

What Roman Mars Can Learn About Con Law After Dobbs

Roman Mars [00:00:00] So we are talking on Saturday morning, June 25th. It is one day after the Dobbs decision that's been anticipated was released. And so, what did you specifically want to talk about today?

Elizabeth Joh [00:00:13] Well, let's start from the basics again, right? So, remember that for almost 50 years there has been a constitutionally protected right to an abortion throughout the United States. In 1992, the Supreme Court reaffirmed that the right to an abortion existed and was protected as a matter of constitutional law. It also made clear that there were limits. So, after 1992, states could ban abortions after what it called the point of viability--that's when the fetus could live outside of the womb. And even then, states had to allow exceptions to save a person's life or health. And the Supreme Court had said that abortion is a constitutionally protected right in the same way that rights about marriage, family, and private relationships are protected. They're all part of the liberty that's guaranteed to us from the Constitution's guarantee of due process. Or, as the Court once put it, "the Constitution protects the freedom to make intimate and personal choices that are central to personal dignity and autonomy." But that idea about recognizing this family of rights has never been a favorite of the conservative Justices on the Court or really any conservative judges or lawyers. So, on June 24th, as you mentioned, the U.S. Supreme Court decided to overturn Roe versus Wade and Planned Parenthood versus Casey; those are the two most important cases that recognized constitutionally protected abortion rights. There is no longer such a right under the Constitution. Now, the Court didn't have to do that. The case of Dobbs versus Jackson Women's Health was a challenge to a Mississippi state law that banned abortions after 15 weeks of pregnancy. So, the Supreme Court could have said that this particular state law was constitutional and left it at that. But the conservative majority on the Court--the one solidified by the last three Trump appointees--made the decision to go further. And so, the Roe right has now disappeared. This is a very, very big deal. This is one of those rare examples in which the Supreme Court decides to take away a right that it had previously recognized. In that sense, it's kind of like a legal earthquake. Or, as Chief Justice Roberts put it, "a jolt to the legal system." But the practical result is that young people in the United States now have fewer reproductive rights than their mothers and grandmothers. What was legal and constitutionally guaranteed last Thursday was taken away, and that was potentially a crime after Friday morning. So, what's going to happen now? Let's talk about it.

Roman Mars [00:03:07] Yeah, let's find out. This is What Roman Mars Can Learn About Con Law, an ongoing series of indeterminate length, where we take the horrors of the modern world and the current capricious rights-stripping Supreme Court 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 your fellow student and host, trying to figure this all out, Roman Mars.

Elizabeth Joh [00:03:58] So Roman, remember that at the beginning of May, someone leaked a draft of the majority opinion in the Dobbs case. The leak itself was a shock, but the main shock is that we clearly saw the direction that the majority was headed in. We saw that the draft majority opinion, written by Justice Alito, clearly intended to eliminate constitutional protections for abortion rights. And we saw the reasoning from that 68-page draft. And basically, the Alito draft said, "Look, the Constitution doesn't mention the word 'abortion.' There's no right there."

Roman Mars [00:04:32] So what turned out to be different from the Alito draft that was leaked to the decision that was announced yesterday?

Elizabeth Joh [00:04:38] Well, it turns out that the Dobbs opinion--the official one--doesn't differ in any major ways from the leaked draft, which makes you wonder still who leaked it and why. We don't know. Alito's reasoning is basically still the same. First, there's the dislike of this kind of right. The majority in Dobbs says that the Constitution makes no reference to abortion. And even though the Constitution has other rights that the Supreme Court recognizes that are not specifically mentioned, the majority in Dobbs says that these rights exist because they are deeply rooted in this nation's history and tradition. So according to the majority, if you look at the history of abortion law, there's a long history of criminalizing abortion in the United States, so there can't possibly be a deeply rooted right to an abortion. But then there's the problem of stare decisis. And stare decisis is the Court's practice of relying on its prior decisions. And that practice is supposed to contain a very strong preference against overturning a prior decision or two in this case. And the majority's response in Dobbs is, well, they turned to Plessy versus Ferguson. That's the 1896 case that decided that government sponsored racial segregation was constitutional. "Roe versus Wade?" says the majority in Dobbs. "An abortion case is just like that case--egregiously wrong from the start." So now this comparison is a part of Supreme Court law--that the right to a legal abortion is as bad as government approved racial segregation. So, for the majority, that is why you need to overturn Roe and Casey. And also, for the majority, a big reason to overturn Roe is because, in their words, "the decision has had damaging consequences. It inflamed debate and deepened division." It's only been a day, but it's hard to see how Dobbs ends debate or heals any kind of divisions at all.

