What Roman Mars Can Learn About Con Law
The Longest Week

Roman Mars [00:00:00] So, we are talking on Tuesday, July 26th at about 12:15 p.m. And what is our subject for this episode?

Speaker 2 [00:00:07] Well, let's talk about the longest week of a Supreme Court term ever.

Roman Mars [00:00:13] Yeah, I felt it. I felt it, too.

Speaker 2 [00:00:15] In any Supreme Court term, which begins every October, the Supreme Court tends to issue its most important decisions at the end of the term, which is usually at the end of June. And this term wasn't any exception, but it was a different kind of term. The Supreme Court decided to unrecognize a constitutional right; that's what happened when the conservative majority on the Court overturned Roe v. Wade in the case of Dobbs versus Jackson Women's Health Organization. So, now states can criminalize abortion entirely, and some states have started to do just that. That was June 24th. The Supreme Court also decided to expand another constitutional right. In New York State Rifle and Pistol Association versus Bruen, the Court decided that the Second Amendment protects a broad right to carry guns outside of your home. In this Second Amendment case--just like in the abortion rights case--the Court said what matters is history and tradition, but just in the other way. Now, if the states want to impose rules on carrying guns in public after Bruen, they have to show that that regulation is consistent with this nation's historical tradition of firearms regulation. That was June 23rd, but that last week wasn't about just guns and abortion. The last week of this Supreme Court term this year is probably the most historically significant one maybe in almost 100 years. The Chief Justice said that overturning Roe was a jolt to the legal system. That's only partially right. The six-person conservative majority on the Court has made it clear that they are intent on changing constitutional law, that they are in a hurry, and that they are just getting started. So, what happened in those other cases and why are they so important? Time to find out.

Roman [00:02:15] Let's do it. This is What Roman Mars Can Learn About Con Law, an ongoing series of indeterminate length, where we take the dizzyingly inconsistent decisions of the Supreme Court and use them to examine our Constitution like we never have before. Our music is from Doomtree Records. Our professor and neighbor is Elizabeth Joh. And I'm your fellow student and host, Roman Mars.

Elizabeth Joh [00:03:05] So, let's start with religion. The First Amendment both protects the free exercise of religion--that's called the Free Exercise Clause--and bars the government from establishing government-sponsored religion--that's called the Establishment Clause. Now, both of these are in the actual text of the First Amendment, but what they mean and how those two clauses relate to one another is not obvious. So, of course, it's been up to the Supreme Court to interpret these questions. Now, I'm sure you've heard of the term "separation of church and state"--that we don't have an official government religion. But this is a distinction that the Court has not always been entirely clear about, and their most recent cases show the direction they're going in. On June 21st, the Court had decided a case called Carson versus Makin; that involved a challenge to the way Maine handled its education funding. Maine has rural areas where there aren't any public schools, so you need to do something for those students. And the state of Maine addressed the problem in this way: A public school district can decide to pay the tuition at a local private school so long as it is not a religious one. And you can see the logic here, right? If they did, wouldn't that be official sponsorship of a religion? And the state didn't

want to do that. But in the Carson case, the six conservatives decided that the State's ban on religious schools discriminated against religion. In other words, Maine's attempt to avoid the Establishment Clause's bar violated the Free Exercise Clause. So, according to the six-person majority, the conservative Justices, Maine's program was unconstitutional. But to give you an even better example of how far the conservatives are going when it comes to religion is another case decided on also that last week of the term. It's called Kennedy versus Bremerton School District, and this is a case about prayer and public schools. A good way to think about this case is by breaking it up into three questions, I think. First, you know, what kind of dispute is this--is it a workplace case or a private speech case? The second question is: What part of the First Amendment really matters here? And then the third question, believe it or not, is: What actually happened? Okay. So, let's start out with what the majority says. Joseph Kennedy is hired in 2008 as an assistant coach for the football team at Bremerton High School. So, that's a public high school in Washington State; that's why we're talking about the First Amendment. Kennedy--let's call him "the coach"--had started to make it his practice to pray at the 50-yard-line of the football field. That's the very middle.

