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The Constitutional Canon: The Challenge Posed by a Transitional Constitutionalism (Symposium: The Canon(s) of Constitutional Law)

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THE CONSTITUTIONAL CANON: THE CHALLENGE POSED BY A TRANSITIONAL CONSTITUTIONALISM

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How does a transitional constitutionalism challenge the constitutional canon? My recent book, *Transitional Justice* (Oxford University Press, 2000), discusses constitutional theory in periods of radical political upheaval, and offers a transitional perspective on the American constitution. Here I merely highlight some ways that incorporating a transitional constitutionalism might challenge, as well as supplement, the dominant constitutional canon.

To begin, the very question of whether a transitional account ought to be brought to bear upon the canon illuminates its underlying assumptions about the place of constitutional law in our political scheme; that is, the extent to which the canon is constituted by and constituting of a distinctive normative constitutional conception. In particular, I contend that the prevailing canon derives from an understanding of American constitutionalism that is "foundational," and, by the same token, not transitional. The established account implies a certain structure, and periodization, that define the Constitution's salient historical and political context, and that also generate a canonical constitutional doctrine. Moreover, this foundational account privileges a particular conception of constitutional change. It is a normative account of the relation of constitutional law to political change that privileges the role of law over politics. In this idealized account, the canonical narrative is constituted by select caselaw that is said to construct constitutional transformation. To the extent that the dominant account seeks to relate to constitutional law a notion of steady state constitutionalism, it emphasizes an entrenched authoritative constitutional canon. A transitional perspective would challenge many of the dominant account's

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conceptual assumptions, with a number of interpretive consequences. A transitional account problematizes foundational constitutionalism's assumptions by suggesting a less idealized and more complicated view of the relation between constitutional and political change. Reconfiguring this relationship implies complicating the canon.

Consider the extent to which the narrative of American constitutionalism represented in most law school texts is predicated upon a distinctive periodization, which one might consider a canonical history. Conceiving of the first stage as the "founding" focuses scholarly attention on constitutionmaking and the constitutional convention and ratification processes. It also focuses scholarly understanding of our constitutional culture upon a circumscribed literature of the period, chiefly the writings of the "founders." So canonical is this account that this version of constitutional history has become virtually synonymous with American constitutionalism.

Further, the canonical account is premised upon an understanding of constitutional change that emphasizes constitutional proceduralism over other more substantive recognition rules. This apparently autonomous view of constitutionmaking processes, and more generally of constitutional change, has consequences for the prevailing approaches to constitutional interpretation. The dominant view has shaped the scholarly debate of the last decade over the question of what are the applicable principles of constitutional interpretation. The content of the canonical doctrine to a large degree follows from this arch understanding of our constitutional origins.

Reconceptualizing constitutional law's relationship to politics has consequences for the narrative of constitutional change and, therefore, for constitutional doctrine. Deploying a transitional account would reconceptualize the canonical periodization. For starters, it would temporize the account in a way that redirects our attention to more extensive periods of constitutional transformation. It would shift the analysis from established accounts of the processes of constitutional change to more gradual and less radical forms. Adding a transitional account would reconceive the critical periods and processes of constitutional change, and, relatedly, the relevant constitutional doctrine.[1] A transitional perspective offers alternative narratives of

1. For references to the implications for the dominant constitutional account of

the Founding, Reconstruction and the New Deal with ramifications for canonical doctrine.[2]

Deploying a transitional analysis would have further consequences. To a large extent, the canon is predicated on a distinctive understanding of an enduring constitution. Yet, from a transitional perspective, this understanding is too crude. A transitional perspective contemplates a more nuanced approach to constitutional interpretation, as it theorizes multiple constitutional modalities. The notion of differentiation of constitutional modalities along a continuum of entrenchment contributes a more dynamic approach to constitutional interpretation. The proposed perspective of a constitution, which comprehends differentiated modalities, offers added available interpretive principles, with implications for rethinking the canonical doctrine. This account clarifies for example, how portions of the constitutional text relate distinctly to particular transitional context and circumstances. A transitional account would allow, for example, understanding the extent to which the 1787 Constitution is in some part ratifying of existing constitutional consensus, and in other part constitutionally transformative. Adding a transitional perspective to the available interpretive approaches would allow a better understanding of the quintessentially American project of constitutional transformation.

The proposed transitional evaluation would also enable a better understanding of the extent to which constitutional transformational work is ongoing, with ramifications for applicable principles of constitutional interpretation. Ultimately, deploying a transitional analysis would help to expose the interpretive assumptions underlying the canon, but also it may constitute a view of constitutionalism that is constructivist, and in the final analysis, anti-canonical.

These thoughts are preliminary, as my book primarily focuses on the meaning of justice in transition, not on the American constitutional canon. Nevertheless, the constitutional component of the project points to a research agenda, which should

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accepting my view of 1776-1789 as a "transition," see Jack N. Rakove, *The Super-Legality of the Constitution, or, a Federalist Critique of Bruce Ackerman's Neo-Federalism*, 108 Yale L.J. 1931, 1940 n.23 (1999), citing Ruti Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106 Yale L.J. 2009 (1997); Sanford Levinson, *Transitions*, 108 Yale L.J. 2215 (1999).

2. A not unrelated problematization of this doctrine are the contemporary challenges to the canonical account of the New Deal. See e.g., Barry Cushman, *Rethinking the New Deal Court*, 80 Va. L. Rev. 201 (1994).

be challenging of some of the meta-theoretical predicates of the prevailing constitutional canon.