Roman Mars [00:06:44] Yeah.

Elizabeth Joh [00:06:46] So, there we have it. A bare majority of Justices--five of them--have ended the nearly 50 years of constitutional protection for abortion rights in the United States. And three of those five Justices were appointed between 2017 and 2020.

Roman Mars [00:07:04] It was a 5-4 decision?

Elizabeth Joh [00:07:07] That's right. The Chief Justice did not join the majority's reasoning. He agreed with the result. He wrote a separate opinion to say, "Look, I actually think that the Mississippi abortion ban--banning abortions after 15 weeks--I think that should be considered constitutional." But Roberts wrote separately because he says, "Look, I don't think we needed to go this far in this particular case." So, let's be clear--Roberts is not a fan of Roe or Casey, but he's an incrementalist. He's not a defender of abortion rights--he's just saying, "Look, we're going too fast. We didn't need to do this that quickly." And that's why he doesn't agree. So, in essence, that's right. It's just a bare majority that decides to overturn these two cases.

Roman Mars [00:07:53] Wow. I guess I'd seen it reported or people talking about it being a 6-3 decision. What does that mean--that his is slightly different but effectively upholds the law anyway?

Elizabeth Joh [00:08:06] Not much in terms of abortion rights because, you know, it's just a clear counting system. If there are five votes, that's the law. And there were five votes to say, Roe and Casey are no longer Supreme Court law. Chief Justice Roberts presumably is just saying it for the historical record. "I didn't want to go this fast. I just would have

upheld this particular law, and we could have taken up that issue about Roe and Casey another time." So not a big hero in this case, but he just didn't want to be a part of what was really a dramatic decision.

Roman Mars [00:08:37] Okay.

Elizabeth Joh [00:08:37] And then there's the dissent. There are the three liberal Justices--Breyer, Kagan and Sotomayor--and they write an unusual, jointly authored dissent. It's kind of notable because, for instance, in this term, Justice Sotomayor has written a large number of dissents, and she hasn't been shy about calling out what she sees as a lot of extremism on the Court. But this one's a joint opinion. And the dissent points out that after Dobbs, from the very moment of fertilization, a woman has no rights to speak of. A state can force her to bring a pregnancy to term, even at the steepest personal and familial cost. Here's how the dissent summarizes Roe: "Roe held that the government could not make that choice for women. The government could not control a woman's body or the course of a woman's life. It could not determine what the woman's future would be." And I think that is actually the best way to summarize the impact of jobs on ordinary people. The Supreme Court's decision means that if you can become pregnant, you have now lost control over what your future might be.

Roman Mars [00:09:49] So what is this future after Roe? Like, I'm having a hard time pulling it together in my head just because I've lived in a land of Roe for 50 years.

Elizabeth Joh [00:09:59] Yeah. So, I think that there are some things that are very clear and immediate and there are other developments that we'll just have to wait and see about. So why don't we talk about the state laws, right? At a minimum, states are now free--after Dobbs--to criminalize abortion in any way they want. So, remember, before Dobbs, at least in theory, states weren't allowed to ban abortion completely, right? They could impose a lot of obstacles--and they did. The response before Dobbs was everything from you have to wait 24 hours or 48 hours, you have to undergo some medically unnecessary ultrasound, or your abortion provider needs some special licensing that they actually don't medically need. These were all intentional hurdles. So, it's really hard in some places to get a legal abortion anyway. But after Dobbs, states don't even need to do that. What Dobbs means is that a state can simply ban abortion completely. They don't need an exception to save someone's life or health. They don't need to have an exception for rape or incest. They can completely criminalize abortion. And when abortion is no longer considered a fundamental individual right, which is the case after Dobbs, then a law regulating abortion only has to be "rational." That's the legal test. And all abortion bans meet that really weak legal test. In Dobbs itself, the conservative majority criticized Roe and Casey because they said, "Look, there was insufficient attention given to the state's interest in what it calls fetal life." So, any abortion ban presumably is there to protect fetal life. And in the Court's view, that's going to be considered rational. And I think one of the things that may not be clear to some folks now is that this newly expanded state power can reach a lot more than just what we normally think of as abortion. If the state can interfere with pregnancy from day one--from fertilization--a state could not just ban abortion, they could say, "Well, you can't have in vitro fertilization, IVF. That process involves the creation of several embryos. And a state might and could say, "No, you can't do that." And of course, ironically, that would mean a state could stop people who want to be parents from being parents at all.