Roman [00:05:53] That one I got.

Elizabeth Joh [00:05:56] As soon as the games are over. So, he starts this midfield prayer as soon as he's hired. And over time, it becomes a practice where most of the student players join him in this on-the-field prayer as soon as the game is over. And then the coach also starts to deliver religious speeches after the game, too. Was this okay under his workplace rules? No. The school district had a specific policy. They said that school staff shall neither encourage or discourage a student from engaging in oral or silent prayer or any other form of devotional activity. Not only that, the school district said that religious services shall not be conducted in connection with any school-sponsored or school-related activity. But for whatever reason, the school district doesn't find out that the coach is doing this until another school's football coach tells the Bremerton principal that, "Hey, it's cool that you allow a coach to do this--pray on the field." And this happens years later. The school district tells the coach, "Look, you have to stop doing this. You can't keep praying in the middle of the football field with our students as the coach right after the football game ends. You're making it look like the school is endorsing religion--and not only that, a particular religion. We're not allowed to do that. We'd be violating the Constitution." And the coach initially stops--but then he gets a lawyer. And the coach's lawyer tells the district, "You're violating my client's right to exercise his First Amendment rights. He's going to go back to the 50-yard-line prayers at the next game." And this is October 16th, 2015. He does; he goes back. He does it, and he repeats this for two more games. What does the district do? They fire him. The coach sues, and the case goes up to the Supreme Court. And the conservative majority decides in a 6-3 decision, and the Court's opinion is written by Justice Gorsuch. So, I want to go back to those three questions to help you understand what's going on in the case, right? So, the first one was: Is this a workplace issue or a private speech issue? If the coach was speaking as a government employee, the government--and that's the school district--could restrict the speech of its own employees when it comes to the things that they're doing as part of their duties. And it's the same reason, and you and I have talked about this before, that school districts have a pretty good argument--that they can tell their teachers that teaching some subjects like critical race theory is not allowed. It's the same idea--that the government can restrict the speech of its employees when it comes to their duties. But if the coach's prayers were private speech, then the district would have a harder but not impossible time of trying to restrict what the coach was doing. So, the conservative majority in the coach's case says, "This is clearly private speech. He wasn't coaching. He was engaged in quiet prayer. And if we let

