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LochnervNewYork_DRAFT2.mp3

DATE

September 25, 2025

DURATION

40m 10s

4 SPEAKERS

Hannah McCarthy

Nick Capodice

Matthew Lindsay

Rebecca Brown

START OF TRANSCRIPT

[00:00:00] Hannah McCarthy

Nick. When I say anti cannon does it does it mean anything to you.

[00:00:05] Nick Capodice

Yeah like Supreme Court anti cannon.

[00:00:06] Hannah McCarthy

Yeah.

[00:00:10] Nick Capodice

I always think these are the cases that aren't just sort of bad. They were decided badly and so badly they can't be used by any future cases as precedent. Right, right.

[00:00:21] Hannah McCarthy

Exactly. The decisions wherein the court got something so wrong that they cannot be considered precedent. Right? The court can't reference back to them. Don't build a future opinion on the opinions there. And the list is typically as follows. Dred Scott versus Plessy v Ferguson. Lochner v New York and Korematsu v US. And you know, not all legal scholars agree that all of these cases are bad jurisprudence, as we call it. I just want to make that clear. But we here at Civics 101 are calling them anti canon, and we have made episodes about every case on this list except for.

[00:01:03] Nick Capodice

One, except for one. Hannah. It's the one I know nothing about.

[00:01:09] Hannah McCarthy

Well, aren't you Nick Capodice lucky to be here and aren't I? Hannah McCarthy, this is Civics 101. Today we are taking on the case, of course, of Lochner v New York. Nick, why do you think we have not dug into Lochner?

[00:01:25] Nick Capodice

Huh? Honestly, um, it's like it's not shouting ill will from the page like the others, as far as I can tell.

[00:01:34] Hannah McCarthy

Like it doesn't feel evil in the same way. It doesn't make you balk.

[00:01:37] Nick Capodice

Honestly. It's like not shouting ill will from the page. Like at least as far as I can tell. Come on, Dred Scott. People of African descent, though they actually mean black people in America, cannot be citizens ever. And then you've got Plessy v Ferguson, uh, which basically upholds the long standing tradition that racial segregation is okay. And then Korematsu, you can imprison Americans of Japanese ancestry without due process, full stop. But Lochner. Lochner is about bakers right with the be like the people who make bread.

[00:02:20] Hannah McCarthy

No disrespect to bakers. We love bread, we love bread.

[00:02:23] Nick Capodice

Bread is the staff of life.

[00:02:25] Hannah McCarthy

One of these days, we will treat our listeners to a rousing round of bread or stairs. Which came first?

[00:02:30] Nick Capodice

Bread, by the way, it is stairs.

[00:02:33] Hannah McCarthy

Good. This is my hill to die on. These are my stairs to die on.

[00:02:38] Nick Capodice

This is my bread to choke on. You're wrong. By the way, Hannah, it is bread. But we do digress.

[00:02:44] Hannah McCarthy

I'm not. And we do. *Lochner v New York*, 1905. About bakers. Yes, but more importantly, it is about economic regulation and unenumerated meaning not explicitly stated in the Constitution. Rights.

[00:03:01] Nick Capodice

Okay. Uh, well, you do have my attention here, Hannah. Great.

[00:03:05] Hannah McCarthy

So my two big questions going into *Lochner* were what actually happened here, you know, like the facts of the case, that sort of thing. And then what makes this anti cannon what puts this Baker case alongside *Dred*, *Plessy* and *Korematsu*.

[00:03:26] Nick Capodice

Hannah, can we answer the first question in the broadest terms first?

[00:03:30] Hannah McCarthy

Uh, well, you know, I can do my best. I like the details. So it's 1899. Joseph *Lochner* owns a bakery in Utica, New York, and he is accused and convicted of violating the Bake Shop Act.

[00:03:45] Nick Capodice

The bake shop act. Now, what does that say?

[00:03:47] Hannah McCarthy

Let's bring in somebody who knows a lot more than me.