Roman Mars [00:12:27] And to be clear, that's just because in IVF, a lot of embryos are created to be implanted and, in some cases, they are destroyed and therefore, that would be an abortion under somebody's view potentially.

Elizabeth Joh [00:12:40] That's exactly right. And that even goes to the procedures that are sometimes used in abortion because some procedures may be used for other reasons as well. So, if you have an incomplete miscarriage, in which your pregnancy can't possibly go further, a very common way for you to sort of end that process so you can preserve your health is to have exactly the same procedure one would have if you were actually having an abortion. If the state bans that altogether, that means that you may risk health consequences like infection--serious side effects--because you can't have access to a procedure that really isn't about abortion at all because now, again, the states are free to criminalize a wide range of activity.

Roman Mars [00:13:25] Wow.

Elizabeth Joh [00:13:27] Second, let's talk about the state laws themselves, right? Some of these laws were waiting for Dobbs to be decided. And these were so-called "trigger laws." These were laws that the states had passed in anticipation of the Supreme Court overruling Roe. Kentucky is an example; they had a trigger law. And as of today, now in Kentucky, nearly all abortions are illegal in the state. Louisiana also had a trigger law that took effect immediately after Dobbs was issued. Almost all abortions in the state are illegal, including abortions by medication. It's just one day after Dobbs, and there are at least, I think, nine states where an abortion ban has already been put into place. Many of these trigger laws were passed after Trump became president because, remember, as a candidate, Trump publicly promised to appoint Supreme Court Justices who would vote to overturn Roe. And he delivered. And then there are these very old laws--older than Roe--that couldn't be enforced once the Supreme Court decided that there was a constitutional right to an abortion in 1973. So, Michigan has a law from 1931, banning abortions, that was never appealed. So, these kinds of laws are now enforceable. They're kind of zombie laws, right? They're coming back from the dead because the lawmakers never took them off the books. There are also laws that had been put on hold by courts because of legal challenges. And those laws presumably now all can go into effect. So, Alabama had a law that banned nearly all abortions. But a federal judge had put a hold on that law, for the time being, until Dobbs came out. And that hold was lifted on Friday afternoon as soon as the Supreme Court issued its decision. Now, that doesn't mean abortion will be unavailable completely in the United States. There are a number of states that are very open and explicit that they will continue to provide abortion access. California, Illinois, New York--states like that. But in at least half of the states, abortions are either going to be completely banned or very severely restricted.

Roman Mars [00:15:44] So can Biden do anything? I mean, he came on and said, "vote harder" or something.

Elizabeth Joh [00:15:50] Something like that. But, you know, the president really can't do much on his own. Congress could act. It could create a federal right by passing a federal statute that says there's a federal right to an abortion that would apply nationwide. But there's the practical problem--a bill like that, called the Women's Health Protection Act, that already failed in the Senate in May. There just aren't enough votes to get that bill into law.

Roman Mars [00:16:17] Hmm. I don't want to back you into punditry, but do you think that the Dobbs decision makes it so a law like that is a little more on the table than it was in May?

Elizabeth Joh [00:16:29] Well, you definitely need more senators in the Senate who would support such a bill. And even after Dobbs today, we don't have that momentum going. And there's other problems, too. Even if you have enough votes to codify such a federal right, you could expect Court challenges right away. And this would be a different question: Does Congress even have the power to do that? Would they be doing it under its power to regulate interstate commerce or what? Right? That's an issue. And in fact, we should consider the other possibility that goes in the other direction. And that is Congress could pass a national ban on all abortions, thus making it impossible for some states to even offer legal abortion. And in fact, yesterday, right after Dobbs came out, former Vice President Pence just came out and said, "I would like to see a nationwide ban on abortion." And why? He's a very likely Republican candidate for a 2024 run, so he is making that possibility part of his agenda.

