

What Roman Mars Can Learn About Con Law The War Between the States

Roman Mars [00:00:00] Okay. So, it is Friday, November 18th, at about 11 a.m. And what are we going to talk about this time?

Elizabeth Joh [00:00:05] Well, why don't we start off with the midterms?

Roman Mars [00:00:08] Okay. Yes.

Elizabeth Joh [00:00:09] So everyone was predicting a Republican red wave, and that meant probable control of the House and likely control of the Senate. And, of course, that would have been historically expected. The incumbent president's party usually loses seats in the midterms. So, Trump lost 40 seats in 2018. Obama lost 63 House seats in 2010. And Bush and Clinton both lost the House during their midterms. But that red wave nearly everybody was expecting didn't happen. And on November 12th, Catherine Cortez Masto narrowly kept her Senate seat in Nevada, and that secured 50 Democratic seats in the Senate. And there is one remaining race--that's the December runoff election in Georgia between the incumbent Democratic Senator Raphael Warnock, and his Republican challenger, Herschel Walker. And Republicans did win the House, but just barely. They secured the 218th seat on November 16th. It was not a red wave. So, I think in part, we can thank the Supreme Court for the results. Everywhere that abortion was on the ballot, voters came out in big numbers to protect abortion rights. And the issue of abortion rights turned out to be a huge factor in motivating voters in general in battleground states. And that was critical in places like Pennsylvania and Michigan. And another big factor was the high turnout in battleground states to defeat a lot of anti-democratic candidates that supported Trump's big lie that the 2020 election was stolen. And the Republican candidates for governor in Michigan, Pennsylvania, Wisconsin, and Arizona were all election deniers, and they were all endorsed by Trump. And they all lost. Now, Trump is the leader of the Republican Party. And this, if you're counting, is his third loss. There's the Democratic wave of the 2018 midterms, his loss in 2020, and now the 2022 midterms. So, is it time to step aside?

Roman Mars [00:02:20] Apparently not.

Elizabeth Joh [00:02:22] Yeah. On November 15th, the man who was impeached twice as president attempted to overturn the results of the 2020 election, never conceded that he lost, praised the people who participated in the January 6th attack on the Capitol, appointed three of the five Supreme Court Justices who decided to overturn Roe versus Wade, and now may face criminal charges from a special counsel that will be announced by Attorney General Merrick Garland announced that he was running again.

Donald Trump [00:02:52] In order to make America great and glorious again, I am tonight announcing my candidacy for President of the United States.

Elizabeth Joh [00:03:04] So the Democrats avoided a red wave, but the country is still politically polarized. But Roman, I have a question for you. Have you ever eaten foie gras?

Roman Mars [00:03:16] I don't think so. No.

Elizabeth Joh [00:03:17] Oh, well, now that's time to consider that dish because that's what I thought we'd talk about. What do ducks, horses, and pigs have to do with the Constitution and political division? Time to find out.

Roman Mars [00:03:31] Let's do it.

Roman Mars [00:03:51] This is What Roman Mars Can Learn About Con Law--an ongoing series of indeterminate length, where we look at the lawsuits concerning the odd and dormant clauses of the Constitution and pretend I'm a first-year law student, a very old, very slow first year law student. Our music is from Doomtree Records. Our professor and neighbor is Elizabeth Joh. And I'm your fellow student and host, Roman Mars.

Roman Mars [00:04:22] That was quite a cliffhanger zag you threw at the very end there. So, what does foie gras have to do with any of this?

Elizabeth Joh [00:04:29] Okay. Well, we're going to end up, I think, in an unexpected place. But let's start with ducks and foie gras. So, if you've ever eaten foie gras--that's duck or goose liver--maybe you haven't thought about why it tastes so rich. And that's because of the French practice known as "gavage." And gavage means that you force-feed a duck or a goose by sticking a tube down its throat for a couple of weeks and feeding it. You're force-fattening the duck and its liver. But there's a growing call from many consumers, who are also voters, that the animals that we eat be treated humanely during their lives. And California has passed a number of laws that require the humane treatment of animals raised for meat. And in 2004, California passed a law that said it can't sell any product that is the result of force-feeding a bird for the purpose of enlarging the bird's liver beyond normal size. The law was supposed to go into effect in 2021, so no more sales of foie gras in the state of California. Now, as you can guess, a group of foie gras sellers filed a lawsuit in federal court. They argued that the law was unconstitutional. They said the goose liver ban violated the dormant commerce clause.

