Liberalism at the Turn of the 21st Century: An Historical Perspective

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On or about December 1910, human character changed.

- Virginia Woolf[1]

In 1955, Louis Hartz proposed that liberalism has always dominated American political thought.[2] This seemed like a rather uncontroversial thesis. Historians and political theorists of all different stripes have criticized him ever since. Perhaps the persistence and the ardor of the criticism betray that there is, at least, a grain of truth in Hartz's thesis. But that truth is somewhat elusive as, regardless of where one falls in this debate, the meaning of liberalism has not remained constant throughout American history.[3] The twenty-first century inherits a liberalism that is altered from Locke's vision, a liberalism that is fundamentally different from that of early American politicians, or the abolitionists or the labor movement of the late nineteenth century. One way in which liberalism has changed over the last century is that the notion of the individual that it seeks to protect is different from its nineteenth-century counterpart. This essay gives a brief overview of this shift and explores some of the implications for contemporary constitutional debates.

In the nineteenth century, at least as far as the law was concerned, the world was populated by distinct, rational, and self-reliant individuals, each seeking to unravel the meaning of a more or less discernible universe. Principles of property, consent, and self-

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[1] *Mr and Mrs Brown,* in THE CAPTAIN'S DEATH BED AND OTHER ESSAYS 89, 91 (John K. Martin, ed. 1950).

[2] Louis Hartz, The Liberal Tradition in America: An Interpretation of American Political Thought Since the Revolution (1955).

[3] J.G.A. Pocock, Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition viii (1975). Perhaps the most important critique of Hartz is not that he was wrong about the importance of liberalism, but rather that he was wrong about the nature of ideas. In other words, historians like Bernard Bailyn and Gordon Wood undermine the notion that there is an American consensus and explore instead how people must construct an understanding of reality within a certain inherited ideological and rhetorical framework. Bernard Bailyn, The Ideological Origins of the American Revolution 95; Gordon S. Wood, The Creation of the American Republic.

ownership defined freedom and fueled both the market and the polity. In Locke's view, men were inherently capable of thinking and acting in their own interest. Reason and self-interest were inextricable aspects of human nature. In a just political system, obligation was created through acts of free will rather than through relationships of subjugation and authority.[4] In addition, Locke assumed that every man had a natural right to his own labor and an equally inviolable right to property once he had mixed his labor with the land.[5] Built on these premises, Adam Smith argued that value was determined by the labor that went into an object rather than demand or marginal utility. It was the role of the political system to protect freedom, defined as the right to one's own labor and the right to act on one's own behalf. It followed that the state should not interfere with property or with contract except in rare moments when it was absolutely necessary to protect the public.[6]

Courts had a special role in this political economy. They policed the boundary between the private and the public. The private realm was, in theory, an arena free from coercion, one in which individuals acted voluntarily, entering into agreements that produced a particular distribution of the nation's wealth, which was just precisely because it was a product of these acts of free will. Thus, private law could protect freedom by making sure that relations between individuals properly reflected their intentions. Similarly, courts would ensure that the public realm was neutral as to the distribution of goods, by limiting government action. Courts would prevent factions from creeping into the polity and seizing the state apparatus for their own good just as courts ensured that the state interfered as seldom as possible in the private realm of the market.[7]

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[4] Joyce Appleby, Liberalism and Republicanism in the Historical Imagination 1-11 (1992).

[5] Blackstone, Commentaries 2:2; John Locke, Second Treatise of Government 27.

[6] Adam Smith, An Inquiry into the Nature and Causes of the Wealth of Nations 22 (1776); Herbert Hovenkamp, The Political Economy of Substantive Due Process, (1988).

[7] Morton Horwitz, The Transformation of American Law: The Crisis of Legal Orthodoxy, 1870-1960 (1992); Herbert Hovenkamp, *The Political Economy of Substantive Due Process*, 40 STAN. L. REV. 379 (1988).