Roman Mars [00:17:30] And so what do these state laws look like? What will they do?

Elizabeth Joh [00:17:33] So that's what we have to wait and see. Most of the abortion bans that existed before Roe versus Wade typically banned abortions by punishing people who provided abortions. Before Roe, some states made it a crime to perform or to attempt to perform an abortion; they didn't punish the pregnant person. But after Dobbs, anything goes. A state could punish the provider of the abortion services, the pregnant person for seeking an abortion, or even just trying to seek an abortion. And in the short term, you might not even need a new law. An aggressive prosecutor, for example, might think that this is now the right political climate to be creative and aggressive, then say, "Look, maybe an abortion could count as a criminal homicide caused by the pregnant person," and go after that person in that way. And that is an important point here--not to forget the power of prosecutors. So, on the one hand, the Michigan attorney general announced yesterday that she will not use the state's resources to enforce the state's 1931 abortion ban. But many, many other prosecutors in the United States are going to go in the opposite direction because, remember, in the United States, it's very common for prosecutors to be elected. And they are going to act in ways that will win them reelection.

Roman Mars [00:18:59] Yeah. How far do you think prosecutors would actually go now that they're given this permission?

Elizabeth Joh [00:19:04] They could go in a lot of different directions, but there are a couple of issues that we can sort of contemplate now. Not every state in the United States is going to ban abortion, right? So, some people are going to try and travel to states where abortion is legal. So, let's say that State A has a total abortion ban. But a pregnant person travels to State B, let's say, with a friend to obtain a legal abortion there. So, could the prosecutor from State A try and enforce State A's law against the person and the friend--who live in State A--even though the abortion took place in State B? Or could a state pass a law that would ban people from leaving the state to try and seek a legal abortion? So, in Dobbs itself, Justice Kavanaugh wrote a separate opinion--a concurring opinion. He joined the reasoning that Alito had. He makes a note of this. Kavanaugh says, "Well, in my opinion, a state can't stop a person from leaving the state to obtain a legal abortion." He's "pretty sure," he says. But it's actually not that clear. The Supreme Court has recognized that there is this idea of a protected right to travel, but there's just not that many cases on it. And there's also a different constitutional principle that states can't

burden interstate commerce. And this might be implicated since abortion services are medical services, but the answer isn't that crystal clear either. So, the short answer for people living in states with abortion bans, who worry about being punished for traveling elsewhere, is this: Are you willing to take that personal risk? And I think for many people, the answer is going to be "no," right?

Roman Mars [00:20:48] Yeah. Yeah.

Elizabeth Joh [00:20:49] And for other people who are seeking abortions--as the dissenters in Dobbs point out--going to another state, arranging childcare for your kids, taking time from your job, getting the money to put this together is just not going to be possible anyway.

Roman Mars [00:21:04] I mean, that's what you've always said; it's like abortion bans are not abortion bans for the wealthy. It's really abortion bans for the poor who can't gather the resources to do something about this condition.

Elizabeth Joh [00:21:15] That's right.

Roman Mars [00:21:16] And so what other concerns would there be after Dobbs?

Elizabeth Joh [00:21:19] Well, I want to clear something up about Dobbs' effects. There is a way that people are already talking about the Dobbs decision as turning back the clock or going back to the 18th century or the 19th century. I think that's actually wrong. In fact, what makes Dobbs so dangerous is because of the times that we live in, right? Because once abortion is a crime, people providing abortions, people seeking abortions, and the people who help them are now potential criminal suspects. Now, you add in what it's like to live in 2022--and I'm talking about all of the digital information we create every day of our lives. So, we create all kinds of data about what we are doing, who we're talking to, what we are buying, and where we are going.

Roman Mars [00:22:10] And what our menstrual cycles are.

