

**What Hartz Didn't Understand about the "Liberal Tradition" Then,
and Why It Matters for Understanding Law Now¹**

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To what extent, and in what sense, is it meaningful to talk about the liberal tradition as a context within which constitutional deliberation takes place in the United States? There certainly are very real constraints on what most of those who don black robes and speak the language of constitutional law seem to be able to think. Justice Robert Jackson wrote that "never in its entire history can the Supreme Court be said to have for a single hour been representative of anything except the relatively conservative forces of its day."² The Constitution establishes much tighter boundary conditions for deliberation for some legal scholars and jurists than for others, and arguments about whether the principles and values expressed in that document are fixed or available to later generations to interpret for themselves. That legal discourse has been relatively constrained remains clear.³ It is also reasonably clear that the 2004 election assured that

¹ Portions of this paper have just been published as "Locke, Alger, and Atomistic Individualism Fifty Years Later: Revisiting Louis Hartz's *Liberal Tradition in America*," *Studies in American Political Development* 19 (Fall 2005): 206-215. Thanks to Aaron Strong and Ian Sulam for research assistance.

² Robert H. Jackson, *The Struggle for Judicial Supremacy* (New York: A. A. Knopf, 1941), 187. The remark was made in the context of discussing Roosevelt's struggle with the Court and what Jackson saw as "the usurpation, the unwarranted interferences with lawful governmental activities, and the tortured construction of the Constitution" by the conservatives (189). The liberal forces he had in mind were the New Dealers.

³ Michael Harrington once wrote that "some of the *Federalist Papers* seem to have been written by a Marx of the master class." The claim is roughly that they either brilliantly or inadvertently devised a system which would keep the future working class from attaining political power, protect wealth against assault, and limit the kinds of demands that geographically dispersed interests could effectively press onto the political agenda. Harrington's contribution to Seymour Martin Lipset and John H.M. Laslett, eds., *Failure of a Dream: Essays in the History of American Socialism* (Garden City, NY: Anchor Press, 1974), 661.

the high Court will move closer to the pole about which Justice Jackson complained than it might have under a different electoral outcome. Movement in one direction seems to eventuate in some course correction in another. But I'm not convinced such observations get us any closer to an assessment of the value of the concept of a "liberal tradition."

Scholars who reference "the liberal tradition" in American politics and law mean somewhat differing things by it. My students identify "liberalism" with something the Democrats used to use in the Great Society era; many conservative commentators identify "liberalism" with what current congressional Democrats talk about. Leaving common usage aside, I think it is fair to say that when social scientists and legal scholars talk about "the liberal tradition" they accept the notion of certain boundary conditions within which discussions and disagreements over principles, meanings, and values take place. I will work with a simplifying assumption about "the liberal tradition" here. Louis Hartz wrote *The Liberal Tradition in America* half a century ago, and I will accept that understanding of the boundary conditions of political discourse—and by extension for Hartz, political life—in the United States. To do so here, I have to leave aside quite a few of the critiques that have been leveled at Hartz over the years.⁴

Hartz described the liberal tradition as one of Lockean, atomistic individualism, wedded to Horatio Alger in the nineteenth century. He argued that the Whig-Hamiltonian-capitalists in the late antebellum era managed to "throw a set of chains around" the American democrat, in effect, selling the peasant-proletariat hybrid a bill of goods which became an ideological straightjacket.⁵ We were all simply hoodwinked by the Whigs, who wooed us with equality of opportunity—a materialist dream—while they themselves won the race.⁶ American political thought became fixed in time, impoverished and static.

For Hartz, American political thought was remarkably homogeneous and consensual; self-evident truths were beyond examination. While the heirs of the liberal tradition reacted with hysteria to challenges from the left,⁷ the basic portrait painted was of struggles that were not life and death ones. While the Civil War has always served to

⁴ Some critiques important for this paper appear below. Some of my own critiques appear in "Gendered Citizenship: Alternative Narratives of Political Incorporation in the United States, 1875-1925," in *The Liberal Tradition in American Politics: Reassessing the Legacy of American Liberalism*, ed. David F. Ericson and Louisa Bertch Green (New York: Routledge, 1999), 137-169.

⁵ Hartz, *Liberal Tradition*, especially 62-63 and 203-205. See my discussion in *The Fictional Republic: Horatio Alger and American Political Discourse* (New York: Oxford University Press, 1994), 264-266.

⁶ I think this helps explain why disparities based in wealth do not trigger strict scrutiny in contemporary constitutional law.

