Progressive Constitutionalism: What Is "It"?

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I do not purport to speak for all who identify themselves as progressive constitutionalists, which explains the scare quotes in this Essay's title. The other contributions to this Symposium show how foolish would be any attempt to do so. I must note at the outset as well that the term "progressive" comes with some historical baggage that cannot easily be left behind, though, as my comments will suggest, it should be.[1] Those called Progressives in the early to mid-twentieth century were enamored with social science and expertise, and more important many of them were inattentive at best, or indifferent or even hostile, to claims of racial justice.[2] The twentieth century properly induced skepticism about the claim that experts guided by social science could develop, secure the adoption of, and implement policies that would advance the public good (however defined).[3] And the claims of racial justice remain pressing. With those caveats, I move to describe what I regard as the important components of progressive constitutionalism in the early twenty-first century.

I suppose that it comes as no surprise that I believe that progressive constitutionalism must be progressive and constitutional. But, what do those terms mean?

For me, the central use of the term "progressive" lies in describing public policies aimed at improving the material conditions of those existing under material conditions of existence that place them in positions of reasonably severe deprivation. There is a lot bound up in that and a lot deliberately omitted. First, I focus on material conditions rather than psychic ones and in particular on material conditions rather than the conditions Charles Taylor refers to in describing a politics of recognition.[4] Second, my focus is on deprivation rather

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[1] For a discussion of how the term "popular (or populist) constitutionalism" has baggage of its own, see Mark A. Graber, *The Law Professor as Populist*, 34 U. RICH. L. REV. 373 (2000).

[2] There were, of course, Progressives who were not indifferent to racial justice, such as some of the founding members of the National Association for the Advancement of Colored People. But, in my view, their positions on racial justice were independent of, and probably not even incidental to, their commitment to Progressivism.

[3] For me, this skepticism is captured in the title of David Halberstam's book on the Vietnam War, *The Best and the Brightest*, published in 1972. From a Progressive point of view, those responsible for U.S. involvement in Vietnam were indeed the best and the brightest, although from almost any other point of view they were not.

[4] Not that it matters, given my position as a mere academic, but I have no objection to those who *include* the politics of recognition within their understanding of progressivism today, as long as they treat material conditions as central. And it may well be that failures of recognition are correlated with material deprivation or even that failures of recognition cause

than inequality as such. My version of progressivism is entirely comfortable with reasonably wide disparities in material well-being.[5] It is not egalitarian for equality's sake, although it recognizes that at some point material inequality may be so severe that policies aimed at ensuring that people not live in conditions of severe material deprivation may be difficult to adopt or sustain.[6] That, though, is a strategic rather than a conceptual point. Third, the goal of progressivism is to reduce and eventually to eliminate conditions of severe material deprivation. It is agnostic about the choice among policies that aim at doing so. Laissez-faire capitalism in its most aggressive, Herbert-Spencer form might be the best policy for progressives to seek, because it might be the best policy available to eliminate the conditions that progressives are concerned about.[7] What should matter for progressives is that policy debate focuses on eliminating severe material deprivation.[8] The resolution of that debate will inevitably turn on empirical questions, which themselves are likely to be highly contested and therefore resolved on the basis of intuitions arising from the general perspectives from within which individuals operate, and about which I have nothing interesting to say.

My description of progressivism has several obvious gaps. Some are collateral to progressivism. On my definition, progressivism is not centrally concerned with freedom of expression, procedural fairness in criminal cases, and more—many of the issues associated with liberal constitutionalism in the late twentieth century. In part, the reason is to keep progressivism from having

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material deprivation. In the former case addressing material deprivation would lead to recognition. In the latter, the politics of recognition would be a strategy for reducing material deprivation. So my version of progressivism does not rule out treating recognition as important or as key to progressive political strategy, but it does insist that alleviating material deprivation remain central to progressivism.

