

What Roman Mars Can Learn About Con Law Jan 6 and the Evidence Against Trump

Roman Mars [00:00:00] So we're talking on Friday, June 3rd at 10 a.m. And it's been not that long since we've spoken, but so many things have happened. I have no idea what you want to talk about today.

Elizabeth Joh [00:00:12] Well, let's talk about what happened in Uvalde. All right?

Roman Mars [00:00:16] Okay.

Elizabeth Joh [00:00:17] So remember on May 24th, an 18-year-old entered Robb Elementary School in Uvalde, Texas. And Uvalde is a small city in Texas--west of San Antonio--and it's about 80 miles from the US-Mexico border. And the gunman killed two teachers and 19 children. And all of the children were just nine, ten or 11 years old. And law enforcement officials eventually shot and killed the gunman. Now, Uvalde was the deadliest mass shooting at a school since the murders of 20 first graders and six adults at Sandy Hook--Sandy Hook Elementary School in Newtown, Connecticut. That was 2012. But it wasn't even the only deadly mass shooting within the last ten-day period before then because on May 15th, a man opened fire at a church in Laguna Woods, California. He injured five people and killed one person. And then on May 14th, an 18-year-old opened fire at a supermarket in Buffalo, New York. He wounded three people and killed ten. And mass shootings continued in the U.S. after Uvalde, too. If you think about mass shootings as incidents where at least four people are killed or injured--excluding the shooter--we had at least 12 over the most recent holiday weekend. And according to one count, it's only halfway through the year, and we've already had 200 mass shootings in the United States. So, because of the number of victims, and because they were mostly young kids, everybody's focused on Uvalde. So why did the police wait so long before they confronted the shooter? Were there warning signs about the shooter before this happened? And is this about video games, or mental illness, or fatherlessness? But you know what? Let's just focus on the guns. So, in Uvalde, Laguna Woods, and Buffalo, all three gunmen bought their weapons legally--and that includes the two teenagers responsible for the shootings in Uvalde and Buffalo. They bought AR-15 style assault weapons--but keep in mind, they were also too young to buy alcohol or cigarettes. Compared to other developed nations around the world, America is an outlier. We have more guns than people--about 400 million guns and about 331 million people. No other developed country even comes close to that. And since 2017, guns are the leading cause of death for American children. So most other developed nations just don't have the same level of gun violence that we do. They make private ownership of guns much more difficult, if not impossible. But in the United States, in many parts of the country, it's just not that hard to buy a gun--even an AR-15, which can fire multiple high velocity bullets that can cause horrific and deadly injuries. So how did we get here? There's the gun lobby, there are lawmakers who have resisted stricter gun laws, and then there are the courts. How did the Second Amendment allow this to happen? And why is it likely to become worse? Time to find out.

Roman Mars [00:04:05] 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 use it to examine our Constitution like we never had before. Our music is from Doomtree Records. Our professor and neighbor is Elizabeth Joh. And I'm your fellow remote learning student and host, Roman Mars.

Elizabeth Joh [00:04:36] So, Roman, let's start with the Second Amendment itself. It's pretty short. So why don't you read it?

Roman Mars [00:04:42] "A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed."

Elizabeth Joh [00:04:50] And that's it. That's the entire Second Amendment. Well, if you think about the Second Amendment, it's an unusual part of the Bill of Rights because it has a preamble--a clause--that's supposed to tell us about its purpose. That's the part that says, "a well-regulated militia being necessary to the security of a free state." That's sometimes called a "prefatory clause." What follows is sometimes called the "operative clause"--the substance of the Second Amendment: "The right of the people to keep and bear arms shall not be infringed." When it comes to the Second Amendment, everybody--everybody--agrees that there is a constitutional right that says something about firearms. In that sense, the Second Amendment is different than when we've talked about abortion, for example. With abortion, a lot of the debate is whether any right exists at all. So that's not the case for the Second Amendment. But with the Second Amendment, what is in dispute is everything else. So, we can boil this down to sort of two big questions about the Second Amendment. The first one is: What exactly is included in that right? That's also a question about whose right it is. The second big question is: Even if there is a right, how much can the government regulate that right? After all, no constitutional right's absolute, and sometimes the government has really important reasons to place restrictions--even on rights that the Court says are constitutionally protected. So, let's start with the question--the first one--about who gets to claim that right and what is it about. So, Roman, the Supreme Court's already answered this question. So, when do you think that issue was decided? 1890s, 1930s, 1970s?