Elizabeth Joh [00:22:12] Sure, that's right. So, I'm talking about your social media activity, your credit card purchases, your texts, your emails, your Internet searches, even your location information from your cell phone apps, and even your car movements that are captured on license plate readers. Now, the reason all of this information is originally collected is for the purpose of selling stuff back to you--right--for advertising? But it's turned out that it's also a massive amount of potential criminal evidence. And American prosecutors and law enforcement understand this. It's really common now--in totally ordinary criminal investigations--to get this digital information. We're producing it every minute, and it's being collected all of the time. And the problem in the United States is we don't really have that many privacy protections over this information, even if it reveals a lot of intimate detail about our lives. And we've allowed this enormous surveillance system to grow up around our lives, basically in exchange for convenience, right? So, what I mean is, you know, if you download a cell phone app, there's some small print you've probably never read. And so, in a lot of those cases, when you click to download the app, you also agreed to give that company the right to sell the information to other companies or to other people who want to buy it. So now think about abortion as a crime not in the 19th century but after Dobbs. So, what is useful evidence--your Google search history, your emails, or your chats with a friend talking about how to obtain an abortion, if you decide you want to go online and purchase abortion medication, or the mapping app that helped you find a

provider? What's especially troubling here is not just that there's so much information and that the government has pretty easy access to it, it's that you also have the possibility of-- Let's call them "anti-abortion vigilantes"--people who are motivated to also collect all of this evidence because they suspect a person is trying to get an abortion or is helping someone to try and get an abortion and then just handed that information over to the police. So, it's a big problem for anybody who gets pregnant. And it's just not realistic to tell people, "Well, don't use your cell phone," or "Don't use Google," or "Don't use messaging apps," or "You should encrypt everything," or "Delete everything." Most normal people can't do that, and they won't do that. It's just asking too much. But that means that it leaves a lot of people in a very vulnerable situation.

Roman Mars [00:24:50] Can you imagine a hypothetical where a person researching an abortion and securing services in a neighboring state--they're in a state where it is illegal, neighboring state it is not--but the conspiracy to get your friend, book the services, go there, even though the abortion doesn't take place in their state, like, that action could just be illegal in and of itself inside of the state that abortion is banned?

Elizabeth Joh [00:25:18] Sure. I mean, in part because you're bringing together the three things, right? The ordinary way criminal law works, right? Their conspiracy is a criminal agreement. You can even have something that never becomes an abortion. You can have an attempt, right? Attempt as a very traditional, normal part of criminal law. You have all of the ways we create digital information. And then we have this uncertainty now. What does it mean when you do something that's illegal in your state, but you cross state borders where it's legal--that very same activity? That's kind of up in the air. So again, it does put people in legal jeopardy. And the thing to keep in mind is that it may be that ultimately a court will decide later that, you know, this really wasn't a good case to bring. But think about what it means for the ordinary person; they become subjected to criminal investigation. You get arrested. You get an arrest record. These are not easy or okay things for most people. It can have terrible consequences for the rest of your life.

Roman Mars [00:26:19] Please forgive that I didn't read this very closely when people were talking about it yesterday, but I remember an excerpted piece of Thomas' writing about other decisions that Dobbs calls into question. Could you describe what that was?

Elizabeth Joh [00:26:34] Sure. The dissenters--let's start with what they said. You know, they ended their opinion by saying the sorrow they felt for the many millions of American women who have today lost a fundamental constitutional protection. That's absolutely true. That right doesn't exist anymore. But I think we will probably look back on the Dobbs decision as the beginning of something much larger. You know, the majority opinion makes it explicit that, "Hey, we're overturning Roe." But Alito says, "Don't worry, we're not putting any of these other seemingly related rights about marriage, family relationships in the same jeopardy." But that's kind of a hard distinction to make because the Court has always lumped those rights together--family, abortion, marriage, privacy rights. If they're all part of the same family of rights, well, aren't they all vulnerable? That's the real question. The majority in Dobbs says, "nope"--that they're not the same because abortion involves the ending of fetal life, and the others don't. But that's a pretty weak distinction when you think about why these other rights exist. So, Justice Thomas writes a separate opinion. He also agrees, of course, that Roe and Casey have to be overturned, and he says, "True, in this case today, Dobbs doesn't literally put these other rights in jeopardy." But then Justice Thomas goes on to say, "But you know what? The Court should reconsider Griswold, Lawrence, and Obergefell." These are the Court's decisions recognizing constitutional protections for access to birth control, same sex relationships, and same sex marriage. He

says it openly. And I think Thomas' honesty here is important. The rights protecting vulnerable groups after Dobbs--they feel pretty shaky. The idea of stare decisis isn't clearly going to be enough to make us feel that these are stable rights that aren't going to be attacked. Remember, the Supreme Court had previously said that abortion was like this other set of rights and that the Constitution places limits on a state's right to interfere with a person's most basic decisions about family and parenthood. But I guess the question to ask is: After Dobbs, is that really true? So, we'll have to see how far this conservative majority is going to go now. And I think the answer is we shouldn't be complacent about it and honestly, nothing should surprise us.