Roman Mars [00:05:48] Okay. So, what is the dormant commerce clause?

Elizabeth Joh [00:05:51] So, first of all, it's a terrible name because there isn't a clause in the Constitution called the dormant commerce clause. There's actually no clause at all. There's a commerce clause in the Constitution. But that gives Congress the power to regulate interstate commerce. So, the dormant--or sometimes it's called the "negative commerce clause"--is just a principle that the Supreme Court has interpreted into the Constitution. And the idea here is that the Constitution prohibits the states from using their own state laws in a way that makes it impossible or really difficult to have the free flow of interstate commerce across the country. It's called the dormant commerce clause because Congress isn't doing anything here. You know, it's sleeping. That's the dormant part.

Roman Mars [00:06:36] I see.

Elizabeth Joh [00:06:37] And because it's not based on anything in the Constitution itself, some of the Justices absolutely hate it. Justice Thomas, for example, has said for decades now that there's nothing there. There's no dormant commerce clause at all. Why do we pretend it's a thing?

Roman Mars [00:06:51] So then if there's not a thing, according to Thomas, then how do you violate the dormant commerce clause?

Elizabeth Joh [00:06:57] Well, there are two ways you can have a dormant commerce clause problem. First, states can't discriminate against interstate commerce. For example, California can't say you can only buy peaches from California farmers but not peaches from Georgia farmers. The other potential problem is that states can't have laws that unduly burden interstate commerce, even if they don't discriminate against out-of-state commerce. What this means is that a state law that has effects on interstate commerce can't work in such a way so that its burdens outweigh its benefits. So sometimes that's called the "Pike balancing test." There's also a related idea from the Supreme Court that states aren't allowed to regulate commerce that happens wholly outside of the boundaries of the state, and that's sometimes called the "extra territoriality principle." So back to the foie gras case. The producers argued that the ban was a violation of the dormant commerce clause. But in May of 2022, a federal appeals court in California rejected their claim. It's probably the only federal appellate opinion ever published with a picture of two duck livers--a tiny normal one, and a giant force-fed one.

Roman Mars [00:08:07] Yeah.

Elizabeth Joh [00:08:07] And the appeals court decided that the California foie gras ban wasn't the kind of law that discriminated against interstate commerce. And the ban didn't burden interstate commerce either. After all, if you sell foie gras, you're free to keep force-feeding ducks and geese and selling your products outside of the state, just not inside the state of California. And that was the end of that challenge.

Roman Mars [00:08:31] Okay.

Elizabeth Joh [00:08:32] But that ban was just one of many animal welfare laws that Californians approved. In 2008, voters in the state passed Proposition two. That law required that calves, hens, and pigs be raised in conditions so they could freely move around. And it's because of Proposition 2 and another law that was passed a few years after that that you can't buy an egg in California if the hen that laid it was stuck in a cramped cage. And those cramped cages were the industry standard before the law. The problem is that Prop 2 wasn't that specific about what it meant for a calf, hen, or a pig to move around freely. And so, in 2018, California voters--by an overwhelming margin--passed Proposition 12.

Roman Mars [00:09:18] Okay. So, what does Prop 12 do?

Elizabeth Joh [00:09:20] Well, it clarifies what it means to treat these animals humanely. And Proposition 12 bans sales of veal, pork, and eggs when they don't meet those requirements--no matter where that animal was raised.

Roman Mars [00:09:34] Okay.