Roman Mars [00:06:29] I actually think this one's pretty recent because this is the D.C. Scalia decision--or wrote the decision? That one?

Elizabeth Joh [00:06:37] That's right. The answer is 2008. So, the Second Amendment didn't have a definitive answer about whose right it was and what was involved in that right until 2008. That's when the Supreme Court decided that case--which you referred to--called "The Heller Decision." And because they waited for such a long time, lower courts came to different conclusions about what the Second Amendment meant. Some courts decided that the Second Amendment protected only a collective right that was held by the states--only the states. So, the idea here is that, since the amendment refers to militias, the purpose of the Second Amendment is to act as a check against federal power to protect the states being states. And so, the concern--the historical concern--was that the new federal government, at the time of the founding, might disarm state militias by banning men from bearing arms while serving as state militia members. So, under that interpretation, that meant that the Second Amendment didn't give individuals any special constitutional right. So that was actually a pretty standard legal view on what the Second Amendment meant for a long time. And in fact, why don't we have a historical check here? You've heard of Warren Burger, right?

Roman Mars [00:07:51] Yes. Yes.

Elizabeth Joh [00:07:52] Burger was the chief justice of the U.S. Supreme Court from 1969 to 1986. He was appointed by President Nixon and not a fringe guy--lifelong, mainstream Republican. But in a 1991 TV interview on PBS NewsHour, Chief Justice Burger said this about the Second Amendment.

Warren Burger [00:08:14] If the militia, which was going to be the state army, was going to be well regulated, why shouldn't 16, 17, and 18 or any other age persons be regulated in the use of arms the way an automobile is regulated? This has been the subject of one of the greatest pieces of fraud--I repeat the word "fraud"--on the American public by special interest groups that I have ever seen in my lifetime.

Elizabeth Joh [00:08:41] So let's talk about the main special interest group. That's the NRA. Beginning in the 1970s, the NRA began to engage in a long and patient campaign to change mainstream views politically and legally about what the Second Amendment meant. And there's a lot of interesting details here, but the short story is that the NRA began to promote the idea that the Second Amendment protected an individual right to bear arms. So, the NRA spread this view in a lot of ways, like trying to pass gun control laws in the states. But if you want to change the minds of judges, you do some very specific things. You sponsor legal scholarship--now, most people don't read legal scholarship, but judges read legal scholarship--that supposedly shows the traditional view on the Second Amendment and that this widespread view at the time that only the states had this right was wrong. So, you make a connection between that view, you call it "constitutional," you call it "the original understanding of the Second Amendment," and then you make a connection between that and being a conservative political advocate. So, in other words, you create the conditions for legal culture to change. It took a long time, but it absolutely worked. And in 2003, a group of individuals sued over a law in Washington, D.C., that made it a crime to possess a loaded handgun in your house. And the man whose name will be forever associated with that case is Dick Heller. Heller was a special police officer assigned to the Thurgood Marshall Judiciary Building. He was allowed to have a gun at work, but he wanted to have one at home, too. But that was illegal under a local law. So, in 2008--for the very first time--in the case of District of Columbia versus Heller, the Supreme Court decided that a gun control law was unconstitutional. But Heller is a really important Second Amendment case for a number of reasons. First of all, it's the Second Amendment case.

Roman Mars [00:10:49] So what's so important about this case?