[5] My formulation is not Rawlsian, because for me progressives need not seek to make the worst off as well off as they could possibly be. All that I think progressivism requires is that people not exist in conditions of severe material deprivation. It might be that my version of progressivism converges, contingently, with Rawls's view, but I have nothing to say about that possibility. (Nor, it should be clear, do I have anything to offer in the way of a criterion for determining when material deprivation is severe enough to warrant a progressive's concern.)

[6] People living in conditions of severe material deprivation may find it nearly impossible to mobilize politically, with the effect that political support for alleviating their conditions is weak. Historical experience suggests that this can be a real problem, but also that people living in such conditions can indeed mobilize politically, at least to some extent.

[7] History makes me skeptical about that claim, less skeptical about the claim that some version of regulated capitalist competition is the best policy for progressives to seek, and increasingly less skeptical as the degree of regulation ratchets up to some point short of socialism as classically understood (public ownership of the commanding heights of the economy).

[8] For what it's worth, my judgment is that the policies associated with European social democracy in the late twentieth century are more likely to eliminate severe material deprivation than any other policies, but I have neither the qualifications to make that case nor an interest in doing so.

baggage that would distract progressive constitutionalists from what I believe should be the focus of their concern. Taking on battles about the regulation of sexually explicit publications, for example, would be such a distraction.

Progressive constitutionalists might be concerned with these collateral issues, nonetheless, for two kinds of reasons. The first kind is philosophical or political-theoretical. Why are progressives concerned about conditions of severe material deprivation? Presumably, because of some deeper commitment, for example, to the propositions that each human being is, by virtue of his or her humanity, entitled to pursue his or her own vision of the good life, and that the ability to do so is severely constrained by material deprivation. But the commitment to an entitlement to pursue an individual's own vision of the good life is at the root of many of these collateral issues as well. So the same commitments that underlie the progressive opposition to severe material deprivation underlie defense of freedom of expression and the like. In consequence, progressives could devote their attention to the issues I have described as collateral.

I agree with that as a matter of political theory. But, progressivism is a form of practical politics as well as a position in political theory. As such, its practitioners must be attentive to a second kind of reason for treating these issues as collateral. This second kind of reason is strategic or causal. As to the latter, problems of criminal procedure might arise because those living under conditions of severe material deprivation come to the attention of the criminal justice system disproportionately. Addressing problems of criminal procedure might be one relatively modest and indirect way of addressing the conditions of material deprivation, at least so that the criminal justice system does not worsen those conditions. Further, protecting some rights might make it easier for progressives to achieve their core legislative goal. Policies that restrict free expression are a good candidate for strategic concern, though that concern should be formulated carefully.[9] These sketchy discussions simply illustrate the form of analysis that progressive constitutionalism counsels for matters not directly involving policies aimed at reducing or eliminating severe material deprivation.

A more central concern is that progressivism, as I have described it, says nothing about racial justice. I have several reasons for focusing entirely on severe material deprivation. Race in the United States is strongly correlated

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[9] The difficulty lies in identifying the policies that are strategic impediments. For example, policies aimed at suppressing sexually explicit material *might* interfere with the progressive political agenda, particularly if the rationales for such suppression might be extended to justify suppression of progressive advocacy. But they might not so interfere, or the justifications might not be extendible in that way. This is a caution against taking protection of free expression in the large as a component of progressive constitutionalism; because the issue is strategic (for progressive constitutionalism as I have defined it), a more finely grained analysis is required, although in the end the analysis might—but might not—yield the conclusion that progressive constitutionalists should defend freedom of expression in the large.

with material conditions.[10] Were policy successfully to reduce or eliminate conditions of severe material deprivation, a large portion of the beneficiary class would consist of members of racial minorities.[11] In addition, taking one thing—severe material deprivation—as the heart of progressivism reduces questions about holding progressives together as a political force. Questions about coalition politics would remain, of course, but they would be questions about building coalitions between progressives and others understood as external to progressivism, rather than questions about the progressive coalition seen from the inside. And, finally, an exclusive focus on severe material deprivation holds out the possibility of reducing the interracial tensions that have impaired the effectiveness of many U.S. liberal-to-left political movements.