Elizabeth Joh [00:09:35] So, for instance, Prop 12 says that starting in 2022, California would ban selling within the state what the law calls "whole pork meat" that the seller knows or should know is the meat or immediate offspring of a covered animal who is confined in a cruel manner. So, in plain English, what that means is you can't buy pork in California under the law if it comes from a cow or its offspring if that store was stuck in a tiny crate where it couldn't move around. And that tiny crate--it's supposed to be at least 24 square feet of living space. And it doesn't matter where the pig is located. If the pig didn't have that amount of living space, you can't sell its meat or the meat of its offspring within the state of California. And violating the law can have civil and criminal penalties. Now, at

the time Prop 12 was passed, the vast majority of breeding pigs in the United States lived in conditions that did not meet those standards. And that's still true. And in 2019, the National Pork Producers Council and the American Farm Bureau Federation filed a lawsuit in federal court. The pork industry argued that Prop 12 violates the dormant commerce clause, and the Supreme Court decided to take their case. The Justices heard oral argument on October 11th. And the Prop 12 challengers have two main arguments. Well, I mean, they say it's true, but it's actually sort of one. So, the first argument is that the challengers say, "Look, Prop 12 violates what's called the extra territoriality principle of the dormant commerce clause." That's just another way of saying that California can't regulate things that happen completely outside of the state of California. Second, the challengers argue that Prop 12 burdens interstate commerce in an unconstitutional way. In other words, even if there's a benefit to California in passing a law, it's still outweighed by a burden on interstate commerce. But actually, they're sort of the same argument; they're really just saying that there's an impermissible impact of the state's law outside of the state of California. So, I also want to clarify something here. The dormant commerce clause means that states can't pass laws that unconstitutionally burden interstate commerce. But that doesn't mean that a state law can't have any effects on interstate commerce. And that's because it's kind of impossible. Almost every state law has some kind of effect outside of the state. So, the tricky question is how much is too much? And in the Prop 12 case, the challengers argued that the burden imposed by California's law is enormous, and that has something to do with California itself. California imports 99% of its pork from outside of the state. But Californians eat about 13% of the pork raised within the United States, so California is a huge percentage of the national market. It's a \$26 billion market that raises 125 million pigs a year, according to the briefs. And the challengers say that because of the way the pork industry works, the effect of this California law would change how the entire pork industry raises pigs. That's because the pork industry, again, from the briefs, is totally segmented. Piglets are born in one place, then they're raised in another, then they're sold to slaughterhouses somewhere else, and then they're processed in yet another place. So, you can't really tell where a particular cut of pork came from. So, the challengers argue, "Look, if the pork industry wants to sell pork within California, they basically have to restructure the entire pork industry in the United States. They don't have to do that. It's unconstitutional." So far, this National Pork Producers case might seem maybe interesting, but a really niche case, right?

Roman Mars [00:13:24] Well, yeah, but I can see down the tunnel of how it would have great implications down the line. So, let's keep going.

Elizabeth Joh [00:13:30] So let's remember that a state law can violate the dormant commerce clause if its benefits outweigh the burdens. So, Roman, do you have any guess as to what California says is the reason they passed Prop 12?

Roman Mars [00:13:42] I mean, as advertised to the people--the populace who voted for it--I would imagine two things. One is just animal welfare and sort of the empathy related to animal welfare. And also, probably a health benefit or, you know, like, the fact that we have a right to decide what goes in our bodies, and it can't be, like, captive animals.

Elizabeth Joh [00:14:00] Yeah. I mean, I think that's right. I mean, that's exactly what California argues. They said, "Originally, the purpose of the law is to protect consumer safety and to protect animal welfare." So, let's take those two reasons. Health and safety for the people of the state is a completely legitimate concern. But the problem is that the consumer safety benefit here is pretty thin. There's not that much evidence to suggest that pork from a pig that was living even in really not so great conditions is in some way

harmful to consumers. So then maybe the real reason California has this law is animal welfare, as you point out--that Californians don't want to have anything to do with an industry that treats pigs this way. Well, let's call that an ethical objection. So, states can clearly pass laws for moral reasons when that conduct is just within the state itself. So, think of criminal laws. We have criminal laws, and part of the reason we have them is for morality and ethical reasons. But whether the state can rely on moral reasons to pass laws with big effects on interstate commerce is a totally different question. And the problem in the pork case is what it means beyond industrial farming. So, during oral argument, the Justices were pretty clear that the main thing they're worried about is the implications of the case. Justice Kagan asked, "Well, can California just ban pork altogether?" Kagan pointed out that a couple of states have banned the sale of horse meat for human consumption.

