

What Roman Mars Can Learn About Con Law Book Banning and the Constitution

Roman Mars [00:00:00] So we're talking at 11:15 a.m. on Friday, February 25th. And what are we going to be covering today?

Elizabeth Joh [00:00:07] Well, Roman, are you familiar with the graphic novel *Maus*?

Roman Mars [00:00:12] I am. I'm very fond of it. Yes.

Elizabeth Joh [00:00:14] Yeah, I love it. It's a graphic novel by Art Spiegelman, written in two parts about the Holocaust. And I'm sure, as you know, it's a story of Spiegelman's parents who were sent to Auschwitz but did survive the Holocaust. Now, what made this book so gripping for millions of people is that Spiegelman turned the experiences of his parents into a comic book format. And remember, when it was first published in 1986, the format felt so different and new. The Nazis are cats. The Jews are mice. And Auschwitz is sometimes referred to as Mauschwitz. But the horrors are still the same. But it was that combination--*Maus*' gripping subject matter with its comic book storytelling--that drew international attention. And in 1992, Spiegelman won a special Pulitzer Prize for his two volumes. We shouldn't be surprised that you can find *Maus* as a part of many classroom discussions all around the country. But on January 10th, the McMinn County, Tennessee Board of Education met to discuss the eighth-grade language curriculum, and the director of McMinn County Schools raised the meeting's first subject. He said, "There is some rough, objectionable language in this book." That book was *Maus*. And what the board members objected to were words like the "GD" word and B.I.T.C.H. There was also nakedness in the book--and of course, this is a book about the Holocaust. One board member said, "We aren't against teaching the Holocaust." And a teacher spoke to the board and said, "I love the Holocaust. I have taught the Holocaust almost every year in the classroom. But this is not a book I would teach to my students." And another board member said, "We don't need to teach this stuff to teach kids history. We can teach them history, and we can teach them graphic history. We can tell them exactly what happened. But we don't need all the nakedness and all the other stuff." So, all ten members of the McMinn County Board of Education voted to remove *Maus* from the eighth-grade curriculum. Now, Art Spiegelman had a few things to say about the decision. In a way, he agreed with the board. He told *The New York Times*, "This is disturbing imagery. But you know what? It's disturbing history." And Spiegelman said he got the impression that this decision was really raising a different issue: "Why can't they just teach a nicer Holocaust?" So, the Tennessee school board decision is just one of the many battles we're seeing around the country because we're living in a politically heated, hyper partisan moment. Now, some portion of the public wants more voices and perspectives to be part of what kids read and what they learn. And another part of the public thinks that certain books and certain discussions are just too liberal, too dangerous, or worse. And probably another part of the public is a little confused. Just what can the government do about the school library and the classroom, and what does the Constitution have to say about it? Time to find out.

Roman Mars [00:03:36] Let's find out. This is *What Roman Mars Can Learn About Con Law*--an ongoing series of indeterminate length, where we take the maelstrom of current events in the world of government and politics, reeling from extremism and reactionaryism and 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 has failed the first semester of law school five years in a row, Roman Mars.

Elizabeth Joh [00:04:28] All right. Well, since we started with Maus, why don't we talk about books? School book bans aren't new, of course, but certain kinds of books are becoming new targets for new reasons. And a lot of these books want to raise the topic of racism and especially uncomfortable facts about racism and history. So, you might say that this started most recently as a focus on policing. When George Floyd was murdered by a police officer in May of 2020, we saw a lot of protests and demonstrations across the country. And Floyd's death made the problem of police violence against Black Americans very real, but it also raised much larger questions and attention to race, racism, and inequality in the United States. And, of course, 2020 was an election year, let's not forget. And Trump made race and his dismissal of racism a central issue in his campaign. Do you remember one of the lines he had during one of the debates about The Proud Boys?

Roman Mars [00:05:28] He usually says vaguely, like, "They're good people," or "They mean well," or-- No, that was the one that was like, "Be ready."