Elizabeth Joh [00:10:52] Well, a couple of reasons. First, the Court decides that the Second Amendment protects an individual's right to possess guns. The Supreme Court decided in Heller that the core of the Second Amendment isn't about federal tyranny or states protecting themselves. It's about self-defense. In fact, the majority in Heller says that self-defense is, in their words, "central to the Second Amendment." Of course, keep in mind that the words "self-defense" are not in the Second Amendment.

Roman Mars [00:11:20] No.

Elizabeth Joh [00:11:20] And the other aspect that's important in Heller is the way the Supreme Court reached its conclusion. The opinion was written by the late Justice Antonin Scalia, and the Heller decision is about his triumph of originalism.

Roman Mars [00:11:36] So tell me about Scalia's originalism and what originalism is all about.

Elizabeth Joh [00:11:40] So very simply, originalism is a method of interpreting constitutional law. And it's the idea that courts should only interpret the Constitution by figuring out how particular words were allegedly intended to be understood when they

were written--or, as Scalia put it, "the original understanding of the Second Amendment." Because there's a couple of problems with this view, right? First, how do you decide what was intended? It's really hard to ask because you can't. And when it comes to something that was hashed out among a large group of people, it's hard to know what intentions really were. The other problem is that most lawyers aren't historians, and when they try to do history, they're not particularly good at it. And picking and choosing words from historical sources that supposedly provide evidence for your point of view is surprisingly easy. Since Heller, a number of actual historians and scholars have shown pretty convincingly that Scalia got a lot of the allegedly original meaning of the Second Amendment all wrong. The other problem for Scalia's originalism are the words of the Amendment itself. So, do you remember the prefatory part--the purpose?

Roman Mars [00:12:51] Yeah. "A well-regulated militia being necessary to the security of a free state."

Elizabeth Joh [00:12:55] So what about that? Doesn't that limit the reason for people to have guns? So, the problem in Heller is that Justice Scalia kind of conveniently sort of ignores that problem. He says, "Oh, sure, there's a preamble. There's a prefatory clause here about militias. But that's not the only reason that we should have a constitutionally protected right to own guns." So, the fact that self-defense isn't there and the fact that the militia part doesn't limit what the rest of the Amendment means doesn't seem to be a problem. So instead, again, the Supreme Court decides in Heller that the Second Amendment's right to bear arms is really about protecting a right to self-defense. So, it takes until 2008 for this to be decided definitively by the most important court in the United States, and they choose to adopt the individual rights theory.

Roman Mars [00:13:47] And so after the decision, what happened to gun control laws across the U.S.?

Elizabeth Joh [00:13:52] Well, for the law that was challenged, it was pretty easy for the Supreme Court to overturn it because in the majority's view, if there is an individual constitutional right, you can't have a total ban on possessing what the Court called "the most popular gun in the country" at home. Then in the decision, the Supreme Court acknowledged that, you know, like a lot of rights, this right can have restrictions. And Justice Scalia said, "Well, you can have laws on banning felons or the mentally ill from possessing handguns, or banning guns in sensitive places, or putting qualifications"--that's what the Court said--"on the commercial sale of arms." So, the message from Heller was, sure, you can have some gun control laws. But the reason why Heller is important when it comes to gun control is that once the Supreme Court decides that the Second Amendment is a constitutionally protected individual right, it means that every conceivable gun control measure can be challenged in court--arguing like, "Hey, you can't pass this law. It infringes on my individual right." Remember, before the Supreme Court had announced that this was an individual right in 2008--which is not very long ago--states had much more freedom to impose gun control measures because if there's no individual constitutional right, courts generally just defer to whatever the legislature says. Only a totally irrational law would be struck down.

Roman Mars [00:15:24] So it's been 14 years since that decision. What has happened in, you know, subsequent years in terms of gun control and the proliferation of guns?