[00:03:50] Matthew Lindsay

The adoption of the Bake Shop Act, and this is in 1895, followed a very public exposé of just the appallingly unsanitary conditions in New York bakeries.

[00:04:02] Hannah McCarthy

This is Matthew Lindsay.

[00:04:03] Matthew Lindsay

I'm a professor of law at the University of Baltimore School of Law. I teach constitutional law and American legal history, among other subjects.

[00:04:13] Hannah McCarthy

Matthew says that the unsanitary conditions, those were the main point of the Bake Shop Act.

[00:04:20] Matthew Lindsay

Open sewage drains, rat infestations, domestic cats hanging around to catch the vermin sleeping on the bread, bakers sleeping all night in bakeries, often in filth, coal dust covering everything, including the bakers and the bread itself because the ovens were coal fired. And so, to address these problems, the acts sanitary provisions did some pretty uncontroversial things that weren't subject to any meaningful legal challenge things like requiring that sewage drains be closed in pipes, or that domestic animals not be kept there, requiring that the floors be made of concrete or tile rather than dirt. For example, prohibiting people from sleeping there, uh, providing for periodic inspections by by state inspectors.

[00:05:04] Nick Capodice

Okay, bake shops are super gross, and that's not okay. Fix it.

[00:05:09] Hannah McCarthy

Straightforward enough. And nobody had an issue with the whole bake shops or gross evaluation workers aside. And I will get to that in a moment. Nobody wants to eat bread covered in cat hair and rat poop and maybe trace sewage. And because pretty much everybody does eat bread, those regulations make a lot of sense.

[00:05:28] Nick Capodice

Are the halcyon days before carbs became a four letter word.

[00:05:33] Hannah McCarthy

The part of the Bake Shop act that people did have a problem with.

[00:05:38] Matthew Lindsay

The act also included a provision that was added late in the process at the behest of the bakers union, limiting work in bakeries to ten hours per day or 60 hours per week.

[00:05:50] Nick Capodice

So the bakers union wanted this hours thing passed. Well, I'll put it.

[00:05:53] Hannah McCarthy

Like this unions were not powerful enough at the time to get this law passed. For that, we can really thank reformers who were powerful enough to call for business regulation. But the unions would have been pretty happy about this. And not only the unions, the bosses to wait.

[00:06:13] Nick Capodice

The bosses and the unions on the same side. That dog don't hunt McCarthy.

[00:06:24] Matthew Lindsay

The bacon industry in the in the late 19th century, particularly in a more urbanized state like New York, was divided between these larger, more modern factory style bakeries that were mostly unionized, uh, and smaller kind of old fashioned, typically ununionized bakeries. And those bakeries in that second category were often located in the basements of tenement buildings, and they were often staffed by German, Jewish and Italian immigrants. And unlike the modern unionized bakeries, which organized work into specific shifts, basement bakeries typically paid workers by the week, and the employer could demand virtually unlimited number of hours within that week, and the pay itself didn't change during some particularly busy periods. For example, bake shop owners either required that workers be on call 24 hours a day.

[00:07:17] Hannah McCarthy

Big union shops are they're big. They can manage shifts. Workers can do ten, you know, maybe even eight hours a day. Small, non-unionized mom and pop shops cannot pull that off. They've got like three employees. They got to work all the time. So, Nick, if the Union bakeries can meet, the minimum hours can meet the minimum hours regulations, but the nonunion bakeries cannot.

[00:07:47] Nick Capodice

Less competition for the union shops making the union happy, because that means employment. And the boss is happy because that means business keeps trucking. Mom and pop take the hit.

[00:08:00] Hannah McCarthy

Correct? Also, by the way, unions tended to be all white, all male and anti-immigrant. Uh, those small shops tended to be immigrant run German and Jewish bakeries. Fun fact unions had a tendency to support regulation for women's working hours and conditions as well. And guess what? It wasn't out of the goodness of their hearts. All right, so back to the German run bake shop at the center of this case.