As the nineteenth century drew to a close, this view of the world began to self-destruct. The economy, which had thrived so well under this classical model, began to expose the myths that lay beneath the liberal ideology. As the industrial economy matured, corporations grew. Labor disputes became more intense threatening the myth of American exceptionalism.[8] It became increasingly strained to view individual acts in the market as the product of free will. Thus, progressive legal thinkers observed a reality that had become almost impossible to ignore: there was no such thing as a private realm free from coercion. As the political and economic world became more centralized after the Civil War, the concept of a rational and disembodied self determining its own fate by contracting in a neutral market grew increasingly anachronistic. Impersonal forces and great conglomerations of power seemed much more responsible for the way things were than individual acts of volition.[9]

As the explanatory value of the will theory and contract ebbed, judges began to develop new legal doctrines, and reformers like Roscoe Pound, Oliver Wendell Holmes, and Louis D. Brandeis began to articulate new theories of the law. In doing so, they cobbled together a new sort of freedom, based on the individual's right to control information and define the contours of his or her own personality. As they grew to accept the government's role in distributing wealth, courts seized on this right to self-definition to trace new limits on state power. The imagined boundary no longer insulated property or contract, but rather personality. Of course, contract and property did not disappear but they lost their preeminence. Throughout the twentieth century and in areas of law such as tort law, First Amendment law, and criminal law, free will and freedom of contract persisted in an uneasy tension with the right to metamorphose, to reinvent

[8] Coined by Alexis de Tocqueville in 1831, the phrase generally refers to the idea that because America grew up with unique institutions and without feudalism that it experienced its own history distinct from that of Europe. By the late nineteenth century, historians and political theorists used the term to explain why America lacked the strong working class radicalism of much of the continent. See Daniel T. Rodgers, *Exceptionalism* in ANTHONY MOLHO AND GORDON S. WOOD, EDS., IMAGINED HISTORIES: AMERICAN HISTORIANS INTERPRET THEIR PAST 21-40 (1998).

[9] Horwitz, supra note 5.

oneself by controlling public and private information. In other words, the law gradually recognized that individual freedom was expressed not only in agreements in the market but also in the choice to be whoever one wanted to be and live however one chose to live. Thus, in the new liberal order, the market and polity comprised the public and the internal life of the individual and family grew to represent the private realm.[10]

The story of how classical legal theory faltered is a familiar one.[11] This essay focuses on one piece of that story. Influenced by the growing popularity of naturalism, positivism, and Darwinism, progressive critics of laissez-faire economics and classical legal thought recognized the organic unity of subject and object, the individual mind and the body politic. They saw the human being in context, a product of his environment rather than its author. Individuals act in relation to each other, never in isolation.[12] Eventually, the law grew to recognize that the particulars of a person's position in society, his or her social, ethnic, or racial group determined, at least in part, his or her share of the nation's wealth and power. Recognizing that the accidents of birth determined an individual's chances posed certain unique problems for a liberal ideology based on the preservation of human liberty. What, then, were the purpose of the courts and the limits of state power?

The law gradually recognized the importance of social group, and the nineteenth century shift that Sir Henry Maine so famously termed "the movement from Status to Contract"[13] moved back. The twentieth-century legal emphasis on status, however, was quite different from its eighteenth-century analog. Status was no longer authoritatively

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[10] This is a premise that I take for granted here, but has been the subject of much thought elsewhere. Rebecca Roiphe, Law and the Modern Soul (2002) (unpublished Ph.D. dissertation, University of Chicago) (on file with the author).

[11] Horwitz, Transformations, supra note X; Arnold Paul, Conservative Crisis.

[12] E.g., Roscoe Pound, *Law in Books and Law in Action*, 44 AMER. L. REV 15 (1910);.Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, reprinted in AMERICAN LEGAL REALISM (William W. Fisher III, Morton J. Horwitz, eds. 1993); JAMES KLOPPENBERG, UNCERTAIN VICTORY: SOCIAL DEMOCRACY AND PROGRESSIVISM IN EUROPEAN AND AMERICAN THOUGHT 1870-1920 (1986)

[13] Sir Henry Maine, Ancient Law 100 (1861). This well-known phrase has been criticized and modified greatly.

allocated or enforced by law. Suited to the modern world, status or identity grew to represent a constantly shifting state; while at times a product of environment and biology, personality was also determined by the creative mind. At the turn of the century, progressive legal reformers, like their counterparts in the social sciences, recognized that the realm of freedom was smaller than they once thought, but they did not forsake the ideal entirely. Instead, freedom in its attenuated form took on new meaning; it became the right to control the ebb and flow of information about oneself. In essence the modern legal status of the individual embodied a state of perpetual self-invention. To be free, in other words, an individual (or family or group) must be able to determine who she is and how she will lead her life.