⁷ See Michael Paul Rogin, *The Intellectuals and McCarthy: The Radical Specter* (Cambridge, MA: M.I.T. Press, 1967).

challenge Hartz's consensus view, American political dynamics in the past 30-35 years are also offering a serious affront to Hartz's construct. As Sean Wilentz recently noted, "[t]he great weakness of Hartz's approach was that, as a unified field theory of American political thought, it turned politics in a modern liberal polity into fake battles fought with wooden swords."⁸

Writing during the Cold War and at the end of the McCarthy era, Hartz accepted the premise common to far more radical theorists of the era that ideas were the product of relations among social classes. We could describe his argument in terms of how America missed-the-boat. Lacking a feudal past, there was no genuine aristocracy in America against which a nascent bourgeoisie could formulate its own identity and revolution; it followed that the American peasant-proletariat never developed a working-class consciousness during the rise and maturation of the industrial system. Having failed to turn to socialism during this key time, America was rendered immune to such appeals (though not from fear of them). Thus, it was not material conditions per se but the class dynamics presented at key historical moments that mattered. The American peasant-proletariat had, in effect, become hermetically sealed off from foreign ideas and foreign appeals. The ocean turns out to have been a big deal in American political development. In the new world, Locke equaled Burke. That is what Americans conserved, and became "exceptional" in their immunity to class conflict and what that produced in Europe.

Hartz talked about how class-based experiences nevertheless produced atomistic individualism. He recognized (though hardly uniquely) the centrality of property and possession to the Constitution we framed and the political struggles we experienced. He understood that political discourse is patterned and that new ideas had to have strong, indigenous roots if they were going to be able to grow. And he concluded that America was extremely unlikely to become more self-aware or grow new ideas.⁹

Some of this characterization of the liberal tradition is valuable for us. We certainly see that the law generally treats people as individuals. Discussion of groups or classes of citizens has weak traction. As Scalia wrote in *Adarand*, "Individuals who have

⁸ Sean Wilentz, "Uses of *The Liberal Tradition*: Comments on 'Still Louis Hartz after All These Years,'" *Perspectives on Politics* 3 (March, 2005), 118.

⁹ While I will not discuss it here, Hartz asked some extremely important questions for our time about America's relationship with the rest of the world. America's "messianism is the polar counterpart of its isolationism," he wrote. It "hampered insight abroad and heightened anxiety at home." America had difficulty communicating with the rest of the world because its liberal creed was "obviously not a theory which other peoples can easily appropriate or understand." Failing to understand that we never had a real social revolution, Hartz argues, we do not understand our inability to lead others. (Hartz, 286, 288, 305-306). It would be interesting to talk about whether and to what extent Hartz helps us understand recent U.S. Middle East policy. See John G. Gunnell, "Louis Hartz and the Liberal Metaphor: A Half-Century Later," *Studies in American Political Development* 19 #2 (2005).

been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or a debtor race. That concept is alien to the Constitution's focus upon the individuals . . . In the eyes of government, we are just one race here."¹⁰ Property is a core value, and we have seen its protection ratcheted up during the Rehnquist Court years in regulatory takings cases.¹¹ Standing privileges injuries that can be expressed as discrete economic losses over injuries that are widely shared, more attenuated, or of a non-economic sort (e.g., some environmental harms). The fact that Americans are heirs of Locke is certainly apparent. But our political heritage is also of Hume and the Scottish Enlightenment,¹² of Machiavelli,¹³ of Hobbes,¹⁴ and the Puritans.¹⁵ The Constitution is not pure Locke. These other traditions bring striking potential for tensions.

Several scholars have labored to save Hartz from consensus politics by positing two or several poles of political discourse, each reflecting a different perspective on the relationship between liberal principles. J. David Greenstone offered a more dynamic picture of American politics, with special tension between humanist liberal perspectives (basically the Lockean atomistic individualism of Hartz) and reform liberal perspectives (identified with Dewey, Addams, and the progressive impulse to use the state positively, to insure that all citizens can develop their faculties). American political struggles were, then, quite real; bipolarity best expresses the way in which different thinkers and groups understood tensions between competing values, such as between liberty and union in the 1850s. There were, in Greenstone's view, nevertheless boundary conditions within which our disagreements took place, and these disagreements were liberal ones.¹⁶ When

¹⁰ Scalia, J. concurring in part and concurring in the judgment in *Adarand Constructors, Inc. v. Peña* 515 U.S. 200 (1995).

¹¹ With respect to eminent domain, one might read *Kelo* to indicate a privileging of commercial over residential property claims.