[00:08:25] Rebecca Brown

We're talking a criminal punishment for a bakery to employ bakers for more than ten hours a day, or more than 60 hours total. So Joseph Lochner was an immigrant from Germany who owned a small bakery, and it was so small that he had only a single shift of bakers. And those bakers had to work all night in order to prepare the bread for, say, in the morning for the people to buy.

[00:08:51] Hannah McCarthy

I'm bringing in another brilliant soul here. This is Rebecca Brown.

[00:08:54] Rebecca Brown

I'm a professor of constitutional law at the USC Gould School of Law.

[00:09:00] Hannah McCarthy

Rebecca says, you know, no matter how bad you consider Lochner, maybe we can have a little sympathy for those big shop owners who could only survive if their bakers baked round the clock. So Lochner gets convicted, he's fined \$25, and his response is, uh uh, this is fundamentally wrong. This hours thing is a violation of an American right?

[00:09:23] Rebecca Brown

And he took his appeal all the way to the US Supreme Court, and he argued that this law interfered with his liberty, specifically his right to enter into contracts with his employees as an owner of a small business on whatever terms they two consensually agree to. That's what he says, that this is a natural right of people. It's not specifically listed in the Constitution, but he said it's incorporated into the word liberty. And you can't take away my liberty without due process. And due process means you have to have a good reason, right? That it can't be arbitrary. So that was his argument, and the court ended up siding with Lochner. It agreed that the right to make contracts was a fundamental liberty that could only be restricted for a good reason.

[00:10:15] Nick Capodice

Wait, I just have to ask, what exactly is a contract? You know, does it have to be on a piece of paper and signed and everything?

[00:10:26] Hannah McCarthy

No. Uh, so a contract in this case is presumed to be a voluntary agreement between two parties. And then, you know, specifically in Lochner related to the sale and purchase of labor. Now, real quick, the word contract is actually in the Constitution. It's in article one where it is stated that a state cannot pass a law that impairs the obligation of contracts. Oh, but that article is not actually cited in Lochner, since the justices are relying on that 14th amendment due process idea, they are leaning on that connection between liberty and liberty of contract.

[00:11:10] Nick Capodice

Okay, so the court says, yeah, you're right. You do have a fundamental right to enter into contracts without the government mucking about. But hang on here, Hannah, Rebecca said due process means you have to have a good reason. I thought it meant you had to give someone a fair and speedy trial, or explain to them what they're accused of doing, that sort of thing. I thought that's kind of what due process meant.

[00:11:36] Hannah McCarthy

Yeah. So Matthew walked me through this one.

[00:11:39] Matthew Lindsay

There were a couple big innovations in Lochner. One, as I said, is this idea of liberty, of contract, right, that there exists a substantive right to liberty that includes the right to purchase and sell labor. But the second really important thing that Lochner did was to attach that new substantive right to a provision of the Constitution that traditionally had been understood to guarantee a fair process. The due Process Clause says that a state can't make or enforce a law that deprives any person of life, liberty, or property without due process of law. Now, that doesn't mean that a state can't deprive somebody of life, liberty or property. It just means that in order for it to do that, it has to provide due process.

[00:12:22] Hannah McCarthy

Here's what you need to know here. There are two kinds of due process. Procedural due process says the government must follow the proper procedures when it takes away life, liberty and or property.

[00:12:38] Nick Capodice

Right. That's the speedy trial thing.

[00:12:40] Hannah McCarthy

Yeah, but substantive due process. It kind of comes before that. It's more essential before the government ever got to the procedural part. Did they take a fundamental right away and did they do it for a good reason?

[00:12:58] Matthew Lindsay

The theory of substantive due process was legally innovative because it protects non enumerated substantive rights. In other words, rights that aren't found in the Constitution's text. And it does that by attaching those rights to a provision of the Constitution, the due Process Clause that was designed to guarantee a fair process. So, for example, Joseph Lochner in *Lochner v New York*, isn't claiming that the legislature that enacted the law or the governor that signed it, or the public officials that enforced the Bakeshop Act against him somehow failed to adhere to the proper procedures. Instead, he's arguing that the act itself, and specifically the maximum hours provision, deprives him of his substantive right to freedom of contract.