Elizabeth Joh [00:05:35] "Stand back and stand by." That's right. He refused to condemn them. So, he was very clear on what he was going to say and not say on these issues. And, of course, he exploited issues that were already there in the American public, but he really focused a lot of attention on race and racism. Now, Trump lost, but the influence of his remarks on race and racism are still with us. In the past year and a half, there have been dozens of reports of bans or requests to ban books from public school libraries. And a lot of these books have one thing in common--they represent identities and viewpoints about race, gender, sexuality, and history that are not part of the mainstream or weren't formerly part of the mainstream. You know, for example, a school district in Pennsylvania removed a book called Heather Has Two Mommies from its elementary school library. And then some of them are mysterious. Another school district purportedly banned a long list of books, including just a picture book about Martin Luther King Jr. Now, whether or not these kinds of reports are requests--people being upset about certain books being available to kids--whether that's a really nationwide phenomenon is kind of hard to say. There are more than 90,000 public schools in the United States. So, it's not clear that, you know, big swaths of the country are experiencing this, but it's getting a lot of media attention. And they're part of a Republican-led effort to scare people into thinking kids are being ruined by having access to books.

Roman Mars [00:07:09] So what does the Constitution say about these, you know, school boards banning certain books? Because it doesn't really make sense to me.

Elizabeth Joh [00:07:17] Well, the short answer is it depends.

Roman Mars [00:07:22] Always does.

Elizabeth Joh [00:07:24] Remember, public schools are government actors, and that means they have to abide by the Supreme Court's interpretation of the First Amendment. And the Court has actually looked at this issue. So, in 1982, the Court considered a case where a school board in New York banned a very long list of books from its junior high and high schools. The board said it was banning these books because they were anti-American, anti-Christian, anti-Semitic, and just plain filthy. A majority of the Court said that school boards do have broad powers to manage public schools, including what's on the library's shelf. But they can't just ban books for any reason they want. Now, the problem with this 1982 case is that there wasn't a majority opinion, which simply means there isn't any majority reasoning that lower courts have to follow. But since that case,

courts usually look at the opinion of Justice Brennan, who was joined by three other Justices in the book Banning Case, which is called Pico. Brennan said that if a school wants to ban a book, it can't do so in a way that is considered "narrowly-partisan" or "political." So, a board can't ban a book if their intent is to say, "We don't want kids to have access to this particular viewpoint." That would violate the First Amendment. But if the board's decision is based on the book's, quote, "educational suitability," or if the board thinks that the book is pervasively vulgar, then presumably that would be okay. So, if you think about it, Roman, it's a pretty easy test to get around.

Roman Mars [00:09:03] I mean, yeah, because the language that they use when they were banning Maus all had to do with its sort of supposed vulgarity not its subject matter, or its political leanings, or its even historical depiction.

Elizabeth Joh [00:09:15] Yeah. Naked people, nakedness, and swear words. Yeah. So, I mean, that's exactly right.

Roman Mars [00:09:19] Naked animals.

Elizabeth Joh [00:09:20] Naked animals, naked mice, and, you know, not really talking about the subject matter at all. So, I think that's right. The Pico test really means that most boards are going to be savvy enough to avoid the bad reasons for banning books. As long as they use some of those magic words, they're going to be okay. And so, what it means, in a practical sense, is that if you want book bans to be reversed, don't rely on the courts. You've got to get involved in your local politics. You've got to speak up at school board meetings or actually be on the board yourself. Let's turn to the classroom. There are a couple of things we should clarify before we get to the law part of it. So, Roman, let's talk about critical race theory. What is your understanding of what critical race theory means?

Roman Mars [00:10:03] I understand it to be a type of curriculum and sort of resources that talk about the role slavery has played in the development of the United States and the continued oppression of Black people and the people who are descended from slaves in the United States. And I also understand it to be something that is taught pretty much in college.