¹² Garry Wills, *Inventing America* (Garden City, NY: Doubleday, 1978).

¹³ J.G. A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton, NJ: Princeton University Press, 1975).

¹⁴ James E. Block, *A Nation of Agents: The American Path to a Modern Self and Society* (Cambridge, MA: The Belknap Press of Harvard University Press, 2002).

¹⁵ See below for further discussion of the import of America's religious heritage.

¹⁶ J. David Greenstone, "Political Culture and American Political Development: Liberty, Union and the Liberal Bipolarity," *Studies in American Political Development* 1 (1986): 1-49. He applies this approach to constitutional law in "Against Simplicity: The Cultural Dimensions of the Constitution," *University of Chicago Law Review* 55 (1988). He does also acknowledge a republican strain in American political thought, but bipolarity receives most of his attention.

Greenstone turned his attention to the Court, he likewise saw different but patterned ways in which justices resolved tensions over principles. Ronald Kahn, a student of Greenstone, has argued that polity and rights principles guide judicial decision making, and that these “are the basic filters through which doctrines of popular sovereignty and fundamental rights confront each other.”¹⁷ For Kahn, different justices weigh principles of popular sovereignty and individual rights differently, but all are members of an interpretive community in which principle, not instrumentality rules.¹⁸ Principle, precedent, and the legal culture establish rules of discourse and bounds within which that discourse takes place. Liberalism seems to still describe those boundaries.

Rogers Smith’s typology of republican, ascriptive, and liberal traditions captures the point that we have a richer (in his view, not better) and wider set of enduring narratives to which political elites can appeal in American politics.¹⁹ And alternative understandings of American political and legal traditions better capture the extent to which “articulations of citizenship have always depended upon the exclusion of constructed and ascribed others.”²⁰

I suspect that the notion of American “exceptionalism” had particular purchase during the Cold War era. When the meaning of America was formulated as an antithesis to the Soviet Union, distinctions with the old world, where communist and socialist appeals tended to be seductive through at least 1968, were highlighted over similarities. In a polar world, America was a pole apart. In the post-Soviet era, does America indeed look as exceptional?

The very notion of a liberal tradition as Hartz uses it is problematic. A “liberal” tradition that stretches to encompass everything that Hartz tries to encompass ceases to have much explanatory power. Variants on the ‘American exceptionalism’ thesis are not likely to help us understand the ways in which the politics of a limited social welfare state were patterned in the United States, nor are American exceptionalism likely to help us understand meaningful political contingencies and possibilities.²¹ Even if we

¹⁷ Ronald Kahn, *The Supreme Court and Constitutional Theory, 1953-1993* (Lawrence: University Press of Kansas), 18, 20.

¹⁸ See also Ronald Kahn, “Liberalism, Political Culture, and the Rights of Subordinated Groups: Constitutional Theory and Practice at a Crossroads,” in David F. Ericson and Louisa Bertch Green, eds., *The Liberal Tradition in American Politics: Reassessing the Legacy of American Liberalism* (New York: Routledge, 1999), 171-197.

¹⁹ Rogers M. Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* (New Haven: Yale University Press, 1997).

²⁰ Richard Iton, “The Sound of Silence: Comments on ‘Still Louis Hartz after All These Years,’” *Perspectives on Politics* 3 (March, 2005), 114.

²¹ Carol Nackenoff, “Gendered Citizenship: Alternative Narratives of Political Incorporation in the United States, 1875-1925” in *The Liberal Tradition in American*

acknowledge Hartz's astute observation that the social welfare policies of the New Deal era were chiefly pragmatic and never given a well-developed philosophical underpinning,²² it would be hard to contend that this explains the current erosion of many U.S. welfare state provisions since parallel erosions can be found in Europe.

Hartz wrote during a period taken with the idea of a single national "character." His vision seemed to better suit an era in which academics talked about "false consciousness" or cooptation than an era in which social scientists and legal scholars think about ways in which groups and communities actively participate in the creation of political meanings and understandings and are not merely passive recipients of communications from elites. Or, in current terminology, institutional actors and activists participate in constructing constitutional meanings outside the Court.