So much for "progressive." What about "constitutionalism"? First, constitutionalism requires some sort of hierarchy of values. Some political interests are "merely" political, others are constitutional. To use a conventional example, the choice between a marginal tax rate on high-income earners of 35% and 50% is (as a general matter) a mere policy choice, whereas the decision to have a progressive income tax might be a constitutional one.[12] Constitutional values are (1) fundamental and (2) to some significant degree entrenched against modification through ordinary policy making.[13]

But second, a distinction familiar to British constitutionalists, less so to American ones, is useful in thinking about the institutional mechanisms by which that hierarchy of values is implemented.[14] The distinction is between legal constitutionalism and political constitutionalism. These forms of constitutionalism differ in the mechanism by which constitutional guarantees are enforced. Here "enforcement" refers to the process by which legislation and executive actions are evaluated to determine whether they modify fundamental values through ordinary policy making rather than through the mechanisms reserved for *constitutional* change. In legal constitutionalism, nearly all constitutional guarantees are enforced by the courts.[15] In contrast, political

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[10] So, in my view, are many of the other characteristics that define the politics of recognition. That, though, is an empirical question as to which I am happy to be enlightened.

[11] I am genuinely unsure of the extent to which concerns about racial injustice would retain their urgency were no one to be living in conditions of severe material deprivation.

[12] I insert the parenthetical qualification because I believe that in some empirical circumstances, the choice of marginal tax rates might indeed have constitutional significance—most obviously when the choice is between a rate that will allow significant reductions in material deprivation through redistribution and a rate that will not.

[13] For discussions of these characteristics, see *infra* text accompanying notes 31–32.

[14] For discussions of the distinction, see RICHARD BELLAMY, POLITICAL CONSTITUTIONALISM: A REPUBLICAN DEFENCE OF THE CONSTITUTIONALITY OF DEMOCRACY (2007), and ADAM TOMKINS, OUR REPUBLICAN CONSTITUTION (2005).

[15] Several qualifications exist: (1) Legal constitutionalism admits a relatively narrow exception for "political questions," whose enforcement is remitted to the political branches; (2) In principle, legal constitutionalism requires judicial enforcement of constitutional provisions defining the basic structures of decision making, such as electoral rules, but in

constitutionalism relies on the mechanisms of ordinary politics—political parties, representatives in legislatures, the people acting "out of doors"—to enforce constitutional guarantees.[16] Importantly, political constitutionalists insist that legislators should—and assert that they often do—discuss their choices by making reference to constitutional values, in addition to policy matters. But, for political constitutionalists there are no regularized institutional mechanisms for ensuring that constitutional values prevail over mere policy ones with respect to any specific choice.[17] In short, for political constitutionalists, sometimes policy making involves *constitutional* choices rather than mere policy choices.

My core argument then is that progressive constitutionalism should be understood in the framework of political rather than judicial constitutionalism. One reason should be reasonably obvious. I doubt that courts could come up with effective doctrines that would allow them to decide that public policy was not progressive in the sense I have given the term—that public policy was not aimed at reducing and eliminating severe material deprivation. To revert to an earlier example: laissez-faire capitalism might be a progressive policy in my sense, depending on the resolution of a large number of factual (and predictive) questions. So might social democracy. With the range of possibilities so large, I doubt that we would want courts to say that one or another policy was insufficient.[18]

Progressive constitutionalism might have a residual, roughly procedural role for courts. The courts might tell the legislature, "This policy might increase or sustain existing conditions of severe material deprivation, and in adopting it you didn't direct your attention to that possibility. We're going to suspend its operation pending a discussion in the legislature of those possibilities."[19] Once

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practice such questions rarely arise; (3) The choice between legal and political constitutionalism is itself a political one, so that in some sense the distinction dissolves once we start thinking about fundamental issues of institutional design, and in particular about the very choice between the two forms of constitutionalism themselves.

[16] Recent U.S. literature on constitutionalism has used the term "popular constitutionalism" for political constitutionalism. I have come to think that the British term is more useful because it makes clear that the enforcement mechanism is politics broadly understood, including parties and the like which mediate the people's views, whereas the term "popular constitutionalism" suggests a less-mediated relation between the people and constitutional enforcement.