[00:13:45] Nick Capodice

So the law itself was a constitutional violation, not the way they enforced the law.

[00:13:51] Hannah McCarthy

You got it. Joseph Lochner wasn't saying the government deprived me of procedural due process, like they didn't let me appeal this or they didn't tell me what I was accused of. He is saying the law that got him into trouble is itself a violation of his constitutional right.

[00:14:11] Nick Capodice

But I'm still wondering about the quote unquote good reason. Part of all, this wasn't the reason for the hours provision, basically, that it's not good for people to work endless hours.

[00:14:23] Hannah McCarthy

No, not the people. Bakers, here's Rebecca again.

[00:14:28] Rebecca Brown

And that good reason has to be something about protecting the public, right? Protecting the health and safety of the public, which is the core power that a state enjoys. They call it the police powers, that it's the power to regulate for the common good, for all the good of all. And unless you could justify your restriction by saying it needs to be done for the common good, that it would be considered a violation of due process. And that's exactly what the court found. They did not think that there was a good enough justification. They didn't think it had much to do with public health, and they didn't think it had much to do with public safety.

[00:15:07] Nick Capodice

But weren't bakers getting white lung or whatever it's called from working long hours in clouds of flour?

[00:15:14] Hannah McCarthy

Yes. By the way, Nick, did you know that white lung is still a thing? It is also called Baker's asthma and it is a leading cause of occupational asthma. This is completely different, by the way, from this thing people were calling white lung pneumonia in 2023. That's actually a misnomer.

[00:15:32] Nick Capodice

The things you never think you'll learn in a civics 101 episode and then whoop, there it is.

[00:15:37] Hannah McCarthy

But to your point, the healthfulness of the baking industry did come up in *Lochner*, and the court was like, look, we actually upheld an hour's limit, with exceptions for miners and smelters back in 1898, and it had to do with their health.

[00:15:54] Nick Capodice

Wait, miners like mine's right in caves, not miners like, you know, kids. Yeah.

[00:16:02] Hannah McCarthy

Um, no. Fair enough. Question. Since child labor was a huge problem at the time. But I do mean miners like mines. The majority's point in this case was, look, those people were in mines. Lung issues aside, a bakery is not a mine. Baking is not sufficiently dangerous for the legislature to interfere with a bakery worker's freedom of. Contract, they said, and I quote, there must be more than the mere fact of the possible existence of some small amount of unhealthiness to warrant legislative interference with liberty, unquote. Basically, if we let this slide with bakers, what's next, bank clerks?

[00:16:47] Nick Capodice

Did the opinion actually say that?

[00:16:49] Hannah McCarthy

Yeah, I'm gonna I'm paraphrasing, but it did actually say that. And and Nick, I think you're gonna love this. Rufus Peckman writing for the majority was like, you know, clerks often work by artificial daylight. Sometimes they don't see the sun all day. And you're gonna tell me the legislature should be allowed to say that's unhealthy. So no long hours for clerks.

[00:17:08] Nick Capodice

Oh, but who is gonna who? Whoever will think of the suffering bank clerks? This will be a smorgasbord of regulation.

[00:17:16] Hannah McCarthy

Doctors, lawyers, scientists, all professional men as well as athletes and artisans could be forbidden to fatigue their brains and bodies by prolonged hours of exercise. And I quote that is in the majority opinion. And then, of course, the health question in this case, who is the state protecting? They're only talking about bakers.

[00:17:39] Rebecca Brown

The court said that's not the public protecting us. Small segment of that is that's paternalistic. That's not regulating for the common good. The common good means that you'd have to show that if bakers work long hours, they produce less healthy bread that would endanger the public. That's not shown here. So we think the health justification is missing. So not good enough to restrict a fundamental liberty under the due process clause.

[00:18:05] Nick Capodice

Wow. Okay, so that's Lochner. People have a fundamental liberty of contract, and New York didn't have a good enough reason for depriving them of that. Right. So, um, I feel like that brings us to your second big question about Lochner. Hannah. What makes this case anti cannon. Like when did people, especially the Supreme Court, look at this whole thing and say, yikes, this is so, so, so wrong?