Elena Kagan [00:15:30] You also have said total product bans are permissible. But some total product bans are based on moral feelings or even feelings of disgust, like a ban on horse meat. There's nothing dangerous about eating horse meat. People in Iceland do it all the time. There's a kind of yuck disgust factor--a kind of moral factor. So, could a state not do a ban on horse meat?

Elizabeth Joh [00:15:57] And in fact, she's right. There have been horse meat challenges. And judges have ruled against those challenges to horse meat bans. So, for example, in 2007, a federal appeals court decided that Illinois's decision to completely ban the sale of horse meat for human consumption was perfectly constitutional. As the judge said in the horse meat case, "A state is permitted to express disgust at what people do with the dead--whether dead human beings or dead animals." The Proposition 12 challengers said to Justice Kagan, "Well, yes, California could have a total ban on pork in the States. But it can't impose a condition on sales that forces an industry wide change across the country." Then Justice Kagan, being the former law professor that she is, says...

Elena Kagan [00:16:48] I mean, just to take an extreme example of this, Mr. Kneeder, suppose we imagine ourselves back into slavery days. Would it have been impermissible for a state to have said, "We're not going to traffic in products that have been produced by slavery?"

Elizabeth Joh [00:17:06] The challengers responded, like, "Gulp. Well, yes, I guess a state could not do that under our logic." So, you see Justice Kagan's discomfort with this idea. Why can't California, or any state for that matter, pass a law that they don't want to be involved in something that they find morally objectionable? But here's where it gets more complicated. So, let's say that California is allowed to ban the sales of pork within the state if it wasn't produced under humane conditions--no matter where the pork came from. And they're allowed to do that because the people of California do not want to be complicit or involved in something that they find morally objectionable. So maybe this is less of an issue in another time or maybe if we have a well-functioning Congress that can step in when we live in a less polarized atmosphere. But we don't. So, what about abortion? After Dobbs, the states are free to regulate or ban abortion in any way they like. Now, most abortions in the United States today are medication abortions that women can take at home. So, medication abortions have been legally available since the year 2000. After Dobbs, abortion rights advocates have been trying to make abortion medications more available to women in states who no longer have easy access to abortion. So, Roman, you can imagine what a state might want to do if they want to restrict abortions here.

Roman Mars [00:18:34] Yeah. I mean, they basically could pass something--either legislatively or through a proposition--that says, "You know, these things are illegal. You can't get them from other states. Doesn't matter where you get it from." You could just say that these are not allowed here.

Elizabeth Joh [00:18:46] Yeah, exactly. No abortion pills mailed into the state--no matter where the pills come from. A state like Louisiana or Mississippi can say, "We have moral objections to abortion. And we don't want to be morally complicit in them by allowing abortion medication to be mailed to anybody inside of the state." And the idea here is, if California can regulate out-of-state pig farming, then presumably these kinds of laws would be okay, too. And so, if California can express its moral views in this way, why can't other states do the same for their own worldviews? And actually, Roman, the United States--the Biden administration--filed a friend of the court brief. Do you have any guess which side they were on?

Roman Mars [00:19:27] You know what? I do not because the ethics of this really cut either way. It really depends on whether or not you believe in this idea of the burden or the idea of states' rights. It's really, really interesting.

Elizabeth Joh [00:19:40] Yeah, so, the United States actually sided with the pork industry.

Roman Mars [00:19:44] Oh, my goodness.

Elizabeth Joh [00:19:45] One of the points the Biden administration made is that the burden here is really severe and there's not enough real benefit inside of the state of California. And clearly, one of the things the Biden administration is concerned about is that the implications for the case if Prop 12 is allowed to be the law. That would allow states to do things like have bans on mailing medication abortions into the state, or maybe you can't sell products in the state if they were made by businesses, let's say, that allow their employees to seek abortions under their workplace health insurance. Anything. Anything like that could be fair game. And it wouldn't just be abortion either. So, imagine that Texas passes a law that says, "We won't buy products if they were made by undocumented immigrants." Or California says, "No products can be sold in the state unless they were made by union labor." And then Florida says, "No products sold in the state if they were made by union labor." And here's how Justice Barrett put it during oral argument. She asked the lawyer for California...

