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George Will's Supreme Court History Is Dubious

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Want to insult a Supreme Court justice? Just tell him his opinions are "Lochner-like." Then run.

"Lochner" refers to a 1905 Supreme Court decision that struck down a New York law setting maximum hours for bakery workers. The Court said the law interfered with "the liberty of contract," a right the Court implied from the Fourteenth Amendment's prohibition against depriving people of "liberty" without due process of law.

The Lochner decision came to symbolize a whole era of early 20th century jurisprudence when a conservative Supreme Court aggressively invalidated progressive labor and consumer laws. Maximum hour laws, minimum wage laws, even child labor laws were found unconstitutional.

Public outrage with this infusion of laissez-faire economics into constitutional law boiled over during the Great Depression when the Court struck down some of FDR's signature New Deal programs. Roosevelt threatened to pack the Court by asking Congress to add more justices (the Constitution nowhere specifies the number). This crisis was averted when one of the Court's five conservative justices switched sides and began voting with the Court's four liberal justices to uphold economic regulations. This was "the switch in time that saved nine."

The switch occurred in 1937, and the Lochner era soon came to an inglorious end. As the Court famously announced in a 1955 decision: "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought."

For the last half-century, the Lochner decision has been the poster-child for the misuse of judicial power. And that is why, to this day, it is a supreme insult to call a judicial opinion "Lochner-like."

But that hasn't stopped justices from comparing their colleagues' opinions to Lochner. The most recent example was Chief Justice John Roberts' dissent in the same-sex marriage case. Roberts accused the majority of imposing its own vision of marriage on the rest of the country. He said the Court's opinion "has no basis in principle or tradition, except for the unprincipled tradition of judicial policymaking that characterized discredited decisions such as Lochner v. New York."

Touché!

Roberts surely thought this Lochner analogy was apt. So he was probably surprised when syndicated columnist George Will excoriated him for using it.

Will didn't write to defend same-sex marriage. He wrote to defend Lochner.

Will thinks Lochner was right all along and has been unfairly demonized. He says the decision was never about a rogue judiciary striking down a reasonable worker health regulation. He claims (quite wrongly) that there was "no evidence" that baking was a dangerous occupation that required limited hours. The law instead was special interest legislation, pushed through by large unionized bakeries to "crush" small family-owned competitors that needed flexible working hours. It was a victory for the little guy!

The ultimate goal of this revisionist history is to dispel the notion, sacrosanct in the jurisprudence since 1937, that courts should refrain from second-guessing economic regulations. "Sensible judicial deference to government regulations does not," Will says, "require judicial dereliction of its duty to gaze skeptically on government's often ridiculous rationalizations of them."

Will's revisionist history is dubious. His argument for scrutinizing regulations is not. There are surely some regulations that have less to do with protecting the public interest than with protecting special interest groups.

If conservatives are truly concerned about special interest legislation, they should set their sights on stopping the flood of money into politics that leads to this legislation. That would be more effective than having judges with no economic training second-guessing complicated regulatory regimes.

Perhaps conservatives should cultivate a new insult for Supreme Court justices: "Your decision is Citizens United-like."

Just don't count on it.

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