Elizabeth Joh [00:10:28] Yeah, I mean, that's kind of close. I mean, if we want to get really technical and specific, critical race theory is actually an approach to scholarship and teaching about race and the law that was developed by a group of law professors in the 1970s. It's about law school stuff. Now, critical race theory doesn't have one authoritative definition. You can think of it as, like, a lens or a perspective to think about our society, and law, and politics. But practically, what does critical race theory mean to the people who write about it? A critical race theory article isn't just looking at race. It might say, "Look, let's look at how law is meant to address racial discrimination." Like, the Fair Housing Act, or the Voting Rights Act, or the Supreme Court's decision in Brown versus Board of Education--why didn't it do nearly as much as we thought it would to combat racial discrimination? Well, critical race theorists--again, law professors--might respond by saying something like, "Well, it's not the case that racism is just about a few bad actors. Instead, racism might be deeply embedded in our laws and policies. So that's part of the problem." Or they might respond that, "Look, race is a concept that's politically and socially defined. So that has a big part to explain what's happened over the course of American history." Or they might also point out that when it comes to discrimination and inequality, for a lot of people, that's an experience, let's say, not just because someone is Black, but because someone is Black, and someone is a woman, and someone is low-income.

There's a lot of dimensions in which you can experience discrimination. Does that sound pretty academic?

Roman Mars [00:12:16] Yes.

Elizabeth Joh [00:12:16] Yes, it is. It's absolutely academic. So, I'm pretty sure that there is no third grader in the United States who is learning about what critical race theorists have said about voting, housing, or employment law. But nevertheless, critical race theory--or CRT--has become this kind of boogeyman in politics, right? I guess because "CRT" sounds mysterious. And for Republicans, critical race theory became an all-purpose term for any kind of discussion of racial bias or inequality. So, the second term that's important here--the 1619 Project. Now, this is originally a special issue of The New York Times magazine, and it contained a series of essays and reporting on how slavery shaped the United States. And the issue's creator, Nikole Hannah-Jones, won a Pulitzer Prize for the issue in 2020. Now these two terms--the 1619 Project and Critical Race Theory--they became favorite Trump targets. So, in September of 2020, Trump focused on critical race theory. He tweeted about it. That was when he was still allowed to tweet. On September 5th, Trump tweeted that critical race theory was a sickness that cannot be allowed to continue. And then he wanted to target it by a commission. I don't know if you remember the 1776 Commission. He announced that he was going to promote patriotic education. Why? Well, Trump said that was because the left has warped, distorted, and defiled the American story with deceptions, falsehoods, and lies. There is no better example than The New York Times' totally discredited 1619 project. And he had more to say about it. Trump said that critical race theory and the 1619 project were, quote, "toxic propaganda that would destroy our country." Now, during the same month, Trump also issued an executive order that banned federal agencies, federal contractors, and recipients of federal grants from doing any training that promoted what the order called "divisive concepts."

Roman Mars [00:14:26] Okay. What is a divisive concept?

Elizabeth Joh [00:14:30] So they're specified in the order. They're nine ideas, and they're kind of a garbled set of ideas. Some are things that most of us would agree on. You know, one idea says it is bad to have training that teaches one race or sex is inherently superior to another race or sex. I think that's pretty uncontroversial, right? But another idea in it is that you can't teach the idea that any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex. No making people feel bad. So that order was successfully challenged in court, and then Trump lost the election, so President Biden quickly revoked that executive order when he assumed office. So, it's over, right?

Roman Mars [00:15:20] You would expect so.