Roman Mars [00:29:14] Wow.

Elizabeth Joh [00:29:16] And Roman, let's put it pretty bluntly. In your view, what has changed between 1973 and 2022 in our understanding of legal abortion?

Roman Mars [00:29:26] Well, it seems that the fundamentals haven't changed at all, except for just the people who are in charge have changed.

Elizabeth Joh [00:29:33] Yeah. And I think that is one of the most disturbing things about Dobbs. Really, nothing in the legal doctrine has changed at all. The only thing that's really changed is the raw political power of the conservative majority. And that's why the dissenters in Dobbs say this: "Power, not reason, is the new currency of this Court's decision making." Now, Justice Sotomayor saw this coming when the lawyers argued Dobbs before the Court last December. Justice Sotomayor pointed out that the very reason that lawmakers in Mississippi passed their abortion ban was because of the newest Justices on the Supreme Court. You'll remember that in December, she said, "Will this institution survive the stench that this creates in the public perception that the Constitution and its reading are just political acts?" And that's a real question now. Remember that the arrival of Justice Jackson for the next Supreme Court term is going to do nothing to change the Court's composition. And it's very likely that the next person in the White House after the next presidential election will have the opportunity to change or keep the balance on the Court, right? And this is actually where you make the connection between what's happening on the Court and the ongoing hearings with the January 6th House Committee going right now. You know, if you want Democratic checks on our institutions, you need free and fair elections. But that very basic requirement is in question, too.

Roman Mars [00:31:12] Yeah. Oh, it just feels so terrible. The balance of power seems so far off. Because of an unwilling executive, an anemic legislature has left the courts so powerful and also so democratically unresponsive, I guess, that it just seems like everything's so far out of whack.

Elizabeth Joh [00:31:33] Things are far out of whack, but no one should be surprised by Dobbs. It's shocking, but it shouldn't be surprising. You know, you and I have talked before about how, you know, installing conservative Justices on the Supreme Court--installing conservative judges throughout the federal judiciary--has been kind of part of this really long game on the part of conservatives. If you are surprised by Dobbs, you haven't been paying attention to the last 30 or 40 years. So, it's not enough for people to protest in the streets. Of course, I understand why people are doing that. It's not enough for people to just say, "Hey, just vote." Because if you are in a state where things have been gerrymandered--where it's very difficult to get legislative change going because of all of these structural changes that have been done incrementally... You know, this is where the

organization of the Republican Party has been enormously successful and where there hasn't been a corresponding response on the other side.

Roman Mars [00:32:44] What is the path to making the equivalent of Roe possible again? I mean, constitutional amendments are pretty much a no-go these days. Is there another ruling that would overturn this ruling? Is there a piece of legislation that would work? What is the path? I can't even get it.

Elizabeth Joh [00:33:03] Well, I think maybe the quickest and easiest--but this, too, is by no means easy--would be to have some sort of national, federally protected right that Congress would put in as a matter of law, right? We don't have a majority of lawmakers to make that happen right now, but elections are coming and that is something that could happen. The Supreme Court, I think, is a much harder path because, number one, we've already had an overturning of Roe and Casey. It would be hard to imagine--even with a majority of so-called "progressive" Justices on the Court--that they would then just quickly turn around and reverse the reversal. That would really be sort of the ultimate concession that, hey, this is just a political branch, just like any other. Maybe that's, you know, plain for everyone to see right now. But it's hard to imagine that Justices would do that.

Roman Mars [00:34:04] And would a piece of legislation that guaranteed a federal right to abortion--can the Dobbs decision be used to call that law unconstitutional? You know what I mean? Like, how does this work? I don't even know if I understand.