the school district fire this coach for his quiet Christian prayer, then you know what else could happen? The school district could also fire a Muslim teacher for wearing a headscarf in the classroom." So, that's how they want to see it. Then there's the next question: Which part of the Constitution is important here? Remember, the school had a policy of telling all of its employees, "Don't do anything as a part of your job on school grounds or as a part of a school function that makes it look like you're encouraging a particular religious practice." Why? Because of the Establishment Clause, right? You're not supposed to do that. But the majority that decides in favor of the coach doesn't focus on the Establishment Clause at all. For the conservative majority, this case is about religious freedom and religious freedom only. Justice Gorsuch says that this is a case about religious tolerance. So, what happened to the coach was that his government employer punished him for engaging in what Gorsuch says is a "brief, quiet, personal religious observance." And in other words, he's saying that the government punished the coach and violated his First Amendment rights. All right. And that leads us to the third question in this case: What actually happened? The coach argued from the beginning that he had the right to engage in what he called brief, quiet prayer on the football field right after the game had concluded. Now, what's interesting here is that Justice Gorsuch picks up this phrase and puts it in the majority's conclusion--that this coach has a right to "brief, quiet" personal religious observance. So, I was curious about this, so I took another look at the opinion. Gorsuch refers to the coach's prayers as "quiet" 12 times. He really, really thinks this is about a "quiet" prayer. And so how can you punish that, right? How can you punish a guy who's just quietly praying? But then Justice Sotomayor pens her dissent. She says, "Wait a minute. Do you think this is about punishing a guy who just wants to quietly pray on his own?" She says, "Why don't we take a look at the record?" So, remember at the beginning, you know, he's praying with the students at these football games. And remember that the school district launched an investigation into the coach's practices. Well, the athletic director initially told the coach, "Stop doing this. Stop praying with the players at the games." And then the coach's response was, he goes on Facebook, and he says, "I think I might have been fired for praying." He hadn't been, but that's what he says. He makes his public announcement. And keep in mind that he was told to stop. He says he's going to continue right after he gets into this dispute with his employer. He didn't just decide this on his own. He went on a media campaign, announcing his plans to pray at the October 16th, 2015 homecoming game. The Seattle Times headline that covered the story said, "Bremerton Football Coach Vows to Pray After Game Despite Order." And when the homecoming game ends, the coach did--of course--in fact kneel in prayer, just like Gorsuch said. But Gorsuch omitted what else happened. The coach was joined by other coaches and players. He's surrounded by TV cameras. The public rushes the field; they knocked down the student band members. There was a group of Satanists who announced that they were going to come and join prayer on the field, but they weren't allowed to go on the field, actually; they were barred from doing so, unlike the coach. This isn't exactly the picture of quiet prayer that Gorsuch painted in order to justify ruling in the coach's favor. And there's more here, too. The six conservatives said that this was primarily a case about religious freedom. Well, is that really right? The school district clearly wrote their own policies to avoid Establishment Clause problems. They didn't want to endorse any particular religion. Another way to think about the Establishment Clause is to say that, well, it demands that the government be neutral about religion. And when you have a school employee leading a prayer at a school event on school grounds, wearing his school uniform. Well, you could also say this is a form of coercion, right? Coercing kids to pray. Now, of course, the coach never told his student athletes to pray, but as Justice Sotomayor pointed out in her dissent, you don't need to say very much when you're an authority figure for kids. And in fact, after the dispute between the coach and the school district began, several parents told the district that their own kids had prayed with the

coach just so they wouldn't stick out. They don't want to be excluded. And then after the coach was eventually disciplined and his contract wasn't renewed, no players prayed on the field at all. So, what you have here is a case where there is certainly a clash between the Establishment Clause and the Free Exercise Clause. There isn't an easy way to resolve that tension--but in the Bremerton case, the six-person majority made it very, very clear where their interests lie. They are not interested in the Establishment Clause; they see this purely in terms of religious freedom. But in order to get to that conclusion, they really had to ignore a lot of what actually happened on those three games.

Roman [00:14:39] It's amazing. And as I recall, like, Sotomayor put in a picture of all the people praying, like, to show that it wasn't quiet prayer--that it was really, like, a gathering of people. I've never seen a picture inside of an opinion before.

Elizabeth Joh [00:14:52] Yeah, that's right. They're not too common, but she posted a picture that comes from the Appeals Court decision from the Ninth Circuit. And in that picture, you see the homecoming game. And remember, Gorsuch had said, "You know, this guy is really doing his own private religious thing, and I can't believe the school district punished him for it." But in the picture itself, you see the coach praying--he's surrounded by at least 20 student athletes and a bunch of television cameras. I mean, in a way, you could say that by defying what the school district had told him, he was saying, "Look, I have the right to engage in school-sponsored, demonstrative religious practices." So, a lot depends on what facts you decide to see and how you decide to characterize them.

Roman [00:15:38] Yeah. Yeah. Fascinating.

Elizabeth Joh [00:15:40] And, you know, this is just the beginning, of course. I think this is not the last of what we're going to see in terms of what the Court is thinking in terms of the clash between religious freedom rights and the Establishment Clause. And as Sotomayor put it in her dissent, the Court sets us further down a perilous path, enforcing states to entangle themselves with religion, with all of our rights hanging in the balance. Because, of course, now a school district like Bremerton has to be forced to allow this to happen. They can't do anything about it. That was June 27th. And then the six-person majority had another target that week: climate change.

Roman [00:16:26] Oh, goodness. Okay.

