota," and putting this pressure on states--at least sort of socially, if not maybe legally--what are his rights to liberate Minnesota? And when he says things in tweets or in press conferences, does that have any power whatsoever?

Elizabeth Joh [00:23:26] So that's an interesting question. So first of all, what Trump says depends on what day it is.

Roman Mars [00:23:32] Yeah. Okay.

Elizabeth Joh [00:23:35] On April 13th, for example, Trump said his authority was, quote, "total," and that states, quote, "can't do anything without the approval of the president." So that's just flat out wrong. I mean, there's no part of the Constitution that says the president has the total power. This is not a science fiction fantasy. He's not the emperor of the United States. Article II doesn't give the president total authority at all. I mean, there's no mainstream middle of the road constitutional law person who thinks that. There's no total power. But the next day, Trump said he would be authorizing the states to ease restrictions if some governor thought that would be okay. But if a governor had some problems, then they don't have to do that. That's a closer description of the powers that the states have. States are, in fact, sovereign entities in our system. We live in a dual sovereignty system of the federal government and of the states, and that is their power. It is up to them. The federal governments didn't close the states. The states decided to shut down or partially shut down or to restrict businesses and other kinds of services within their borders. It was never up to the president to do that. So, if the states were the ones that closed down their own activities, it would be up to the states to reopen them. So, for the president to say, "I'm authorizing that to happen"--that's as meaningful as me saying, "I authorize the sun to rise." I can say that. That doesn't speak to any power I have. I can't authorize that to happen. He can't authorize that to happen either. The states are always able to do this under their police power. And within their police power, they can decide to change, too. The problem, however, is that the president of the United States has the biggest megaphone in the country. So sometimes he says things that sound really authoritative, but they don't actually jive with what we understand with his actual constitutional authority. Now, having said that, he is really powerful because he has that megaphone, right? One of the things that the president could have been doing all this time is really emphasizing the need for states to get in line with social distancing, having shelter in place restrictions, really using the "bully pulpit." That's what we call it--the office of the president--because there's that one single person we associate with the federal government. That's the president. If there's anyone, it's the president. The president could be repeating an urgent public health message every single day. But instead, we get this kind of confusing set of back-and-forth things that are changing almost on a daily basis. But the president is also on Twitter and on a daily White House coronavirus briefing. And those messages are mixed and sometimes conflicting. And sometimes it appears that he's changing his mind. And it's also the case, for example, that the president's own cabinet members have said things that are also sometimes contradicting. You know, the president most recently has said, "Well, it's up to the governors. They have to decide what they're going to do." But Attorney General Barr has said in a recent interview, "Well, these kinds of shelter in place orders--some of them sound like house arrest to me."

William Barr [00:26:46] These are unprecedented burdens on civil liberties right now. And the idea that you have to stay in your houses is disturbingly close to house arrest. I'm not saying it was unjustified, and I'm not saying in some places it might be still justified.

Elizabeth Joh [00:26:59] So he's actually said that thinking about if... And they may start to get involved in individual lawsuits where people are suing the states to say, "Hey, my rights are being violated." You know, he said in this interview, "The Department of Justice may decide to file what are called 'statements of interest,' saying, 'We're not a party to this litigation, but we do want to put forth the federal government's position here.' What exactly is the message? Do we want the governors to have their own freedoms, to make their own decisions, to balance what's appropriate on a case-by-case basis? Or is the federal government going to get involved in one sense, but not in another?" So--apart from the actual equipment problems that we've heard about or the supply issues we've heard about--as far as legal authority, there are a variety of different messages going on right now. And that by itself can be confusing. One of the problems here is that it may be that there are instances where the states are going too far, that there are serious civil liberties questions that should be resolved, and that there are some meritorious lawsuits. In other words, we don't want to say that the governments are doing everything right, every state governor is doing everything absolutely right, and there's nothing we should challenge or question. That typically gets litigated through court decisions. Courts are supposed to weigh the appropriate prior cases that have been decided and decide, "What's the right balance to strike here?" That's not an easy thing to do, obviously, but that's how we typically do it. The problem is when the president of the United States just tweets something cryptically like, "Liberate Minnesota." That appears to be a signal that, "Oh, well, isn't it obvious that your state, Minnesotans, are violating your constitutional rights?" That's the problem--because it's not clear what rights he's talking about. That's just kind of an all-purpose call for action. And also troublingly, it might be a call for--without real justification--letting people think, "Well, then I don't have to listen to anything my governor says."

Roman Mars [00:29:08] Right. He should be more specific with his incitements.

Elizabeth Joh [00:29:12] Exactly.

Roman Mars [00:29:15] Well, thank you so much. This has been good. And I'm sorry we're not in the same room. But I know both you and I have gotten a lot of tweets these days asking about...

Elizabeth Joh [00:29:26] "What is going on?"

Roman Mars [00:29:27] What is going on. And so, it was fun to address some of these here. So, I'm sure-- I mean, who knows what we do--if we'll do this again like this or not? But we'll find out.

Elizabeth Joh [00:29:37] Great. Stay safe, everyone.

Roman Mars [00:29:49] This show is produced by Elizabeth Joh, Chris Berube, and me, Roman Mars. You can find us online at trumpconlaw.com. All the music in Trump Con Law is provided by Doomtree Records, the Midwest Hip Hop Collective. You can find out more about Doomtree Records and get merch at doomtree.net. We are a proud member of Radiotopia from PRX, supported by listeners just like you.