Elizabeth Joh [00:15:21] But not so fast. So, since January of last year, more than half of the states have introduced bills--and some have successfully passed laws--that restrict how public school teachers can talk about race, sex, gender, and history. In May of 2021, Idaho became the first state to specifically ban what it called the teaching of critical race theory in public education. So that's why I just asked you what you thought of it--because critical race theory, as we've just said, is really a kind of very specific legal academic idea or perspective. But when you look at what the Idaho law prohibits, it says you can't teach that any sex, race, ethnicity, religion, color, or national origin is inherently superior or inferior. I think that's a kind of laudable goal that all of us would agree with. It also has nothing to do with critical race theory. In June of 2021, New Hampshire passed a ban on

teaching what it called divisive concepts. Again, same idea floating around. And then there's Oklahoma. The state passed a law last July that restricted the public school teaching of eight concepts. And those eight concepts are all exactly word-for-word identical to eight of the nine divisive concepts from Trump's executive order. Texas has passed a law that says a teacher cannot require an understanding of the 1619 project. Not even sure what that means. And it gets even stranger. A proposed bill in Kentucky would ban the teaching of what the bill calls "revisionist history." So, you might ask yourself, "Okay, well, what does that mean?" Well, according to the bill, teaching revisionist history would mean teaching that slavery, racism, sexism, and white supremacy are practices and principles that are fundamental to America rather than deviations from the American promise of life, liberty, and the pursuit of happiness, as expressed in the Declaration of Independence and enshrined in the Constitution. So, there's kind of a problem with this. You might think, "Okay, well, they're trying to say, 'Well, slavery is really not a part of our fundamental practices because that's not enshrined in the Constitution.'" Well, here's the problem. If you look at something like Article 1, Section 2, Clause 3 that contains the infamous Three-fifths Clause. And that clause in the original constitution meant that slaves would be counted as three-fifths of a free person for the purposes of congressional representation. So, if you're going to apply this law pretty strictly, it looks like under the terms of this bill, you're not even allowed to talk about the actual Constitution itself. And Trump hasn't stopped. In June of 2021, Real Clear Politics published an op-ed by Trump. He said that critical race theory, and the 1619 project, and the teaching of these things would amount to what he called "psychological abuse of children."

Roman Mars [00:18:29] Wow. In these cases, do the teachers themselves have sort of free speech rights in some way? I mean, is it just about the policy of the school board or the school system?

Elizabeth Joh [00:18:41] Well, this is where things get kind of complicated. In general, the government can't ban or restrict our speech except in very narrow circumstances. So, government can't tell us--you and I--that we're not allowed to say a particular thing most of the time. But in these kinds of cases where you're talking about teachers, we're not talking about the government in a private person. We're talking about the government, as an employer, restricting the speech of their own employee. And according to the Supreme Court, that's a totally different situation. So, in 2000--Richard Ceballos was a supervising prosecutor in California--he discovered that one of the criminal cases he was responsible for had some potentially big problems. The search warrant in the case--you know, he's a prosecutor--appeared to have had some really big inaccuracies in it, and that could threaten a successful prosecution. So, he complained about it to his bosses. But what happened next wasn't what Ceballos expected. He said as a result of raising his concerns, his bosses retaliated against him. He didn't get a promotion, and he was reassigned to something that was not as good as where he was before. So, Ceballos argued, "Look, I was punished for my speech." He sued his bosses--including Gil Garcetti, who was then the L.A. district attorney. Now, the Supreme Court had decided before Ceballos' case that the First Amendment usually protects government employees when they speak as if they were private citizens on what the Court calls "matters of public concern." You know, like, when you write a letter to the editor of a newspaper, you're just speaking as a private person. But in Richard Ceballos' case, the Supreme Court said that constitutional protections don't apply when the government employee speaks as a part of what the Court called "their official duties." In that situation, the government employee is not speaking as a private citizen under the First Amendment. So, the result for the California prosecutor was not good for him at all. Richard Ceballos couldn't argue that his First Amendment rights were violated when it seems that he was punished simply for speaking up. So that

case, which is usually referred to as the Garcetti case, is a very important limitation on government employees' speech.

Roman Mars [00:21:01] Okay. And so how do you apply that to teachers?