Consensus and stasis have yielded to perceptions of conflict as the driving force in American political development.²³ The notion of a bounded liberal tradition is one that suggests that Americans (other than extraneous fringe elements) participate in a universe of shared discourse. We understand each other when we speak—and speak about constitutional values—but to ask Stanley Fish's question, is there a text in this class?²⁴ If we strike the balance between the value of free speech and equal protection differently, is it the case that we nonetheless abide by the winner's rules and don't consider ourselves permanent losers?²⁵ At a minimum, this requires some faith in the pluralist formulation that coalitions are shifting and that openness in the process doesn't rig the game on behalf of some privileged discourses or perspectives that are actually held out there. Mark Tushnet has argued very effectively, in my view, that we cannot assume that people are part of a shared community of understanding just because they are using the same words.²⁶

Politics: Reassessing the Legacy of American Liberalism, ed. David F. Ericson and Louisa Bertch Green, 137-169 (NY: Routledge, 1999).

²² Hartz, *Liberal Tradition*, 260-266.

²³ The works of Theda Skocpol, Ira Katznelson, and Charles Tilly are among those that have been particularly influential in this regard.

²⁴ Stanley Fish, *Is There a Text in this Class?: The Authority of Interpretive Communities* (Cambridge: Harvard University Press, 1980).

²⁵ But see Mari J. Matsuda et al., *Words that Wound: Critical Race Theory, Assaultive Speech and the First Amendment* (Boulder, CO: Westview, 1993); Catharine A. MacKinnon, *Only Words* (Cambridge: Harvard University Press, 1993).

²⁶ Mark V. Tushnet, "Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles," *Harvard Law Review* 96 (February, 1983), 826, 785. See, of course, Tushnet, *Red, White, and Blue: A Critical Analysis of Constitutional Law* (Cambridge: Harvard University Press, 1988).

As institutions have returned to the foreground in the study of politics, scholars of American political development have been reconceptualizing the dynamics of political change.²⁷ If different patterns of development characterize different institutional formations, as Orren and Skowronek contend, this leads to conflict over norms, rules, and terms of control among them that have repercussions throughout the polity.²⁸ Instead of an integrated political system, “relations among political institutions are (at least) as likely to be in tension as in fit and the tension generated is an important source of political conflict and change.”²⁹ Political actors may exploit tensions and contradictions that exist because of these institutional mismatches, and there is potential for creativity by actors of all sorts.³⁰ In this view, the political universe “is inherently open, dynamic, and contested” and “existing norms and collective projects, of varying degrees of permanence are buffeted against one another as a normal condition.”³¹ American politics are patterned by institutions and norms, but these are dynamic; America is not somehow stuck in an ever-recurring drama.

The second point to note is that there is also something very wrong about Hartz’s secularism. Neither the Puritans nor religion more generally were very important to his story about American political thought. As we follow legal battles over relations between church and state ranging from school prayer to the teaching of Intelligent Design, funding faith-based initiatives and various forms of state aid flowing toward religious education, it is hard to believe that religion can be relegated to a mere footnote in American political development. And when we add in struggles over abortion, recognition of gay rights, and issues of public decency and morality, the list of issues engaging religious convictions gets very long indeed. The Pew Research Center for the People and the Press confirm that religion is much more important to American survey respondents than to people living in other wealthy nations.³²

²⁷ See Ronald Kahn and Ken I. Kersch, eds., *The Supreme Court and American Political Development* (Lawrence, Kansas: University Press of Kansas, 2006 forthcoming).

²⁸ Karen Orren and Stephen Skowronek, “Institutional Intercurrence: Theory Building in the Fullness of Time,” 140. In Ian Shapiro and Russell Hardin, eds., *Political Order. Nomos* 38 (New York and London: New York University Press, 1996).

²⁹ Karen Orren and Stephen Skowronek, “In Search of Political Development,” 39. In David F. Ericson and Louisa Bertch Green, eds., *The Liberal Tradition in American Politics* (New York and London: Routledge, 1999).

³⁰ Orren and Skowronek, “In Search of Political Development,” 39; “Institutions and Intercurrence,” 140.

³¹ Karen Orren and Stephen Skowronek, “Institutions and Intercurrence,” 139.

³² Pew Research Center for the People and the Press, “Among Wealthy Nations . . . U.S. Stands Alone in its Embrace of Religion,” The Pew Global Attitudes Project. Report

Following the publication of *The Liberal Tradition in America*, scholars repeatedly pointed to the important place of religious meanings and tropes in American political discourse and thought.³³ America was a promise and destiny as well as a place; failure was collective treason as well as a matter of personal culpability. Sacred and secular rewards were conflated. Puritanism generated a special American telos—in Sacvan Bercovitch’s words, the myth of America.³⁴ The historical was more than man-made, and a religiously-infused story about the meaning of America helped constitute and give meaning to future experience.