[00:18:37] Hannah McCarthy

Well, at least one person on the court said it right away. And we're going to get to that after the break. But before we do break, dear listener, guess how long I spent trying to figure out how to explain the due process thing without taking 30 minutes of your precious time. Way more than 30 minutes of my precious time. But there is still so much for you to know. And not just about that, but about everything to do with American government. Luckily, we have a place where we put all of that other stuff. It's called extra credit. It's a newsletter, and you can read it at your leisure. Subscribe to get all the stuff that doesn't fit in an episode at our website, civics101podcast.org.

[00:19:30] Nick Capodice

We are back. You're listening to Civics 101. We are talking about the infamous, the lowly, the to be honest, not so completely evil seeming. Lochner v New York. And just before the break, Hannah, you promised to explain to me how this case about bakers and working hours got itself on the naughty list.

[00:19:50] Hannah McCarthy

I did, and it all started with Justice Holmes. Here's Rebecca Brown.

[00:19:56] Rebecca Brown

Oliver Wendell Holmes disagreed, and he wrote this very famous dissent. He thought that the court was just imposing its own policy preferences at that time, the prevailing policy preference among especially people on the court, kind of a conservative philosophy was that you don't you leave people alone. You don't regulate states, don't interfere in private economic affairs. There was a time for that in economics called laissez faire, just meaning leave it alone, stay out. And that's how we flourish as America libertarians, you don't regulate. And he thought that they had that they came to the case with that predisposition. And they kind of planted that view on top of the Constitution and said, it's not in the Constitution. That's your preference. But our job as the court is to read the Constitution, not to impose our policy preferences. You know, if you don't like it, vote against the law or whatever. But don't you can't strike down what the people in New York chose to have in their law on this because it's not objective.

[00:20:56] Hannah McCarthy

And here is Matthew Lindsay.

[00:20:58] Matthew Lindsay

Holmes's dissent just became immediately famous and remarkably influential. So holds offers instead. This this classic statement of judicial restraint, of allowing legislatures to enact dominant opinion into law so long as that law doesn't offend some core constitutional principle. So Holmes is saying to the majority, basically, you may believe that unbridled competition in the survival of the fittest is good economic policy. You might even believe that it's the natural state of society, but that doesn't mean that legislation to the contrary is unconstitutional. So? So Holmes's opinion immediately became this rallying cry for opponents of of constitutional liberty of contract.

[00:21:43] Hannah McCarthy

So Holmes's opinion is still relevant today. Basically, the court went too far and brought their own policy views into their interpretation of the Constitution. That is why some people say Lochner is capital B bad wait.

[00:22:00] Nick Capodice

But to get on that anti cannon list, doesn't pretty much everyone have to believe a case is capital B bad?

[00:22:06] Hannah McCarthy

Yeah, and pretty much everyone does believe that, but not for the same reason. Buckle up. First you got to know what happens after Lochner in what people came to call the Lochner era. And it might have been the Lochner era behind the grand doors of the Supreme Court. But outside those doors it was a different era altogether.

[00:22:32] Nick Capodice

Wait, wait, wait, when was Lochner handed down Hannah?

[00:22:37] Hannah McCarthy

1905.

[00:22:38] Nick Capodice

The early 20th century in America. Hannah, this is the Progressive era.

[00:22:43] Hannah McCarthy

It sure is.

[00:22:44] Nick Capodice

Like this is the era that was all about social and political reforms. This is like Jacob Reece and Upton Sinclair and Ida Tarbell exposing the sins of the Industrial Revolution and the Gilded Age. This is trust busting. This is government regulation and the middle class. So where does Lochner fit into all of this?