Elizabeth Joh [00:21:05] So this is where things get even more complicated. Now, remember, the Garcetti case isn't about teachers at all, so it's not exactly the same facts. It's about a prosecutor. And the Supreme Court hasn't yet decided a case where a teacher speaks up and gets punished like that. So, it's been up to the lower courts to figure out what this means in public education. In general, public school teachers who teach kindergarten through high school--K through 12--seem to be treated by courts just like Richard Ceballos. In other words, they're government employees and they can't make First Amendment claims against their government employer--school board or school district--when they're speaking as part of their official duty, which is teaching kids. So, what that seems to mean is that if you're a teacher in a state where the law now says, "You can't say certain things or teach a certain way," and then you do, well, your government employer can punish you if you decide to violate those laws--and they're not violating your First Amendment rights.

Roman Mars [00:22:03] So that applies to teachers K through 12. But how does that apply to, you know, university professors or people like that?

Elizabeth Joh [00:22:10] Okay. So that's the other complication. College professors might be a different case. In the punished prosecutor's case, Justice Souter wrote a separate opinion. Now, Souter worried out loud; he said, "Look, aren't we threatening academic freedom for professors in public universities?" The majority's response in the Garcetti case was like, "We're not talking about that today. We don't have to decide that today." So, they basically punted on the issue. Now, when people talk about academic freedom, they are usually talking about college and university professors who can talk and write on subjects in their field without fear of being punished by their employer. It's not exactly a law, it's more like a norm, right? Like lots of colleges and universities have formal statements that they support the academic freedom of their faculty. But it turns out that the Supreme Court has talked about academic freedom, and they've said that it's a really important value for professors to have academic freedom--to be able to freely speak and to write. And in 1967, the Supreme Court called the college classroom a "marketplace of ideas." Roman, why don't you read the rest of this quote? It's a really good one.

Roman Mars [00:23:20] "The nation's future depends on leaders trained through wide exposure to that robust exchange of ideas, which discovers truth out of the multitude of tongues rather than through any authoritative selection." Yeah, that's really good.

Elizabeth Joh [00:23:32] It's pretty lofty sounding. You know, and for most college professors, there usually isn't much space between your job-related speech and what you write or talk about anyway. You teach your subject, you write academic articles that nobody reads about your subject, but then you also talk about your subject outside of work, right? And you write op-eds, and you hope to have a wider audience. Now, because of these hints by the Supreme Court, in other cases, that they think academic freedom is important, some lower courts have decided that the rule of Garcetti--that's the prosecutor's case--doesn't apply to professors at public colleges and universities. So that means that depending on where you live, a college professor working for a public university might have greater protections than a public elementary school teacher. Or they might not, right?

But if you're teaching kindergarten to high school, you're probably no different than the punished prosecutor in terms of your speech rights.

Roman Mars [00:24:31] It also seems like the culture of universities--with tenure being that you have some security so that you can have the freedom to have ideas--it seems like that's built into the culture of universities. That is not the case in primary and secondary education.