Elizabeth Joh [00:15:33] Well, a lot of courts did uphold some gun control measures. But the other part is that you start to see some Second Amendment extremism, too. So, let's

take two examples from our own state, California. So just last May, a federal appeals court decided a case involving a challenge to California's ban on the sale of semiautomatic rifles to anyone between the ages of 18 and 20. So, you know the method of interpretation that the Supreme Court used in Heller--which is, you know, what was understood at the time of the founding. Well, the appeals court, in looking at this challenged California law, takes its cue from Heller. Here's the first line of their decision: "America would not exist without the heroism of the young adults who fought and died in our revolutionary army. Today, we reaffirm that our Constitution still protects the right that enabled their sacrifice, the right of young adults to keep and bear arms." So, you know, this is a case about today--a current state law--that's trying to limit access to semi automatic rifles. But for the appeals court, the logic was pretty easy. You look at the Second Amendment by how it was understood in the 18th century. In the 18th century, 18-year-olds could buy guns--have access to guns. It's 2022. They want to buy guns. Therefore, they should be able to buy guns. But I mean, let's just pause here for a moment about how crazy this is because think about how inconsistent the approach is. To decide whether you have the right, you look at what the founders understood. But the kind of weapon the right applies to can always be updated because--if I remember correctly--semiautomatic rifles and AR-15s didn't exist at the time of the founding.

Roman Mars [00:17:28] That's right. You remember correctly.

Elizabeth Joh [00:17:30] Okay. Yeah. So, in the same opinion, the appeals court says--and I'm quoting here--"Under English law, before the Norman conquest of 1066, all able-bodied men were obliged to join the hutesium et clamor to pursue fleeing criminals." I want to remind you this is an opinion from just last month. So, an appeals court says that because in the 11th century you were required to capture criminals--and that's because no one else would--that means that in 2022, 18-year-olds need to have access to semi automatic rifles.

Roman Mars [00:18:08] Because in case there might be Normans outside, trying to steal your stuff.

Elizabeth Joh [00:18:12] Exactly. And then remember, this is a ban specifically on semiautomatic rifles to young adults. So why that? Why do young adults need this particular weapon? Well, one of the reasons, according to the two Trump-nominated Judges who make up the majority here, is that--and I'll quote--"Semiautomatic rifles are able to defeat modern body armor."

Roman Mars [00:18:37] Wow. Wow. Okay.

Elizabeth Joh [00:18:40] And so they strike down this particular restriction in California. Do you know why California lawmakers passed this ban on young adults buying semi automatic rifles?

Roman Mars [00:18:50] No. No, I don't.

Elizabeth Joh [00:18:52] Because of a mass shooting. In 2019, a 19-year-old went to a synagogue in Poway--near San Diego. A shooter injured three people and killed someone. And because of that shooting, lawmakers said, "You know what? Maybe we should restrict access to these guns to these very young adults." Here's another example. You've probably heard about the assault weapons ban that Congress passed in 1994, right?

Roman Mars [00:19:20] Yeah.

Elizabeth Joh [00:19:21] Yeah, it lasted about ten years, and then it expired. But California--our state--was the first state to ban the sales of assault weapons in 1989. You want to guess why?

Roman Mars [00:19:33] From another massacre?

Elizabeth Joh [00:19:34] That's right. At a school that killed five kids in Stockton, California. So since then, the ban has been updated several times by California lawmakers because they wanted to close loopholes that people were using to get around this ban. Now, in June of last year, a federal trial court judge in California declared that the state's assault weapons ban was unconstitutional.

Roman Mars [00:19:57] Was the reasoning for that decision also based off of Heller?