As courts gradually redefined individual freedom, the liberal ideology reconstituted itself in the face of a massive theoretical and practical assault. It transformed just as the progressive critique and the reality of the modern industrial world threatened the basic premises of the liberal state. Thus, courts would police a new boundary between private and public, society and politics. Recognizing the need for government intervention in the economy, the law grew to protect a new kind freedom, one defined primarily by the individual ability to define oneself. It preserved a newly configured private realm and with it the liberal state.

In constitutional law, this shift from property and contract to personality took most obvious form in the doctrine of substantive due process.[14] The right to privacy was not explicitly identified until 1965 when the Supreme Court decided *Griswold v. Connecticut*,[15] but the Court began to develop the notion that a person's right to his own identity presented a constitutional limit to state police power decades before. In the

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[14] One other area of constitutional law that demonstrates this early shift in the definition of freedom is Fourth Amendment search and seizure law. See Katz v. United States, 389 U.S. 347, 353 (1967) (holding that the constitutional provisions protect people's reasonable expectations of privacy not just property). In addition, birth of modern First Amendment law offers another glimpse into this new elaboration of constitutional norms. See Abrams v. United States, 250 U.S. 616 (1919) (Holmes, J. dissenting) (noting that the theory of the Constitution is "free trade in ideas . . . an experiment, as all life is an experiment.")

[15] 381 U.S. 479 (1965).

1920s, for instance, the Court began to carve out a constitutional right to privacy by striking down two statutes that undermined parents' rights to bring up their children. Amidst the red scare that followed World War I, states began passing statutes that reflected mounting xenophobia. In *Meyer v. Nebraska*,[16] the Court held that a state law that forbade the teaching of any modern language other than English to children violated the Fourteenth Amendment. Similarly, in *Pierce v. Society of Sisters*,[17] the Court struck down a statute compelling enrollment in public schools.

In a certain way, both of these cases were run-of-the-mill *Lochner* era cases, striking down state regulation under a broad conception of the due process clause. Yet, they also stood apart, by recognizing a new sort of freedom: The Court in *Meyer* emphasized "the fact that the spirit of America is liberty and toleration – the disposition to allow each person to live his own life in his own way, unhampered by unreasonable and arbitrary restrictions."[18] The Court elaborated:

> it is not just a freedom from bodily restraint, but also the right to engage in the common occupations of life, to acquire useful knowledge, to marry, establish a home, and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[19]

The language was familiar[20] but the emphasis different from the typical *Lochner* era cases. The Court noted that freedom to choose exists not only in the market but also in the internal life of the individual and the family.

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[16] 262 U.S. 390 (1923).
[17] 268 U.S. 510 (1925).
[18] 262 U.S. at 392.
[19] *Id.* at 400.
[20] Allgeyer v. Louisiana, 165 U.S. 578, 589 (1897) (defining liberty as "not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but . . . the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned").

Thus, by the time *West Coast Hotel* and the *Carolene Products* footnote declared the death of the long suffering classical model, the law had already sown the seeds of a new self and a new liberal state.[21] So, in a way, the footnote was a pronouncement of the future of a radically altered liberal state. The courts in the new liberal view would ensure that the state did not interfere with the individual's right to define him or herself and would simultaneously prevent the public realm from becoming overrun by faction. But faction was no longer just a conglomeration of economic interests but rather a group with a particular set of values. The public realm would remain neutral but neutrality no longer meant neutral as to the distribution of goods. Instead, it meant that the state would not adopt one set of values to the exclusion of another or embrace one racial or ethnic group at the expense of another. The rule of law would ensure that there was room for everyone with every set of conflicting or overlapping values to coexist. This is the twentieth-century notion of liberalism.

This right to self-definition was elaborated by the Warren Court in countless contexts. In 1937, the Supreme Court redefined due process of law to include the provisions of the Bill of Rights that were "of the very essence of a scheme of ordered liberty."[22] The Warren Court expanded this doctrine to redefine the nature of rights, freedom, and citizenship.[23] Thus, the right to self-definition translated into a right to privacy in the context of search and seizure law,[24] a right to choose to have a child (or not),[25] the freedom to marry a person of another race,[26] a broad right to express oneself in speech,[27] and an expanded right to associate.[28]

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[21] West Coast Hotel v. Parish, 300 U.S. 379 (1937); U.S v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).
[22] Palko v. Connecticut (1937); e.g., Miranda v. Arizona (1966); Gideon v. Wainright (1963).
[23] See generally, Morton J. Horwitz, The Warren Court and the Pursuit of Justice (1988).
[24] Katz, 389 U.S. at 353.
[25] Griswold; See also Skinner v. Oklahoma, 316 U.S. 535 (1942).
[26] Loving v. Virginia, 388 U.S. 1 (1967).
[27] New York Times v. Sullivan, 376 U.S. 254 (1964).
[28] NAACP v. Alabama, 357 U.S. 449 (1958).