[17] By this I mean that there is no institution such as the judiciary to appeal to, to ensure that a specific legislative choice is consistent with higher-order constitutional values, although there are generalized mechanisms, such as elections, focusing on constitutional matters, through which some sort of "appeal" can be brought.

[18] This is not to say that legal constitutionalism would be inappropriate with respect to policies unrelated to progressivism as I have defined it. Restrictions on free expression, for example, could be enforced by courts, but free expression is not a concern of progressivism as I have defined it.

[19] I have in mind here something like, but not quite the same as, the approach the South African Constitutional Court took to the issue of housing in *Grootboom*, where it can be understood to have invalidated a government's housing policy because the government had

the required legislative discussion occurs, the courts recede. Recent innovations in constitutional design, which I have called "weak-form judicial review," are consistent with this version of political constitutionalism.[20]

The more important reason for placing progressive constitutionalism within a political-constitutionalist frame is to ensure the systemic stability of progressivism. British political constitutionalists[21] and some American scholars[22] have worried that remitting constitutional enforcement to the courts poses serious risks to the substantive components of constitutionalism. One worry is about what I have called democratic debilitation.[23] Those not immediately involved in political action—ordinary people, most of the time—have a lot of things to do: making a living, raising children, and the like. Politics takes time and effort. Facing all these demands, it's reasonable for ordinary people to say to themselves, "Well, if someone else is going to worry about this particular problem, I'll spend my time on something else." And, that's true even if the other people doing the thinking pursue policies somewhat out of line with what the ordinary person wants.[24] Democratic debilitation can produce policies inconsistent with those that political constitutionalism would produce.

A second difficulty progressives might have with legal constitutionalism is precisely its legalism, which entails delegating a substantial degree of control over constitutional meaning to legal specialists. The costs of that delegation can be captured in the image of judicially applied three-part tests, which stands in

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failed to include within it a component directed at alleviating the conditions for the most severely deprived. *See South Africa v. Grootboom* 2000 (1) SA 46 (CC) at 53–54, 86–87 (S. Afr.).

[20] For my most extended discussion, see MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW 43–76 (2008). I do have a minor worry that courts would move from a doctrine requiring that the legislature give some attention to policy's effects on severe material deprivation to a doctrine asserting that the legislature had not given enough attention to those effects, particularly because I suspect that a court's view of the likely effects would affect its view of whether the legislature had given enough attention to them. One might describe the concern as follows, "As we see them, the effects of this policy are actually to maintain or exacerbate existing conditions of severe material deprivation, so you couldn't have given enough attention to those effects." This might be said even about policies expressly designed to reduce severe material deprivation: "Your social democratic policies are so likely to increase severe material deprivation that you couldn't really have given enough attention to their effects on material deprivation, so we're going to block their implementation." (Relatively easy amendment rules coupled with strong-form review can also create a system of political constitutionalism.)

[21] *See, e.g.*, TOMKINS, *supra* note 14.

[22] *See, e.g.*, Mark Tushnet, *Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty*, 94 MICH. L. REV. 245, 247, 275 (1995).

[23] *Id.*

[24] Only "somewhat," because at some point the discrepancy will become large enough that the ordinary citizen will reassert his or her agency with respect to the relevant policies: the costs of democratic debilitation come to exceed the costs of taking political action.

for doctrinalism more generally.[25] Legal doctrine is the domain of specialists, not that of ordinary people. Consider two problems. First, consider *Snyder v. Phelps*, the "funeral protest" case.[26] The Court there held that a private person could not recover damages for intentional infliction of emotional distress where the means by which the distress is inflicted is commentary on a matter of public concern.[27] Undoubtedly this result is doctrinally supportable. But it conflicts with what I believe to be widespread popular intuitions that people should not be able to hijack a private person's funeral as the vehicle for getting their ideas across to the wider community, particularly when those ideas are expressed in ways that (intentionally) are designed to outrage the mourners. And, of course, one could readily construct constitutional doctrine in ways that accommodated those intuitions, though it might be more complex than the Court's. The Court's quest for simple doctrine might not produce "better" constitutional law than political constitutionalism—in the present context, the constitutional views embodied in a jury's damage award—would.