[00:23:04] Rebecca Brown

Change has to sort of be considered right. This pressure is building because all of these problems were just, I guess, proliferating and increasing over time, but all protected for regulation by the Supreme Court's decision in Lochner. So this is what we call the Lochner era. One by one, they struck down minimum wage hours, maximum hours, certain safety protections. They upheld some if they really thought there was a public health justification. But mostly they didn't. And then we had the economic crisis in the country of the depression, the Great Depression, starting with late 1920s and into the 30s. And there was no safety net, there was no social safety net, because the court was telling us that economic regulations by the state were illegitimate, were violations of liberty, and it kept states basically out of the economic relationships that were the sort of heart of our economy at that time, our growing market economy, this whole new idea of a big sort of national market.

[00:24:02] Hannah McCarthy

Now, I want to be fair here because we call it the Lochner era. And when we say that, we are broadly saying that the court is siding with this idea that business regulation is unconstitutional. But actually that wasn't happening across the board. The court was not striking down all regulation.

[00:24:22] Matthew Lindsay

The locker area is sometimes characterized as this period of laissez faire constitutionalism, in which a court sought to protect the private marketplace, maybe even protect capitalism itself from this newly emboldened activist state. But in reality, the court during this period was not as uniformly hostile to economic regulation as termed Lochner era or laissez faire constitutionalism suggests. In fact, the court rejected the vast majority of constitutional challenges to economic regulations, including challenges to some labor regulations. And in fact, economic regulation expanded dramatically throughout the entire so-called Lochner era. Now, that said, the court really did in more discreet ways impede both state and federal efforts to regulate labor relations and to provide workers with at least some measure of protection and the bargaining power in relation to their employers. And that was especially true in the 1920s and 1930s, when the Great Depression really pushed the question of wages and working conditions to the forefront of political and legal debate. I think it is accurate to say that that jurisprudence limited the early New Deal, and it truly did constrain what the Roosevelt administration could do between the time it first took office in 1933 and this period of time in 1937, when the court really shifted gears and began upholding economic regulation.

[00:26:02] Nick Capodice

What happened in 1937?

[00:26:04] Rebecca Brown

The bottom line is, in 1937, a new case is decided. It's called West Coast Hotel versus parish, and it is a case where the that someone's challenging a minimum wage once again and Locutor would say strike it down. Right. Minimum wage. Just like the hours provision in Lochner, it's a product of a contract relationship. This time the court takes a different approach and it says, yes, sure. This is there is a liberty here, but the restriction is justified because the common good now demands it. Maybe the common good has changed because our country has changed. They don't say exactly why, but they do say why should states have to subsidize employers who don't pay a living wage if they're if the full time workers are starving on the streets, the state now, which it didn't used to now as sort of an obligation to step in and provide subsistence for people or take care of children who can't be supported.

[00:26:59] Nick Capodice

Did this case West Coast hotel versus parish overrule Lochner?

[00:27:04] Rebecca Brown

Did they own Lochner? They did not explicitly, but they took the reverse position on the constitutional question. No longer will liberty of contract be considered a fundamental right, and no longer will the state's ability to regulate that be skewed in such narrow terms. They will look at the common good and the regulatory interest more broadly. So it's interesting because they sort of acknowledge that we're all interdependent now as a society, much more so than we were in 1905. We need more things. We need more interventions in a society that now looks like this crowded and working for other people and factors and dangerous and all of that. We need more order to protect everybody.

[00:27:47] Hannah McCarthy

Okay, so when Rebecca started talking about this 1937 shift and the way the court starts taking a different tack, I was like, okay, all right. Because essentially she's saying that there was a different perception on the bench based ostensibly upon the giant pickle America found itself in. And I got really excited. And I will come back to that later, I promise. But what's going on is these nine justices are asking, okay, given this unholy mess, what role should the state be playing here? And they decided it should be a big one.

[00:28:30] Nick Capodice

And so just like that, Lochner is a bad word.

[00:28:36] Hannah McCarthy

So I don't know if you remember, but I told you at the beginning of this episode that even though a lot of people agree that Lochner is anti cannon, people do not agree on why.