Elizabeth Joh [00:20:02] Yeah, absolutely. And he kind of goes further in a way because this is about assault weapons in particular. Here's what the judge said: "Like the Swiss Army knife, a popular AR-15 rifle is a perfect combination of home defense and homeland defense equipment. Good for both home and battle. The AR-15 is the kind of versatile weapon protected under District of Columbia versus Heller." Keep in mind, of course, that particular weapon was not at all the focus of what the Court was talking about in Heller, but that's kind of what Heller has allowed courts to do in the aftermath. It's a 94-page opinion, but the core of the judge's ruling in this California case is that "Well, the Supreme Court says that the Second Amendment protects an individual's right to have guns for self-defense. The AR-15 is good for self-defense like a Swiss Army knife. Thus, you can't let the state ban it." But the federal appeals court here put a hold on this decision--this was just a trial court's opinion--until it decided another case challenging California's assault weapons ban. And that case is now officially on hold until the Supreme Court decides the case of New York State Rifle and Pistol Association versus Bruen. So, we're in June, and the Supreme Court could be deciding this any day now. But let's talk a little bit about what that case is about. The Bruen case is a challenge to a 108-year-old New York state law that requires you to show what it calls "proper cause"--that's a special reason--if you want to carry a concealed handgun outside of your home. And you can't simply say that "Well, I want to protect myself." That's not good enough. You need a special, specific reason. So, a pro-gun group and two individuals sued, saying that the law violated their rights. They said, "Well, the Second Amendment should guarantee my right to carry a concealed gun outside of my house."

Roman Mars [00:22:00] So if the California cases are about these Armalite rifles--these AR-15 and assault rifles--why are they holding pending this decision about handguns?

Elizabeth Joh [00:22:12] Well, we don't exactly know what the Supreme Court's going to do, but it's because of the possibility of what the Supreme Court might do. Remember, in 2008, the Heller decision was really one where the Court said, "Having a loaded gun in your house is really part of your core Second Amendment right to self-defense." And since then, the Supreme Court actually hasn't had any major Second Amendment cases. So, this could be an opportunity for the Supreme Court to make even broader statements about those two big questions we began with today, right? What the Second Amendment means, and also what the government can do in terms of gun control measures. So, the Bruen decision has the potential to be a major Second Amendment case. So, remember, there's now a conservative supermajority on the Court. And all three Trump appointed

Justices--that's Gorsuch, Kavanaugh and Barrett--have indicated at other times that they favor the same originalist approach to the Second Amendment that Justice Scalia used in the Heller case. And that's why--in the briefs of the parties in this case and in the more than 80 friend of the Court briefs and at oral argument--there is so much discussion about what was understood more than 200 years ago or even longer. Here's just one example. You can take Justice Sotomayor. She is not known for her love of originalism, but at oral argument, Sotomayor begins a question like this: She says, "In 1315, the British parliament specifically banned the carrying of concealed arms." She's talking about the 14th century. We are stuck in this discussion because of Heller. We are stuck in the 14th century. And in Bruen, it's also true that the politics here are complicated. One friend of the Court brief said that being allowed to carry a gun outside of your home allows vulnerable groups to protect themselves, like women and the LGBTQ community. And another friend of the Court brief is by a group of elite Republican lawyers. And they argued that you actually need gun control laws like this and that a similar law in the District of Columbia might have prevented what they called a massacre at the January 6th attack on the Capitol. Why? Because protesters were told--they knew--that you couldn't bring a handgun into the District of Columbia, and so they didn't. So, it's not really as cut and dried as you might think. So, we don't really know what the Supreme Court's going to do, and they may decide any day now. The Supreme Court could decide this case very narrowly. They could just decide, "Look, we're only going to decide this about the New York state law and the wording of this proper cause aspect," and then won't say much. Or the Supreme Court might decide to make Bruen yet another opportunity to expand the scope of Second Amendment rights by deciding that all individuals have a broad right to carry guns outside of the home and that the only judicial approach that matters is originalism. And that's going to make it much harder for states and the federal government to impose gun control measures no matter what lawmakers say--even after Uvalde.

Roman Mars [00:25:32] I'm struck by how originalism is used. When I think of the word "originalist," I would think of just what is written in the text, okay? And if self-defense is now part of everything because of the Heller decision, that is clearly not written in the text. But well-regulated militia and security of a free state is. Like, it just seems that originalism is so selective as to be a meaningless doctrine.