It is now commonly understood that we are experiencing a backlash against the Warren Court.[29] And the backlash parallels the criticism leveled by the progressives in the wake of *Lochner* – only the political commitments of the critics have changed.[30] The critics of classical liberalism were motivated by a dedication to social justice. In pursuit of this goal, progressives, among other things, exposed the mythical nature of the distinction between a private and a public realm. It was the progressives who pointed out that you cannot take an individual out of context, that every individual's actions affect one another, and that by restricting government intrusions into the private realm, the government does not remain neutral but rather supports a very particular distribution of wealth and power. In the current constitutional climate, things have reversed. It is conservatives – judges, advocates, and academics – who are attempting to reveal this fundamental flaw in the liberal worldview. It is conservatives who are seeking to expose that neutrality as to values is impossible; by acting, or failing to act, the government inevitably takes a position on values.

This argument was at the heart of Justice Scalia's dissenting opinion in *Lawrence v. Texas*,[31] in which the Court held that a statute criminalizing same sex sodomy violated the right to privacy. Such a ruling is a classic liberal holding in the twentieth-century sense. It protects the right of individuals who wish to engage in particular sorts of sexual conduct to do so. With echoes of progressive critics of *Lochner* era decisions, Scalia argued that all sorts of legislation affect morals, both the morals of those affected by the laws as well as those who sought to enact them: laws concerning "bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and

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[29] Horwitz, The Warren Court, supra note X, at 112; see also Barry Friedman, The History of the Countermajoritarian Difficulty Part III: The Lesson of Lochner, 76 N.Y.U. L. Rev. 1383 (2001).

[30] Scholars have examined the current substantive due process doctrine in light of *Lochner*. See John Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L. J. 920 (1973) (coining the term "Lochnering" to describe the creation of the constitutional right to privacy); see also LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 585 (2d ed. 1988) (arguing that *Lochner* was wrong only because minimum wage laws are not an intrusion on human liberty).

[31] 539 U.S. 553, 590 (2003).

obscenity."[32] Justice Scalia offered a list that juxtaposed laws regulating conduct where there is moral consensus (like bigamy) with those that are highly contested (like same-sex marriage). In essence, Scalia insisted that in the name of forcing the government to stay out of people's private lives, the Court is not maintaining neutrality as to morals, but is, in reality, favoring one set of morals over another. The parallel with *Lochner* did not remain implicit: Scalia explained that the statute criminalizing homosexual sodomy imposes constraints on liberty: "So do laws prohibiting prostitution, recreational use of heroin, and, for that matter, *working more than 60 hours a week in a bakery*."[33] Scalia offered a critique of the structure of liberalism, one that could apply equally to both the laissez-faire liberalism of the *Lochner* Court and its twentieth-century successor.

In *Washington v. Glucksburg*,[34] Chief Justice Rehnquist made a similar argument about the effort to expand substantive due process to include a right to terminate one's life. He described the history of substantive due process, explaining the emergence of economic due process and the persistence of the right under the Fourteenth Amendment in cases like *Meyer*, *Pierce* and *Griswold*. He concluded that the history admonishes that the search should not be for "extratextual absolutes," but rather "scrutiny of a legislative resolution (perhaps unconscious) of clashing principles, each quite possibly worthy in and of itself, but each to be weighed within the history of our values as a people."[35] In other words, there are different and conflicting views of morality. The Court should not upset the legislative decision to favor one over another, unless, perhaps, the legislature strays too far from tradition. Using the progressive critique of *Lochner* era judicial activism, the Court exposed the central flaw in the liberal distinction between a private and a public realm. The government cannot stay out of the private realm; by deciding not to act the government necessarily favors one set of values over another. In the wake of

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[32] 539 U.S. 553, 590 (2003).
[33] *Id*. at 592 (emphasis added).
[34] 521 U.S. 702 (1997).
[35] *Id.* at 764.

the realist critique of *Lochner*, Rehnquist argued, all we can do is look to reality – moral consensus in tradition – to discern a limit on government power.