Elizabeth Joh [00:34:17] Oh, sure. So, you know, the Constitution really is thinking about it this way: It's like an absolute minimum guarantee of rights. So, the federal government can, in some circumstances, provide national rights, even though the Constitution doesn't require it, right? So that's true for things like employment and economic rights. It's also true in lots of civil rights areas. Just because you don't have a constitutionally guaranteed right doesn't mean that Congress can't provide you with that right as a matter of federal law. Now, it just depends, do you have a majority of members of Congress who want to provide the American people with that right? And how long will that right last, right? Those are political questions. So, sure, I mean, Congress can pass such a law. And that's why I think that's the most immediate path. I suppose another way of thinking about the Supreme Court is that the things that seemed laughable--maybe they shouldn't seem laughable anymore. You know, the Constitution is not a religion, and the Court is not a church. You can add more Justices. Congress can certainly legislate the Court, too--although there are certainly questions about the outer limits of their power to do that. But again, you know, there's no reason there has to be nine. There's no reason necessarily that the Supreme Court Justices' terms couldn't be limited instead of having lifetime tenure. These kinds of things could take place. And certainly, there will be challenges, but we're not even really trying those as realistic options right now. If you'll recall, President Biden kind of killed off the idea of adding members to the Supreme Court by having a committee. Nothing says "I don't want to do this" more than making up a committee.

Roman Mars [00:36:04] Yeah, yeah, yeah. You wrote a tweet that was something like, "This decision fundamentally changes what it means to teach constitutional law," or something to that effect.

[00:36:13] Yeah. I mean, I guess it's more of a question, right? Like, what does it mean to--with a sort of sober and serious perspective--say, "the Supreme Court's here to uphold these tenants that it is an apolitical institution dedicated to these principles?" When you say, "And by the way, this entire chunk of our textbook? Just ignore that because we're not

going to be talking about that anymore." And if it feels like, to a new law student, "Well, wait a minute, this right was here. And I don't even really understand why it was taken away." And your professor's answer is, "You know what? I don't really either." You know, pedagogically, that is really hard to go forward with--to say, "You know, maybe it's all about power. But that's not what the law is supposed to be about. It's supposed to be a reasoned set of principles. And, you know, that gets right back to this idea of the Court's legitimacy. We're still believing in this Court. We still listen to what it says. And the question is: Why?"

Roman Mars [00:37:15] What would it mean to not believe in the Court? What would it look like to just consider the Court illegitimate?

Elizabeth Joh [00:37:24] Yeah, I don't know. I mean, you certainly see weakened courts in other systems, right? I mean, I don't think that's a particularly advisable path because it is a central feature of our constitutional structure. For other actors in the political system to say, "Yeah, the courts don't matter at all. I don't have to listen to anything they say," you know, at any other point in history, we would have said that that would be a disaster. The Supreme Court orders desegregation of the schools. "We're just not going to do that--not going to listen." Supreme Court orders recognition of marriage equality. "Not going to do that." We kind of need that supporting structure. The question is: How do you change what's happening in this moment with, really, Justices who said, "You know what? We didn't have to go this far, but we can. So, we did."

Roman Mars [00:38:15] I'm trying to figure out, like, what it even looks like to not accept this decision. I don't know what that means, practically.

Elizabeth Joh [00:38:24] Yeah, practically, I don't know either, I mean, because you can't pick and choose. If you decided that you weren't going to listen to the Court on this thing, well, are you gonna listen to the Court on anything? And we need somebody to be the ultimate umpire on the Constitution. Not sure we want it to be Congress, at least at the moment, since they can't give us an answer on very much. So, that's really the problem. I think what it boils down to is, look, I mean, Dobbs was the result of highly organized legal and political strategies. And some of that's really boring, and it really requires kind of a long perspective, but it works. And for people who care about these issues deeply--and there are many people who do--it does require that kind of long-term engagement and dedication. It's not easy to get people excited about something that won't happen for a while, right? But that's how Dobbs happened. Dobbs is not a shock. It is a totally predictable outcome.

Roman Mars [00:39:29] Is there anything else that we didn't cover that we should?

Elizabeth Joh [00:39:31] I mean, I think maybe we can leave with this idea that we're in kind of a very uncertain time right now--in this moment between the 24th of June, when the Court issued Dobbs, and this moment of uncertainty about a very time sensitive situation for people. When you are pregnant and you are not sure whether any action you take might end up with you as a criminal suspect, I think, or your abortion provider as a criminal suspect, or your friend or family member as a criminal suspect--that's a pretty dangerous time indeed.

Roman Mars [00:40:09] Yeah. It is. This show was produced by Elizabeth Joh 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

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