[00:28:47] Matthew Lindsay

Well, I think it depends who you ask. With the exception of a relatively small handful of modern day libertarians who gone out of the way to defend Lochner. Um, most people are willing to say that it was bad law, but for different reasons. Progressives tend to think that Lochner was a terrible decision, because it really engrafted this idea of liberty, of contract onto the Constitution, and that immediately became a weapon that opponents of economic regulation, particularly labor regulation, could use, could take to court to challenge those regulations. And when there's talk about the Supreme Court striking down some progressive piece of economic legislation, think, for example, about the Affordable Care Act. You often hear progressives accusing the court, or at least the challengers of the act of Lochner Rising, which means enacting their own ideological preferences, their their laissez faire ideology into constitutional law.

[00:29:46] Hannah McCarthy

In other words, the moment you saw the freedom of contract in the Constitution, Scotus, we were in trouble, you know? But that doesn't mean you shouldn't see other freedoms in their freedoms, like privacy, the.

[00:30:01] Rebecca Brown

Sort of more liberal strand of argument, which is they just protected the wrong rights, you know, like the privacy, right? They like where we wade and they think that's an appropriate use of substantive due process, that there is such a thing that liberty means something. And we going back to the Magna Carta that had substantive content and they just protected this right to contract, which really is shouldn't be a fundamental right, because, you know, the progressive agenda is to regulate for common good, you know, to protect workers and to protect people from dangerous. Machinery to protect children. So they think that the economic workplace is not the place to recognize rights, but that there is substantive content and it's appropriately recognized in privacy.

[00:30:52] Hannah McCarthy

And by the way, there is an incredibly important, to me at least, arc from *Lochner* to a case called *Griswold v Connecticut* to a case called *Roe v Wade*, to a case called *Dobbs v Jackson Womens Health Organization*, I made episodes about all of those other cases. You can give them a listen. You will see another unenumerated right. Privacy rears its head in the Constitution in 1965. You should also ask yourself, by the way, when you listen to those episodes, why, to some people, *Lochner* seems to threaten to live again in the *Dobbs* decision. But okay, so that is part of the liberal strand of argument against *Lochner*.

[00:31:34] Matthew Lindsay

When conservatives talk about the problem of *Lochner*, they tend to worry less about the laissez faire implications of the decision itself, and instead to be thinking in terms of judicial overreach, of judicial activism, of legislating from the bench, of the court, acting as a kind of super legislature that fails to stay within its proper parameters.

[00:31:58] Nick Capodice

So this sounds like it's in line with a pretty common modern conservative ideology about leaving decisions to the states, not regulating from on high. We're talking small federal government states rights. That whole line of thinking.

[00:32:13] Hannah McCarthy

Yeah. And then there's another conservative view.

[00:32:18] Rebecca Brown

Justice Scalia was one of these. And Justice Thomas is still saying this on the court. His view is the problem with *Lochner* is that there is no substantive content to liberty. All you get from the due Process Clause is like a hearing. If you're going to be locked up in jail or notice or things like we call procedures. Justice Scalia called substantive due process. He called that an oxymoron. You can't have substantive and process in the same place. So he looked at the fundamental error of *Lochner* as giving content to liberty, right, by saying, liberty includes this freedom to contract. And then *Griswold* says, oh, it also includes this freedom of privacy.

[00:33:01] Nick Capodice

Okay. Very basically, I would call this a textualist view, right? The Constitution doesn't say contract anywhere. You know, it isn't there.

[00:33:11] Rebecca Brown

There's another view that is voiced by some sort of also conservative academics, but with a different point of view. They believe in rights. They believe the substantive due process concept that liberty does contain rights for us, protects us from some things, but they object to the way it's been applied. Some of them disagree with making a difference. When economic rights on the one hand, and personal rights on the other. We should either protect all of them or none of them. So it goes with the conservative philosophy that they think economic rights should be better protected. And there are some academics who take that position.

[00:33:50] Nick Capodice

Wow. Okay. Uh, so that's what, half a dozen complaints against *Lochner*?

[00:33:57] Hannah McCarthy

Yeah, thereabouts.

[00:33:58] Nick Capodice

So no one glaring reason why *Lochner* is anti cannon.