In the abortion cases, the Court's perennial dissenters similarly argue that the effort to stay out of people's intimate lives is merely a pretense for favoring one set of values over another. Curiously, the legacy of Lochner has been claimed by both those justices who embrace the "liberal" approach to substantive due process, and those who oppose it. In *Roe v. Wade*, Justice Blackmun cited Holmes' dissent in *Lochner* to support the modern notion of liberalism, quoting the following passage: "'(The Constitution) is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.'"[36] Of course, Holmes; statement was not an attempt to institute this modern, liberal notion of value-neutrality, but rather to debunk the nineteenth-century version of liberalism, which was supported a particular economic theory. Then-Justice Rehnquist's opinion hewed closer to the type of criticism that fell the *Lochner* era. Just as legal realists criticized *Lochner* and its progeny on the basis that there is no inherent distinction between the public and private realm and that all actions and choices affect one another, so too Rehnquist argued that laws aimed at value neutrality are not neutral at all. Under the guise of keeping the government out of people's private lives, the Court simply inserted itself into the legislative process, favoring one set of values over another.[37] In a way, both Justices Blackmun and Rehnquist are heirs to Holmes' dissent. Taken a bit out of context, Justices Stevens, Souter, Ginsburg and Breyer (the "liberal" justices) have, indeed, adopted Holmes' view that the Constitution tolerates differing views. *Roe v. Wade* announces that it is protecting that principle by requiring the government to remain neutral with regard to

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[36] *Roe v. Wade*, 410 U.S. 113, 117 (1973).
[37] *Id.* at 174 (Rehnquist, J. dissenting).

values. By doing so, ironically, Justice Blackmun reaffirmed the mythical divide between the private and the public, the individual and the community that sustained the *Lochner* era Court.

This rhetoric is not limited to substantive due process. In the context of the Free Exercise Clause, a conservative majority observed that the right of the individual to conduct his life as he chooses cannot be viewed in isolation. The right of the individual to live his own life according to his own values inevitably interferes,, and can eclipse the right of the group to define its identity as it chooses. In *Goldman v. Weinberger*, for instance, the Court held that the Air Force could apply its regulation concerning dress codes to prohibit an officer from wearing a yarmulke.[38] In upholding the application of the regulation, Justice Rehnquist noted that the military had a strong interest in fostering "instinctive obedience, unity, commitment, and esprit de corps."[39] In other words, the value of the group in collective self-definition, at least in some instances, outweighs that of the individual.

Extending this holding to non-military contexts, the Court in *Employment Division v. Smith*,[40] held that a state can enforce a law of universal application regardless of its effect on religious practice. A law of general application can be enforced even if the person it affects engages in the proscribed act for religious purposes. Thus, the Court held that an Oregon statute criminalizing the use of drugs could apply to someone who smoked peyote as part of a religious ritual.[41] Justice Scalia, writing for the majority, explained that allowing an exception for religious practice would simply create "a private right to ignore generally applicable laws," something which he considered a "constitutional anomaly."[42] How could one justice's notion of freedom be another's "constitutional anomaly"? The answer lies in two different attitudes toward the

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[38] 475 U.S. 503, 507 (1986)
[39] *Id.*
[40] 494 U.S. 872 (1990).
[41] *Id.* at 877-879.
[42] *Id.* at 886.

twentieth-century liberal ideal. The dissent subscribes to the notion that the government should stay out of people's private lives, allowing each to develop his or her own personality, while the majority rejects this version of liberalism, pointing out that the logic is inherently flawed. It is the community's collective right to define the contours of acceptable behavior. Under the guise of forcing the government to remain neutral, the Court is, in fact, favoring one set of values over another.