Elizabeth Joh [00:25:58] Yeah. I mean, I think one of the big issues in originalism is that it's never just looking at the words and saying what they mean. And of course, with something like the Second Amendment--which is language that is alien to most people today--you know, it's not obvious what it means at all. And so, originalism, by its very nature, is sort of guessing--using historical sources--about what might have been meant by those words. And then there's the more basic question of why should that matter at all? Why is the Supreme Court in 2022 arguing about the 14th century? I mean, in some ways it seems very absurd even to begin there.

Roman Mars [00:26:35] In all ways, it seems absurd.

Elizabeth Joh [00:26:37] In all ways, it seems absurd. But, you know, we're kind of stuck there because of Heller--because the majority of the Supreme Court, the supermajority, seems quite intent on sticking to that approach and even going farther maybe than what Heller has done. And so, you could have many different approaches--and there are many different approaches--to interpreting the Constitution. Originalism is only one of them. It's a choice. And I think that's what people need to understand. There's nothing obvious about originalism. It is a decision that judges make, and they're not mandated to do this. And again, the long, and slow, and extremely successful campaign by the NRA to influence

legal thinking that's saying originalism in this way absolutely has uncovered, in their view, an individual right under the Second Amendment--that is a campaign. And so, in some ways, we could say that that has some promise for people who are feeling despondent right now about the Second Amendment because that is the result of a political campaign. You know, another different kind of campaign can change what that means, but it takes a long time. Remember, the NRA started this in the 1970s, and Heller was not decided until 2008.

Roman Mars [00:27:58] Are there other examples in which the interpretation of constitutional rights has changed because technology has changed to such an extent as to make it, you know, just a very different world for that right to exist.

Elizabeth Joh [00:28:16] Well, sure. I mean, that's a great question, and we can use two examples. One is abortion itself. We don't think of abortion in terms of technology, right? But we used to think of the original Roe versus Wade in terms of three trimesters. And that's because it was thought that, well, it's only until the third trimester in which we think of fetal viability as being an issue. But technology itself--medical technology--has changed. And that kind of didn't make sense to talk about only the third trimester. And that's why you get this idea about, "Well, maybe it's just viability. Where does that mean?" And that has mucked up the constitutional doctrine a bit. It's made it maybe perhaps more complicated than it was before. And when it comes to the Fourth Amendment's prohibition on unreasonable searches and seizures, there's been a lot of updating there.

Roman Mars [00:29:02] Oh, 'cause the car?

Elizabeth Joh [00:29:03] The car, the cell phone, you know, data. You know, the Court can't just say, "Well, you know..." Is it really like when the constable came into your home, you know? That's just not the same thing. But they can use analogies, and they always do. But in other areas of constitutional law, the Court's been much more willing, I think, to say, "Well, sure, this was meant at the time of the founding, but there are other things that have changed dramatically in modern life." We have not seen that with the Second Amendment.

Roman Mars [00:29:33] Hmm. Interesting.

Elizabeth Joh [00:29:35] One of the things we can point to is the Court's increasing concern that we are losing our ability to control our privacy in lots of ways because of technology. So, this is not the case where the Supreme Court is an institution that is incapable of understanding how much technology can intrude upon our individual ability to control our own information or ourselves. So that's why, for example, the Court can make a decision that, "Hey, you know, it's scary that cell phone companies can have all this information about us without us necessarily even knowing about it. And therefore, we have to change the way the Constitution protects our rights." Now, imagine--just imagine--if something even remotely similar were applied to the Second Amendment. Sure, you know, there used to be the case that every male citizen had to take part in catching criminals. But it's 2022. It's not 1066. And things have changed. But this is this one bizarre area of constitutional law where, you know, there has been enough political and ideological pressure to make a majority of not just the Justices--you know, just giving you some examples from lower court opinions--where they feel like originalism is the only approach that they will apply to this particular corner of constitutional law.

Roman Mars [00:31:01] Well, it's really fascinating--the exceptionalism around the Second Amendment. And I'm glad I learned so much more about it. Thank you so much.

Elizabeth Joh [00:31:09] Thanks, Roman.

Roman Mars [00:31:18] This show is produced by Elizabeth Joh, 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.