Recently, both Jim Morone and Jim Block, in different ways, have worked to supplant the storybook truth about America told by Hartz, and have done a fine job of remedying Hartz’s secularist defect. Morone poses a near-constant battle in American politics between those he calls Progressives and those termed Victorians. The former emphasize systemic sources of sin and urge social and political reform; the latter emphasize personal responsibility for sin and have their most recent flowering in Reaganism. These opposing political forces are moved by different senses of social justice, and are both locked in battles between us and them.³⁵ Arguing that “[l]iberal political history underestimates the roaring moral fervor at the soul of American politics,”³⁶ Morone brings this moral fervor and these pitched, fierce political battles to life. According to Morone, “American politics developed from revival to revival,” and moral crusaders played a powerful if underappreciated role in American state-building.³⁷

released December 19, 2003, introduction and summary. <http://people-press.org/reports/display.php3?ReportID=167> (accessed March 7, 2005).

³³ Some of the important contributions to this literature include Sacvan Bercovitch, *The American Jeremiad* (Madison: University of Wisconsin Press, 1978) and *Puritan Origins of the American Self* (New Haven: Yale University Press, 1975); Garry Wills, *Nixon Agonistes* (New York: New American Library, 1970) and *Under God* (NY: Simon & Schuster, 1990); Michael Kammen, *People of Paradox* (New York: Vintage, 1972); John Patrick Diggins, *The Lost Soul of American Politics* (New York: Basic Books, 1984); Robert N. Bellah, *Broken Covenant: American Civil Religion in a Time of Trial* (2nd ed. Chicago: University of Chicago Press, 1992); Robert Booth Fowler, *Religion and Politics in America* (Metuchen, NJ: Scarecrow, 1985); Wilson C. McWilliams, *The Idea of Fraternity in America* (Berkeley: University of California Press, 1973).

³⁴ Sacvan Bercovitch, *Puritan Origins of the American Self*, 81 and passim; 185.

³⁵ James A. Morone, *Hellfire Nation: The Politics of Sin in American History* (New Haven: Yale University Press, 2003), especially Introduction and Part V.

³⁶ *Ibid*, 7.

³⁷ *Ibid*, 11, 32.

Hartz's liberalism had little to do with morals or with virtue, but "[f]or better or worse, moral conflicts made America."

Block posits an entirely different narrative of American history from Hartz, rooted in the notion of agency rather than liberty, and foregrounding America's Puritan religious heritage. Hartz, in Block's analysis, conjured away all traces of a religious heritage, missing the import of Anglo-American Protestant notions of the American self. Key struggles in American politics have been between those who believe liberty requires traditions, institutions, and authority to inculcate habits of virtue and those who seek to achieve liberal autonomy without such imposed constraints. Liberation and constraint have been interconnected in the American project; Americans forged their character as they worked out their relationship to authority in distinctive ways unavailable to their European forebears. Although Locke remains important to this project, Block argues that "the great theorist of agency civilization," for America was Hobbes.³⁸ Agency as understood by the Puritans, Block argues, involves "individuals participating actively in shaping the worldly means to be employed for realizing divine and collective purposes. . . [a]gency exists only with reference to a principal, a designator, an author/ity."³⁹ Fissures in American political life can be better understood in terms of the tensions between notions of agency as natural and requiring no institutional coercion, and a sectarian Protestant vision of an exclusive religious community.⁴⁰ For Block, Americans have managed to ensnare themselves in forms of resubordination, and "as a nation we have lost our way."⁴¹ Writing before 9-11, Block argues that there has been a collapse of the national narrative, the view that America stands "as a collective experiment in human liberty and as such a model and symbol for the aspirations of the world."⁴²

Culture wars frequently seem to dwarf or supplant economic issues in American politics. During periods I have studied intensely—the Gilded Age and the Progressive Era—there were a number of moral crusades in which moral issues came to serve as shorthand for what America needed in order to be restored to the right path. Everything from the obvious temperance crusades to white slavery, eugenics, the late suffrage campaign, Americanization, religious revivals, purging libraries of sensational fiction, the rise of the YMCA, orphan trains, the Boy Scouts, and the push for pure food and drugs serve as examples. I have read the Boston Unitarian-inspired Alger story (which made its first appearance in 1864, during the Civil War and not, as Hartz would have it, in 1840) as an allegory of the adolescent Republic, where the young person's rite of passage was vital to the welfare of the community; the character of the young and the character of the Republic were inextricably bound. Character formation was possibly *the* centerpiece

³⁸ James E. Block, *A Nation of Agents*, 3, 15-18, 28, 30 and Chapter 4.