Amy Coney Barrett [00:20:51] Could you have California pass a law that said, "We're not going to buy any pork from companies that don't require all their employees to be vaccinated or from corporations that don't fund gender affirming surgery," or that sort of thing? What's the importance and where does it come from of this tie to the product itself?

Elizabeth Joh [00:21:10] So two things here. First, interesting examples she uses. Gender affirming surgery is the one example she can think of besides vaccination. Second, Barrett's question reflects a concern, I think, that doesn't really easily fit a conservative-liberal divide here. Clearly, some of the Justices are worried about two things. One, if you strike down Prop 12 as unconstitutional, that puts a lot of other state laws that have nothing to do with animal welfare in jeopardy. On the other hand, not striking down Prop 12 would allow states to engage in policy wars against each other. So, Justice Barrett said, "How many laws would fall? California has higher emission standards on automobiles than many other states. Does that fall?" And so, the Prop 12 case is one that might lead to a weird alliance of some of the Justices on the Court. You might have

some of the conservatives--let's say, Thomas--siding with some of the liberals to allow California to have this law, even if they have big interstate effects. Or there may be other alliances between Justices who just don't like California being allowed to impose its will on other states and those Justices who worry about the implication of letting Prop 12 go forward because it would lead to, let's call it "a war between the states."

Roman Mars [00:22:37] To coin a phrase.

Elizabeth Joh [00:22:41] Yes. And that is how you get from duck livers to abortion rights.

Roman Mars [00:22:44] Wow. Wow. That's really something. You know, as a Californian, I've kind of always loved... I don't know, maybe this is not the most noble stance, but I've always kind of loved that--as a commercial power--we could force the car industry, for example, to have higher emission standards because then it becomes kind of the law of the land because the market is so big. But I totally see why it would be a mess if everyone did this based on something as loose as their perceived ethics about all kinds of things that would criminalize behaviors that I do not think should be criminalized in other states.

Elizabeth Joh [00:23:30] Yeah. And it's really hard to guess exactly how the different Justices might come out because you can't really decide it based on whether you support increased animal welfare or not because, again, the Justices during the oral argument are clearly really worried about whatever happens, no matter what they do. I mean, they either uphold Prop 12 and say, "Of course, states are allowed to do this," or they strike it down and they say, "No states can do this, but then why can't California do that?" And then you think, "Well, maybe they could have a compromise position." And I think you could imagine a pretty narrow opinion in which the Court says something like, "Well, Californians can do things with some interstate effects, but this one just has too much of an effect." And that could be a result that comes out, but that would just invite so many more lawsuits saying, "Well, this is the kind of law that has too much effect, just like California." So, it's kind of a no-win situation in all directions.

Roman Mars [00:24:26] Hmm. Do you have a sense of how it would go based off of the oral arguments and the questions that people asked?

Elizabeth Joh [00:24:32] I don't think so. I mean, I think that you can see, like, all of these different Justices raising really bizarre, unexpected kinds of questions. And again, like, you can't really pick based on your policy preference because it's just really hard to know. And again, like, you know, even it was a surprise to you that the Biden administration was like, "We're going to go with the pork producers here."

Roman Mars [00:24:50] I mean, now that you lay out the argument, I would imagine the federal government would be more, you know, into the idea of a unified theory of how states work and therefore would side with the pork producers versus with the states. And that makes sense in the broad sense that, you know, the Biden administration wants to be able to run the country like a country and not like a collection of 50 ethnically variant fiefdoms. So that makes sense to me now that you mention it. But this sort of idea that the states are the laboratories of democracy to figure this stuff out. And the Dobbs decision was built on what, I think, is pretty much an erroneous decision that direct democracy is the way to solve the problem of abortion, you know, like in lots of different states. That seems to be an ethic that's firmly held. And, you know, it is just really, like, interesting and confounding. I really like it. As a thought exercise, it's really cool.