Second, consider the problem of proportionality. The doctrine of proportionality is widespread in constitutional jurisprudence outside of the United States,[28] and has its analogues in balancing tests used in some areas of U.S. constitutional law.[29] The ideas of proportionality and balancing are of course common elements in ordinary practical reasoning of a sort everyone does almost every day—in deciding whether or what to purchase, for example. Translated into legal doctrine, proportionality and balancing take on the quality of a checklist, with a structured consideration of whether the government's goals are reasonable ones, whether there are (almost) equally effective means to achieve those goals with a small impact on fundamental values, and more. Whether the structured doctrines of proportionality and balancing built into legal constitutionalism are normatively superior to the rough-and-ready judgments of proportionality made in political constitutionalism seems to me an open question, though my intuition is that the latter are typically at least as good as the former.

But, one might think, political constitutionalism cannot account for the fact that constitutionalism requires that fundamental values be entrenched, while legal constitutionalism can. Principles of free expression are different from the marginal tax rate on high-income earners because the former are entrenched in

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[25] Some doctrines derive from the specific institutional requirements of judicial implementation. *See generally* RICHARD FALLON, IMPLEMENTING THE CONSTITUTION (2001). Three-part tests in general do not, or do so only tangentially, in my view.

[26] 131 S. Ct. 1207, 1220 (2011).

[27] *Id.*

[28] For a survey of the use of proportionality tests, see DAVID M. BEATTY, THE ULTIMATE RULE OF LAW 159–88 (2004).

[29] For some cautions against directly analogizing proportionality and balancing tests, see Jacco Bomhoff, *Balancing, the Global and the Local: Judicial Balancing as a Problematic Topic in Comparative (Constitutional) Law*, 31 HASTINGS INT'L & COMP. L. REV. 555, 557–59 (2008).

legal constitutionalism but not in political constitutionalism, whereas the latter is not entrenched in either.[30]

Entrenchment, though, does not map well on to the distinction between legal and political constitutionalism. Given the possibility of formal constitutional amendment and informal amendment by means of judicial interpretation in legal constitutionalism, the real question is whether in practice fundamental values are more entrenched in legal than in political constitutionalism.[31] This is ultimately an empirical question, on which my judgment is that the differences in entrenchment of fundamental values are slight, and that what critics identify as a lack of popular commitment to fundamental values is most often simply a disagreement over the content of those values in specific circumstances.[32]

The real issue associated with entrenchment does not arise in connection with values like free expression, I believe. Rather, it arises in connection with the very structures of political decision making on which political constitutionalists rely. Legal constitutionalists rely on the courts to identify fundamental values. Political constitutionalists rely on politics. But, of course, politics ordinarily takes place within reasonably stable structures of decision making. We have legislatures selected by first-past-the-post, district-based elections rather than through statewide proportional representation; in some states, referenda and initiatives are an important component of the law-making process, we have equal representation of the states in the Senate, and of course much more.[33] These structures enable political constitutionalism, which could not exist without them. They also constrain it, as structures make some outcomes more likely than others.

This poses a difficulty for political constitutionalists' claim that their approach is normatively more attractive than legal constitutionalism. Legal constitutionalism might be biased in favor of legalistic solutions, but political constitutionalism, with any given political structure, will be biased in favor of

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[30] Except insofar as politics may produce a situation that precludes changes in those tax rates.

[31] The literature on what Ernest Young calls the "Constitution outside the Constitution" points out that, even in a legal constitutionalist world, some policies that appear to be "merely" political may be more entrenched than some values expressly articulated in the Constitution. For Young's account, see Ernest Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408, 426 (2007).

[32] Again, the funeral protest case is an example. *See Snyder*, 131 S. Ct. at 1220. Those who, like me, think that the jury's award of damages for intentional infliction of emotional distress should have been upheld do not reject the proposition that free expression is a fundamental, entrenched value. We simply think that that value ought to have been specified differently in that context. This is not a disagreement over *whether* we ought to be committed to principles of free expression, but over *what* those principles are.