Elizabeth Joh [00:16:27] Let's talk about that... In 2015, the Obama administration adopted what they called the Clean Power Plan. So, this was a set of rules designed to address climate change. Huge problem--needs a big plan, right? So, part of what was going on in this plan is that power plants were supposed to reduce their emissions by doing things like shifting more of their own production to resources like wind and solar. So, as a policy matter, that kind of makes sense, right? I mean, if you want to have less greenhouse gas emissions, that's what you do. But the plan was challenged in court, like these plans often are. So, it's put on hold; it didn't go into effect. Then in 2019, the Trump administration said, "We have another plan." You can probably guess how different the Trump administration's plans were. But that plan was also put on hold after it had its own legal challenges. And then the Biden administration asked the Federal Appeals Court not to reinstate the Trump rules after this court challenge, because--look--now there's a new administration, we're going to have new regulations. Despite all of this, the Supreme Court decided to review the case. So, both the Obama and Trump era plans about carbon emissions were rules issued by the EPA, the Environmental Protection Agency. And this is an administrative agency that is created by Congress and receives its powers from

Congress. The narrow question in this case is whether a specific provision of the Clean Air Act gives the EPA the power to do things like require power plants to switch some of their production to renewable sources like solar and wind. That's pretty dry and boring; doesn't get anybody very excited, right? And if you have a challenge to how an agency uses its statutory power--that's the power given by Congress--you focus primarily on the text of that law, right? That makes sense. Well, in West Virginia versus EPA, the six Justice majority announces a new legal test. They make it up. It's called the Major Questions Doctrine.

Roman Mars [00:18:31] What does that mean?

Elizabeth Joh [00:18:33] Well, according to the majority, this doctrine means that when an administrative agency like the EPA uses its power to make decisions that the Court calls "of vast economic and political significance," the Court shouldn't assume that Congress meant to give them this power. And in fact, if Congress wants to give them this huge power, they have to be clear about it; they have to say, "This is exactly what we intended." With this brand-new rule, the six-person majority decides, "Well, there is no way that the EPA can rely on a not-very-often-used provision of the Clean Air Act to make this enormous change in the way that we regulate power plants--even if it's to address climate change." But this isn't a case that's just about a single environmental law. The Court refers to two of its prior decisions to decide this case. What does it rely on? Its rejection of the CDC's eviction moratorium as a COVID-19 response in 2021, and its rejection of the OSHA employee vaccine mandate in 2022. The EPA using its authority to combat climate change? The Court says this is no different. So, one way to think about this is--yes--this is really about the Clean Air Act, and it has a lot of importance for environmental law. But West Virginia versus EPA is also an all-out attack on the ability of administrative agencies, including the EPA, to address the major issues that are facing the country, including climate change. And Justice Kagan, here, writes a blistering dissent. She's joined by the other two liberal Justices. It's pretty acid. The majority solution--she says, "Well, Congress has to be very specific in telling agencies what to do?" Kagan points out that's pretty silly. She says, "Members of Congress often don't know enough and know they don't know enough to regulate sensibly on an issue." And that's why we have these agencies in the first place. The larger consequence here is that the EPA decision is a big win for conservatives who want to take down the administrative state or the whole set of agencies that exist--you know, the ones that regulate our air, our food, our drugs, our workplaces, our financial marketplaces. And how do they do that? Because the Supreme Court, in its six-person majority, invented a new rule for topics that it doesn't like. And Kagan, in her dissent, summed it up this way: "Whatever else this Court may know about, it does not have a clue about how to address climate change. The Court appoints itself, instead of Congress or the expert agency, the decision maker on climate policy. I cannot think of many more things that are frightening." That was June 30th, 2022--the last day of the last week of the most important Supreme Court term in decades.

Roman Mars [00:21:35] Oh, my God. Oh, it was so much worse than I imagined. So, when you look at all these decisions in their totality, what does that mean to you?