³⁹ *Ibid*, 22-23.

⁴⁰ *Ibid*, 5-9, 29.

⁴¹ *Ibid*, 1, 33.

⁴² *Ibid*, 1-2.

of political concern if the viability of the Republic depended upon its virtue, as the Alger story would appear to suggest. And in Alger's universe, natural value is juxtaposed to artifice, and solid and simple virtues are juxtaposed to social pretense and to fancy, artificial manners.⁴³ Even the Alger story, then, was not simply secular or materialistic, and participated in culture wars of the latter decades of the nineteenth century.

So Hartz missed important religious underpinnings of American political fervor. He missed the ferocity of the battles for the soul of the Republic and its youth. He missed how closely these issues were entwined. He missed how vital these struggles were for their participants, since he thought struggles over ideas in America were not life-and-death ones. He could not adequately specify the relationship between culture wars and liberalism. He did not have a good explanation for the deep divides that can open up in American politics, including around contemporary issues such as gay marriage, abortion, patriotism, and separation of church and state. While Hartz maintained that Americans do not think in terms of class even if they belong, in some sense, to classes, his sense of the political operates on a material plane and his notion of social class is materialist, based in the relationship to ownership and control of the means of production. It is no wonder that Hartz leaves us at sea when it comes to current domestic politics and legal struggles.

Surveys have documented the deepening polarization of the American public.⁴⁴ In November, 2005, 80% of self-identified Republicans approved of President Bush's performance in office while only 7% of self-identified Democrats did.⁴⁵ Congressional voting is more polarized than at any time in the past century.⁴⁶ Keith Poole, one of the experts in Congressional roll call voting, has pointed out that the last time voting was so polarized, America experienced quite a bit of political violence.⁴⁷ This polarization is

⁴³ Nackenoff, *The Fictional Republic: Horatio Alger and American Political Discourse* (New York: Oxford, 1994). 8 and Ch. 3, "Republican Rites of Passage."

⁴⁴ Pew Research Center for the People and the Press, "The 2004 Political Landscape: Evenly Divided and Increasingly Polarized," Report released November 5, 2003. <http://people-press.org/reports/display.php3?ReportID=196> accessed March 7, 2005).

⁴⁵ CNN/USA Today/Gallup Poll telephone poll conducted November 11-13, 2005 reported at <http://www.cnn.com/2005/POLITICS/11/14/bush.poll/>. This is more striking than the partisan division in approval ratings during the administrations of most incumbent presidents.

⁴⁶ Keith T. Poole and Howard Rosenthal, *Congress: A Political-Economic History of Roll Call Voting* (New York: Oxford University Press, 2000); Norman Ornstein and Barry McMillion, "One Nation, Divisible," *New York Times* (June 23, 2005) at <http://www.nytimes.com/2005/06/23/opinion/24ornstein.html?ex=1141102800&en=2bee9cc7a7c8562b&ei=5070>

⁴⁷ Keith T. Poole, Mathematics Department lecture, Swarthmore College, Spring 2003.

linked, I would contend, to the claims Americans heard about the 2004 election being “the most important” in our lifetimes because in this polarized electorate, competing moral visions are at stake. Values—and competing values—are very important to the discourse of American politics. At least one side in the culture wars pitches battles in apocalyptic language.

Political battles in the United States are likely to be expressed in appeals to time-honored traditions and values, and often are expressed in constitutional language. We do tend to constitutionalize our political struggles, perhaps an indication of the extent to which the Court has become part of our strategic calculus in politics. The Constitution becomes a weapon to fight with, and it means different things to different contestants. If we look to American history, we will find plenty of struggles over constitutional meaning.⁴⁸ The outcomes of these struggles tell us quite a bit about power, mobilization, political opportunities, and institutional change. We often learn about contingency and possibility rather than inevitability. I do not think we learn very much about these struggles—or even see most of them—by positing a bounded “liberal tradition” in American political or legal discourse. And it may be that by thinking in terms of boundaries instead of narratives or patterns in political discourse, we also miss opportunities to remain open to new possibilities.

⁴⁸ Ken I. Kersch’s wonderful book comes immediately to mind. *Constructing Civil Liberties: Discontinuities in the Development of American Constitutional Law* (New York: Cambridge University Press, 2004). See also Anne Norton, *Alternative Americas: A Reading of Antebellum Political Culture* (Chicago: University of Chicago Press, 1986).