Elizabeth Joh [00:25:50] It is. And in a way, it's also kind of like a case about California. I mean, our state has so much influence and power. You know, there's a reason why this goes up to the Supreme Court and they take this case. I'm not going to knock Rhode Island, but it's not Rhode Island against the pork industry, right? The pork industry really cannot afford to lose this state's market. And that's kind of the big issue.

Roman Mars [00:26:15] And that's really curious to me because it then allows for the narrow ruling. And the narrow ruling really hinges on the burden being California. And so, therefore, if a smaller state makes, you know, really horrible, draconian, criminalizing decisions, they could rest on the idea that it doesn't really matter what Mississippi does because Mississippi's a small market for any of this stuff. That would be really disappointing.

Elizabeth Joh [00:26:45] Right. I mean, so we'll have to see.

Roman Mars [00:26:47] Elizabeth and I recorded this conversation on Friday, November 18th. On Tuesday, the 22nd, the Biden administration announced that it will extend the pause on federal student loan payments as the courts weigh the fate of the debt forgiveness program. So, do we have an update on any other stuff that we've talked about in the past?

Elizabeth Joh [00:27:07] Well, I mean, we could talk about where the student relief stuff stands.

Roman Mars [00:27:11] Oh, yes. This is really curious.

Elizabeth Joh [00:27:13] Yeah. So, let's remember that in August, Biden announced that the federal government would cancel \$10,000 in student debt for those who earn less than \$125,000 a year. And Biden did this by executive action. So that means that something like 26 million borrowers have applied for student debt forgiveness and more than 16 million applications have already been approved. But nobody's debt has been canceled yet, and that's because of lawsuits. There have been a couple of different lawsuits, but the one that has gotten the most attention so far is a lawsuit brought by Nebraska, Missouri, Arkansas, Iowa, Kansas, and South Carolina. They argued, unsurprisingly, that Biden lacked the constitutional and statutory authority to cancel student debt. The main problem is: Why are the states suing Biden? Why on earth do they have the ability to do this? I mean, they clearly have a complaint. It's clearly politically motivated. But again, in court, you have to say there's a problem here that affects me. So, what kind of injury standing? What kind of injury could they have suffered? Well, in Missouri, there's a vendor called Mohela that stands for the Missouri Higher Education Loan Authority. It collects student loan payments for the government or government entities. And Mohela is paid based on how many accounts they have. So, I guess the idea for Missouri is that if the Biden administration cancels a bunch of loans, then that reduces Mohela's earnings. And because Mohela gives some of its profits to Missouri to support the state's colleges, that is the sort of kind of attenuated injury that Missouri faces. So, you know, it's a connection. It's not the most obvious one. And Mohela isn't even a party in the lawsuit. So, the federal district court concluded that Missouri and the other states just couldn't sue at all. They didn't have standing. They didn't have the kind of injury that allows them to sue. A federal court of Appeals just issued a national injunction--a temporary pause--on the entire debt relief program on November 14th. The three-Judge panel--two of them are Trump appointees--said Missouri did suffer an injury from Mohela, this other organization, having fewer customers because that would lead to less revenue, which would then lead to less

profit being handed over to Missouri. That was enough. That was enough for the appeals court to put the entire program on temporary hold while they're considering the case. The injunction does not ultimately resolve whether those states win or not. But the impact is immediate. The current pause on federal student loans is set to expire in January, and it's unclear whether any student debt forgiveness is ever going to happen before then. And on November 18th, the Biden administration asked the Supreme Court to lift that nationwide injunction. So, we'll see.

Roman Mars [00:30:15] Interesting. It's just so infuriating.

Elizabeth Joh [00:30:18] It's just lawsuits all the way down.

Roman Mars [00:30:20] Yeah, it really is. It really is. Well, thanks for that update. It's great.

Elizabeth Joh [00:30:24] Thanks, Roman

Roman Mars [00:30:36] 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.