Elizabeth Joh [00:21:43] Well, you know, each of these cases is sort of alarming on their own, I think. But what we see now, I think, is the most political Court in many, many decades. It's driven by a group of Justices, with the exception of Thomas, who are appointed by presidents who lost the popular vote. And just in one week, the Justices decided cases that--as a policy matter--are out of step with what majorities of Americans say they think about reproductive rights, gun regulations, and climate change. And so, you might counter by saying, "Well, what about conservative judicial values, right? Maybe

that's what's binding all this together." But let's think about the usual justifications for why conservative judges rule the way they do. Well, it turns out that if you look at that last week of the Court, what you see is incrementalism when they feel like it, sticking to prior decisions or stare decisis when they feel like it, sticking to the text when they feel like it, states' rights when they feel like it, and individual rights when they feel like it. So, it's pretty clear that after that last week of June that this is just the beginning of their project.

Roman Mars [00:23:00] Yeah. I mean, that's what I find so pernicious about it all. It's like... I heard David Plotz talking about this on the Slate Political Gabfest--bad law is bad law, but uncertainty has a real corroding effect on how we live. And if in some cases individual rights are paramount, in some cases they're thrown away--and it's all very capricious--it really makes for just uneasiness and uncertainty among the populace.

Elizabeth Joh [00:23:30] Yeah, I think that's right. And if you look at what's happened just in the month since the Court decided Dobbs--that's the abortion decision--I mean, one of the biggest ironies is that the conservative majority in Dobbs said, "Look, Roe was bad because the Court stepped into the issue of abortion when it shouldn't have." And in their words, "It inflamed the issue of abortion and caused division around the country." And so, the implication is that by overturning Roe, the Court is somehow returning stability to the country--by getting out of the business of recognizing a constitutional right here. But in the months since Dobbs--as you point out--I think the opposite has been true, right? Dobbs has created its own kind of chaos. So, remember, after Dobbs, abortion can now be completely banned by the states. But if you consider that statement, what exactly does that mean? Let's say that a state says that providing an abortion is a crime, except in cases where it's necessary to save a woman's life--or they might use the word "medical emergency." Now, a lot of these laws--both the very old laws and the so-called "trigger laws" that were passed in advance of thinking that Roe was going to be overturned--they were drafted as kind of, you know, making political gains. They weren't really carefully thought-out laws. And we're now seeing the consequences of that because these laws clearly were intended to cover sort of conventional abortions, right? But if you just have a generic law that says, "Well, you can't have abortions except to save a woman's life." Well, what if a pregnant woman is suddenly having a complication where the fetus can't be saved anyway--where a live birth is no longer possible? Does the doctor have to wait until the woman's about to die to provide the abortion--in other words, watch the suffering of the patient until they feel that they're legally allowed to perform the abortion? And then again, with these hastily or not well-thought-out laws, what counts as an abortion? You know, if a woman has a miscarriage--where the fetus is no longer alive, but it's still in her body--you know, it turns out that the procedure used to manage that miscarriage is exactly the same procedure as you'd use for an abortion. So, are both of these procedures illegal now? It's also true for drugs, right? If a drug that can be used to end a pregnancy is also one that happens to be routinely prescribed for people with health conditions that have nothing to do with pregnancy, will a pharmacist still sell it to you?

Roman Mars [00:25:58] Right.

Elizabeth Joh [00:25:59] So, again, many of these bands were written to score political points. It turns out now, we're finding out very quickly that they apply to medical procedures and prescriptions--that it's just not clear whether they're covered by those laws. And it's been left up to hospitals and doctors and pharmacists who--you know--understandably don't want to face the possibility of prosecution. And the result is a lot of suffering--and even for women who never thought that the abortion bans would ever apply to them.

Roman Mars [00:26:33] Well, thank you for this grim roundup of all things that happened in the final week of the last term.

Elizabeth Joh [00:26:38] Yeah, it's definitely not a happy time, but it's important to be informed.

Roman Mars [00:26:43] Well, thank you so much for keeping us informed.

Elizabeth Joh [00:26:45] Thanks for having me.

Roman Mars [00:26:50] This show is produced by Elizabeth Joh, Jeyca Maldonado-Medina, Sarah Baik, 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.