Elizabeth Joh [00:24:50] Sure. I mean, I think that's right. I mean, tenure certainly provides those protections. But, you know, a lot of people who teach at universities don't enjoy tenure protections. And there are other punishments besides, you know, not having tenure. You know, you can be restricted, or reassigned, or disciplined in other kinds of ways. But I do think also that because we're living in such a heated moment right now, it kind of depends on where you live. You know, Texas is threatening to take away tenure from its university faculty. No one's speaking of that in our state--in California. So, it kind of depends on the political culture where you are. But remember, once you have a principle, it doesn't always align necessarily with your own politics. So right now, the main thing is thinking about these restrictions on the teaching of critical race theory, or whatever the politicians think critical race theory is, or discussing the 1619 project, or people might say, "Look, you know, we want to have big protections for faculty when they're teaching in public universities." But, you know, you could also point out, "Well, don't you want restrictions on K-through-12 teachers?" You know, let's say there was a movement for, you know, teaching flat-earthism or creationism, and the state had to say, "Look, you can't teach that to kids," I think a lot of people would say, "Well, I want that restriction on my teacher." But, you know, then you've got to accept that there are other kinds of restrictions that are going to be permissible as well. On the other hand, you could also say that in the university setting, freedom to say what you want as a faculty member is a good thing. But what if you want to say things that are extremely unpopular--or at least in some settings extremely unpopular? Let's say--and these are the facts of an actual case--you are a university professor who refuses to refer to transgender students in your class by their pronoun. You could say, "Well, you really should follow what the university's policies are." But you could also point out, "Don't I have freedom of speech? Don't I have academic freedom because my beliefs, you know, are aligned with how I teach, and I want to teach that way?" So, these are not sort of politically unified theories of the First Amendment. They're really just about "Do you want more restriction or less restriction? And you have to take the consequences of it." So far, we've been talking about the First Amendment in the classroom--in the library. But there's also a different constitutional issue that comes up with many of these new laws. So, we could use that recently passed law in Oklahoma. So, Roman, imagine you're a high school teacher. You find out that your state now forbids you from teaching that an individual by virtue of his or her race or sex is inherently racist, sexist, or oppressive--whether consciously or unconsciously.

Roman Mars [00:27:50] Okay.

Elizabeth Joh [00:27:51] Okay. So now imagine you're about to talk about World War Two and Hitler's beliefs about racial superiority that led to the murder of millions of Jews. Does the law allow you to talk about that?

Roman Mars [00:28:04] Well, I think you could interpret it that it would allow you to talk about it. You would just be saying that Hitler and the Nazi Party were making these distinctions as to what was a race or a class of people that deserved to live or deserve to die. But those were decisions made by individuals to do individual evil acts.

Elizabeth Joh [00:28:25] But you wouldn't say that Hitler was inherently racist?

Roman Mars [00:28:29] Well, "inherently" is an interesting question. Was he born racist?

Elizabeth Joh [00:28:34] So it sounds like you're not totally sure, right?

Roman Mars [00:28:36] It's the word "inherent" which is the question to me.

Elizabeth Joh [00:28:40] That's the entire point. So, it's an important one. If the law forbids you from doing something, then it has to be written in a way that you can figure out the difference between lawful and unlawful behavior. Otherwise, a court might decide that that kind of law violates due process rights. So, the Supreme Court has said that a law is unconstitutionally vague if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. So even if you want to comply with the law, if you can't figure out how to do that because the law is so poorly written, that also can be a constitutional problem. And that's exactly the claim that some of the recent lawsuits that have been filed about these new education laws or restrictions have argued--that the laws are unconstitutionally vague. They're not going to be able to win necessarily that the teachers have free speech rights, but they could claim that "Look, I read this law, and I have no idea what I'm allowed to do and what I'm not allowed to do." But ultimately, talking about the Constitution, I think, misses some of the bigger effects of the laws. Even teachers who maybe even don't agree with the laws, but they still want to abide by the law because they want to lose their job--they may be afraid of even getting close to the line of what's forbidden. So, they limit their speech, right? And that can be the case--even if their plans are perfectly legal--if you ask the politicians who pass a law. So, we often say that such laws have chilling effects on speech or sometimes they lead to nonsensical results. So, Texas now requires that teachers who discuss a topic shall strive to explore the topic from diverse and contending perspectives. So how do you comply with that law? One Texas school administrator said this to teachers in a training session. "Just try to remember the concepts of the law," she said, "and make sure that if you have a book on the Holocaust, that you have one that has opposing other perspectives." One teacher asked, "How do you oppose the Holocaust?" "Believe me," she said, "that question has come up."