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In the wake of *Lochner*, the law has redefined individual freedom and privacy: freedom to contract in the market has changed to a freedom to live by one's own values and define oneself as one pleases. But the structure of liberal ideology has remained intact: to protect individual freedom and avoid the corrosive effect of faction, the state must refrain from interfering with the sanctity of the private realm. As a result, the structure of much of the Court's jurisprudence – exemplified by substantive due process and free exercise but also seen in equal protection and free speech – has continued to focus on restricting government intrusion on the private realm. The Lochner-era justices believed that they were upholding the rights of the minority against the majority. By policing freedom, defined as a right to contract, the Court would prevent the irrational intrusion of majority rule on minority rights. The current substantive due process cases follow this same model but substitute freedom of self-definition for freedom of contract. In upholding the distinction between a private and a public realm, the Court will always be vulnerable to the realist critique that the private and the public divide exists in rhetoric not reality, that individual choices always affect one other, and that the community defines the individual just as the individual defines the community. The realist critique, ironically, has now shifted from the left to the right.

The contemporary liberal view, like the nineteenth-century predecessor, is vulnerable to the same structural critique as laissez-faire liberalism, and perhaps, it will suffer the same historical fate. By forcing the government to stay out of the market,

nineteenth-century courts facilitated economic growth. As the gap between the wealthy and the poor and corporations and the individual grew, however, it became increasingly difficult to sustain the liberal view of the public-private divide. The government no longer seemed neutral as to the distribution of wealth and power and the market no longer seemed free from coercion. Similarly, the new liberal state has helped foster a great array of values and world views. But, that same diversity threatens to expose the artificial nature of a distinction between the public and the private world. Thus, as conservatives point out, the government is never neutral as to values and the private world of the individual and the family cannot be seen in isolation: each individual choice affects the community and each other.

Where are we, then, at the turn-of-the-twenty-first century? The future of the new liberal order depends, in part, on whether the newly constituted Court, as a general matter, exalts value-neutrality over the power of the majority to define the morality of the community. It depends on whether the Court is invested in contemporary liberalism enough to overlook the same flaws that plagued reformers at the turn of the last century. Given that the conservative justices on the Rehnquist Court were gradually exposing the myth of value neutrality as, in reality, favoring one set of values over another, it seems likely that Chief Justice Roberts and Justice Alito will carry that torch. The conservative justices accept that the government cannot intrude on personal decisions when the value at issue is deeply rooted in tradition. So, the Rehnquist Court seemed willing to police the boundary between private and public, favoring value-neutrality but only when there is a basic consensus as to the underlying value. But of course question is where, and how, that line is drawn. In other words, it seems unlikely that the Roberts Court would overrule *Griswold* but the abortion and sodomy cases are less secure.

This is not the only open question. After the collapse of *Lochner*, from the New Deal through the 1970s, academics debated the extent to which the Court might require,

or permit, the government to take certain active steps to ensure economic equality.[43] A similar shadow debate is occurring now. To what extent will the Court permit the government to support certain groups or values in order to ensure that they are represented adequately in the public. Thus, in the name of neutrality, maybe the Court will allow the government to depart from formal neutrality to single out certain groups for preferential treatment. Thus, it seems, in recent affirmative action cases, that in the name of "diversity," the state may be allowed to single out minorities for preferential treatment.[44] In other words, the government can favor a certain group but only if it does so for the ultimate good that everybody's individual and group identity is represented in the public. Similarly, in the Establishment Clause context, perhaps it is okay to fund religion as long as each religion (at least theoretically) has equal access to the money.[45] Or, perhaps, it is okay for the government to sponsor a religious holiday display as long as other religions are given equal access to the public space.[46] A question that might emerge in the future is to what extent the Government has to ensure positive, as opposed to negative, liberties. Where liberty means the right of self-definition, the question becomes when does the government have a right – if not an obligation – to foster certain disfavored groups or values to ensure that they can thrive?

Those with a progressive political agenda now find themselves defending liberalism, albeit a changed liberalism, when less than a century ago they were the greatest critics of liberalism as it was understood then. This fact is more than just a remarkable irony. Just as the *Lochner* Court was vulnerable to a critique that exposed the weaknesses in liberalism, so too are the proponents of the contemporary liberal political philosophy grounded in the principle that the government must remain neutral as to values in order to ensure that each person and group has a chance to thrive. The more

[43] Frank Michelman, CITE
[44] Grutter v. Bollinger, 539 U.S. 306 (2003).
[45] Zelman, 536 U.S. 639.
[46] Allegheny v. ACLU, 492 U.S. 573 (1989)

polarized the country becomes, the more obvious the weakness: by forcing the government to stay out of people's private lives, the Court does not ensure value-neutrality but rather walks into hot-button political debates and finds itself endorsing one set of values over another.