[00:34:03] Hannah McCarthy

Yeah. The only reason that people agree on is that *Lochner* is not to be looked at or referenced for precedent for a helping hand in a new opinion. Now, before we go, I promised you I would come back to something. Something I got kind of excited about. And to clarify, for listeners who don't know me, I get excited about things that people do and do not like, that I do and do not like. So this idea that in 1937, the court had a change of heart or less romantically, a change of perspective. The country had changed and it had made itself clear. It made itself clear through suffering, through political strong arming, through public disapproval of the court, through activism, through state law. So the court changed its perspective. And so I had to ask, given the way we look at the Supreme Court today, the way people see it as politicking and love it for that or politicking and hate it for that. What is the difference between politics and perspective when it comes to the Supreme Court?

[00:35:20] Nick Capodice

Did Rebecca and Matthew have answers?

[00:35:23] Hannah McCarthy

Uh, sort of. I mean, there isn't any one answer to that, but their perspectives are certainly more nuanced than mine.

[00:35:45] Rebecca Brown

I think there's a difference between Partizan and political, in a way, is how you're asking someone for whom. This is a very agonizing question, because when I was young and I clerked with Marshall and I, even the justices on the court that I disagreed with or he disagreed with on outcomes or theories, I believe they all acted according to their own best understanding of what they thought the Constitution was. I do believe that. I did believe it. I still believe it. And so when I taught those cases to my students, I would always try to teach them that even if you were to critique the outcome, you know they're acting on their conception of what they think the Constitution needs and what it stands for and what it how it needs to be applied. It's harder to say than I think.

[00:36:30] Matthew Lindsay

It's hard for most people, regardless of how you feel about it, to look at a decision like like *Dobbs* that overturned 50 years of settled law and not understand that as the culmination of 50 years of nomination fights. Right. And basically the Republican Party just getting a lot better at vetting nominees than it was in the 70s and 80s. So and that's.

[00:36:54] Rebecca Brown

Hard because you do believe, I believe, as a constitutional scholar tries not to be political, but I believe the Constitution does have principles in it. I don't think it's just a blank slate that they make what I want it to be. I think it's principled. And I think our job as teachers, as judges, is to try to make it the best it can be by how we understand it to be. And I think that is what I would wish that the court would engage.

[00:37:23] Matthew Lindsay

On the other hand, I also try to resist the idea that law is just politics. Constitutional law is nothing but politics, that it's just political preference and dressed up in legal doctrine. I point to examples of justices reaching conclusions with it, with which they almost surely disagree as a matter of policy. And it's not it's not hard to do that. I point to, uh, lower court decisions in which which, after all, is 99% of of federal adjudication, where lower court judges routinely apply precedents that they they don't agree with. Sometimes I talk about my own experience clerking for a federal judge, a kind of renowned, you know, member of the progressive legal community, the civil rights community, and yet applied plenty of precedents with which I'm quite certain he disagreed. So, you know, is politics part of constitutional law? Absolutely. Is it more so today than in the past? That's probably a matter of debate. You know, it depends what side of the fence you're on. But is it only politics? I don't think so.

[00:38:54] Hannah McCarthy

That does it for this episode. You heard me mention a few other anti cannon cases earlier, and we have covered all of that here on Civics 101. You can find those and all other episodes at civics101podcast.org. And while you're there, if this and other episodes of Civics 101 do something for you. If you believe that, you know, knowing how this country is supposed to work and how it often does not is an important part of preserving American democracy, please consider making a donation to the show. We are, after all, listener supported public radio. This episode was produced by me, Hannah McCarthy with Nick Capodice. Rebecca LaVoy is our executive producer. Christina Phillips is our senior producer. Music. In this episode by Duke Harrington, John Rosenfeld, Jerry Lacy, Hitomi tsunami, Eden Avery, Gustav Sora, LM Stiles, Helliniko, John Abbott, Groovy Trap, Amoeba, and Chris Zabriskie. Civics 101 is a production of NPR New Hampshire Public Radio.



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