Roman Mars [00:30:57] Wow. I mean, it's a testament to how you have to write these things. You do have to be precise because if you're looking for other sides of every argument--that slavery wasn't evil, or that, you know, somehow there was some upside to the Holocaust, or something like that. That's a ridiculous law to write that way.

Elizabeth Joh [00:31:17] Yeah. I mean, we now kind of have this widespread dissemination of "you've got to have both sides of everything," as if some parts of history could have a both sides.

Roman Mars [00:31:28] Totally. Well, this is all fascinating stuff. And it seems like, you know, we're going to be seeing these fights in all kinds of ways forever, really. So, it's interesting to keep it in mind, you know?

Elizabeth Joh [00:31:39] Yeah. I think, you know, these things are going to be part of, unfortunately, what seems to be really divisive arguments about who has control in the classroom. You know, ultimately, this is about who gets to tell the story about history--which voice gets to be part of that conversation.

Roman Mars [00:31:59] So the last time we recorded it was the day of the announcement of Breyer's retirement. And today it was announced that the first nominee for that seat has been announced. What are you thinking right now?

Elizabeth Joh [00:32:14] Judge Ketanji Brown Jackson is President Biden's nominee to the Supreme Court. As he promised, he did nominate an African American woman for the Court, which would be unprecedented. You know, as far as resumes go, she has a pretty stellar resume. You know, she is currently on the federal appeals court. She has been a district court judge. She has loads of experience. She's literally written hundreds of opinions that people are probably immediately sifting through today. And, you know, she brings also not just diversity in terms of being African American and being a woman--just also professional experience. She would be a former public defender as a Supreme Court Justice.

Roman Mars [00:33:00] That has been mentioned a few times on Twitter by people. And so, tell me a little bit more of the context of that. What does that mean to you?

Elizabeth Joh [00:33:08] So what that means is-- And of course, for people who aren't familiar, a public defender is someone who represents criminal defendants--those who can't otherwise afford a lawyer. What that means is here is someone who has sort of experienced the criminal justice system in the United States with all of its problems, right? And understands what some of those issues are on the ground. They're not theoretical. They're not far away from her. She's actually experienced them herself. I should also mention here--from the reporting--that she has a family member who was serving a long prison sentence for a drug offense. So, it has actually hit her own family. And when we think about some of these issues, it brings a diversity of perspectives, too. You know, if you're going to talk about mass incarceration problems and policing--things of that nature--we've had tons of former prosecutors, people who put people away behind bars, who become judges and important judges. But not yet someone on the Supreme Court in particular; it would be totally different. You know, I think one of the things that people are going to be mentioning here with Biden's nomination is to say, "Well, you know, she's a great pick, but it doesn't change the vote count," which is true. There will still be a kind of conservative supermajority on the Court. But, you know, it's not just about changing votes on the Court. You know, having a different perspective on the Court can shape, you know, future doctrines or future decisions. It might even persuade a Justice or two--even a conservative--into thinking somewhat differently about an issue in ways they hadn't before. And I think that's the significance of being a former public defender at a time when a large portion of people in the United States are really focused on not just policing but criminal justice as a big problem. I mean, we have some major structural problems in our criminal justice system and how it works, especially for poor people.

Roman Mars [00:35:10] Yeah. I think we'll learn a lot through the process of her nomination.

Elizabeth Joh [00:35:14] And, you know, who can really bet? But she may have an easy time of it because she was recently nominated for the federal appeals court, and she had a pretty easy time of it. And, you know, she had a couple of Republican votes, so it would be hard to see why she would have problems through the Supreme Court process. But never say never, I guess.

Roman Mars [00:35:38] We've been down this road before. We thought it was sort of impossible to have a huge fight over a Supreme Court Justice. We've learned that in the right political environment, anything can be stymied, I think.

Elizabeth Joh [00:35:48] Exactly. We shall see.

Roman Mars [00:35:51] We shall see. All right, thank you.

Elizabeth Joh [00:35:53] Thanks.

Roman Mars [00:36:06] 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.