[33] For an examination of the Constitution that makes these political structures central, see MARK TUSHNET, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: A CONTEXTUAL ANALYSIS (2009).

some outcomes.[34] Then, we would have to compare the normative attractiveness of the set of outcomes associated with political constitutionalism, taking into account its structural biases, with that of the outcomes associated with legal constitutionalism. It seems clear to me that there can be no general preference for political over legal constitutionalism, or vice versa, within this framework. The choice will depend on particulars.

There is, though, another possibility, which is to recede from attention to existing political structures and to think about alternatives. Political structures are what Roberto Unger called congealed hierarchies.[35] Unger proposes destabilization rights to disrupt these hierarchies.[36] This corresponds to a simple proposition—that political constitutionalists should always be alert to the biasing effects of the existing structure of political decision making and always seek to innovate institutionally to disrupt those biases (even as they acknowledge that any new institution will have its own biases, which they will then worry about disrupting). Political constitutionalists—within the U.S. constitutional tradition, at least—almost necessarily are innovators in institutional design. Notably, progressives have in fact been at the forefront of institutional innovation historically. Today such innovations include the "New Governance" and alternative dispute resolution as mechanisms for enhancing the decision-making capacity and participation of ordinary people in implementing fundamental values.[37] But, again, for political constitutionalists there are no permanent institutional solutions, just as there are no permanent specifications of fundamental values. Institutions and specifications emerge from politics, all the way down.[38]

I have one final point to make before concluding. Progressive constitutionalism is committed to implementing what progressives believe to be fundamental values. But, how are such values to be identified? Legal constitutionalism uses the courts as the mechanism for that identification, but what is available within political constitutionalism? Of course there is the Constitution's text, the value-laden terms of which are at the heart of political

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[34] Which outcomes? The answer will vary depending on precisely what the political structures are. The obvious example is that equal representation in the Senate biased public spending in favor of smaller states.

[35] For the basic statement, see Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 600 (1983) (referring to "established institutions . . . that have . . . contributed to the very kind of crystallized plan of social hierarchy and division that the entire constitution wants to avoid").

[36] For an application of this idea within a legal-constitutionalist framework, see Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015 (2004).

[37] For an insightful exposition of this perspective, taking ADR as its focus by ranging beyond it, see Amy J. Cohen, *Negotiation, Meet New Governance: Interests, Skills, and Selves*, 33 LAW & SOC. INQUIRY 503 (2008).

[38] This includes, as noted earlier, the choice between political and legal constitutionalism itself.

constitutionalism. In addition, there are the nation's "fundamental" traditions,[39] identified through a process by which people come to interpret their society to themselves.[40] Progressives interpret those traditions to support the values we antecedently have, and that interpretation is certainly available to us.[41]

As a scholar of constitutional law, I have little to contribute to a discussion of progressivism as a set of values to guide political action. I have my own views, but they have no connection to whatever expertise I can claim about constitutional law. I have argued, though, that progressives ought to be (more) committed to legal than to political constitutionalism, although a great deal will turn on a political assessment of the prospects for political constitutionalism, which, while not great, seems to me more than marginally better than those for legal constitutionalism, which have not been terrific for several decades and seem unlikely to improve dramatically.

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[39] In light of the absence in the United Kingdom of a canonical written constitution or even an agreed-upon set of statutes accorded fundamental status, it is unsurprising that the most sustained analysis of political constitutionalism comes from scholars there. The idea of political constitutionalism makes sense of the practice of constitutionalism in the United Kingdom. (And, just to pin the point down, it seems obvious that the system of governance in the United Kingdom fits comfortably within the category "constitutionalist.")

[40] I take it that this sort of social interpretation is the core of the "living Constitution" approach to constitutional interpretation within legal constitutionalism, but it is, I think, available to political constitutionalists as well.

[41] Though it is not the only way to interpret the nation's traditions, of course.