BEYOND PRESENTISM

A COMMENT ON STUART CHINN'S *RACE, THE SUPREME COURT, AND THE JUDICIAL-INSTITUTIONAL INTEREST IN STABILITY*

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The spirit of presentism haunts constitutional scholarship. The key debate tries to identify those aspects of present-day realities which drive constitutional change – a shift in social mores, the rise of social movements, a change in party balance, or simply the death and replacement of justices.

Chinn moves beyond presentism, without disputing its undoubted importance. For him, the Court's work also represents an ongoing and self-conscious effort to synthesize past principles into a constitutional order that makes sense to Americans of the present and future.

This judicial enterprise becomes particularly challenging in the wake of a sweeping transformation – like those occurring during Reconstruction, the New Deal, and the Civil Rights Revolution. Given the system of checks and balances, it takes a lot of time and effort to pass the constitutional amendments and landmark statutes required to revolutionize fundamental principles. Even if a political movement is sufficiently powerful to leap through this obstacle course, it will inevitably lose momentum long before it can tell lawyers everything they want to know about the nature of the new constitutional regime.

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A key problem is constitutional synthesis: while the new amendments and statutes announce large principles, they don't entirely repudiate the legacy left by previous generations of constitutional politics. How then to put Humpty-Dumpty together again, melding new and old principles into a coherent constitutional order?

As the political movement for constitutional reform begins to lose control of the House, Senate, and Presidency, the Supreme Court is left to answer this question more-or-less on its own. Here is where Chinn offers a helpful trichotomy: the Court's first task will be *to delimit* the scope of the new principles, and thereby define what is living and what is dead in the constitutional legacy left by the past. Later on, it will elaborate *order-creating* opinions that give more affirmative meaning to the new constitutional principles; these principles will, of course, sometimes conflict with others derived from earlier constitutional moments, requiring the Court to confront a third, and more standard, task: writing opinions that seek to *resolve the tensions* between constitutional principles inherited from different eras of our constitutional development. This functionalist trichotomy makes a lot of sense, but it shouldn't be treated as a rigid law of judicial evolution: delimitation, order-creation, and tension-resolution are on-going processes, though one function may well be more salient at an early stage while others gain in importance later. With this caveat, Chinn's trichotomy helps moves the debate beyond presentism: while current social and political realities, as well as the particular character of the justices, certainly do matter, so too do the Justices self-conscious understanding of their role in sustaining the constitutional regime through serial acts of intergenerational synthesis.

Chinn's trichotomy also offers an antidote for another presentist tendency – the habit of modern day lawyers to judge judicial decisions of the distant past by contemporary standards. It is increasingly common, for example, to say that *Slaughterhouse*'s evisceration of the "privileges" or "immunities" clause was "wrongly decided" – without a serious consideration of the distinctive way the justices framed their interpretive problem in 1873. Chinn's analysis offers a different perspective. Instead of asking whether *Slaughterhouse* was

"rightly" *or* "wrongly" decided, he invites us to consider how the Court confronted its problem of delimitation: On the one hand, Republican Reconstruction *did* represent a quantum leap forward toward a more nation-centered understanding of We the People; but on the other hand, it did *not* represent a total repudiation of the Founding legacy of constitutional federalism. How, then, should the Court mark off the central concerns of the Reconstruction Amendments while leaving some space for the very different understandings of federalism inherited from the Founding?

By reframing the question, Chinn opens up a new path to interpretive insight. For all we know, the coming decades will once again generate a constitutional revolution – perhaps on a scale rivaling Reconstruction. And the Court, once again, will be placed in the position of delimiting the scope of the new constitutional achievements. From this vantage, there is something more important to learn from Slaughterhouse than whether it was "correctly" decided. Instead of fixating on the bottom-line, it will pay to study the different techniques deployed by Justice Miller and his colleagues approaching their problem of delimitation. If the legal community engages with the *Slaughterhouse* opinions on this methodological level, twenty-first century judiciary might actually *learn* something useful when confronting similar problems of delimitation in the future.

As Chinn rightly suggests, the great transformations of the twentieth century – the New Deal and the Civil Rights Revolution – also left the Justices confronting the basic questions of delimitation, and will also serve as a rich resource of methodological insight. The same can be said, of course, when we turn to consider the order-creating and tension-resolving opinions that Chinn has identified. Three cheers, then, for Chinn's trichotomy, and its promise of insight into two centuries of judicial effort to make sense of a constitutional tradition that has been made and remade through the efforts of many generations of constitutional politics.

It is at this point, alas, that I must part company. When he views the Court through his tri-opticon, Chinn manages to see a curiously monotonic image. Whether the Court is engaged in delimitation, order-creation, or tension-resolution, Chinn thinks that it always

has the same objective: trying to stabilize the regime by creating clear and bright lines. I don't agree, but it will take a book to provide my affirmative account.[1] For now, let me suggest two basic problems with Chinn's monotonic proposal.

The problem of dissent. When the Court speaks by a narrow majority, whatever it says is unstable. Everybody knows that the Court may change its mind in a few years, depending on future appointments. Rather than stabilizing the regime in a decisive fashion, most important decisions simply resolve a particular controversy. Their larger significance is the way they shape and reshape an on-going constitutional conversation – introducing new themes, eliminating others from the realm of serious legal argument.

Return to *Slaughterhouse* one more time: While Miller's five-judge majority opinion was influential, so was Field's dissent. It's a fair question whether Miller or Field was more influential over the next fifty years. The fact that Field only got four votes certainly didn't banish his views from the on-going constitutional dialogue.

The Justices are perfectly aware of the disruptive power of dissent – and they may sometimes try to win greater authoritativeness by handing down a unanimous opinion. But even unanimity may not suffice to generate stability. Think *Brown v. Board* or *Cooper v. Aaron*. It was the civil rights movement, not the Court, that finally stabilized the new regime by creating a political environment that allowed the President and Congress to enact the Civil Rights Act of 1964 and the Voting Rights Act of 1965.

Ought implies can – since the Justices know that they *can't* stabilize the regime simply by handing down a decisive-looking opinion, it seems implausible to suppose, with Chinn, that this is what they think they *ought* to be doing. Since Justices can't accomplish Chinn's goal, it is far more likely that each sets a more modest objective for him/herself: to write opinions *that make constitutional sense, and persuade their various audiences that their constitutional interpretations are*

[1] This will be the mission of my fourth volume in the *We the People*series. For a sketch, see We the People: Foundations chaps. 4-6. I'm presently finishing up the third volume, dealing with the civil rights revolution, see my Holmes Lectures: The Living Constitution, 120 *Harvard Law Review* 1727 (2007). So my book on interpretation won't be out for a while.

more meaningful than those offered up by their rivals on the Court.

If anything serves to stabilize the regime, it is this on-going judicial dialogue (better, multi-logue). The multilogue draws in many sectors of the population that might otherwise be alienated by a series of judicial ipse-dixits that aim to establish order once and for all. While different social groups will lose particular court decisions, the fact that dissenters are expressing their concerns in legal language may sustain their engagement in the constitutional enterprise.

Or it may not. Court-centered multilogue has broken down in the past, and may well break down in the future. But when it does, the Justices have little choice but to rely on political leadership to hammer out revised constitutional understandings.

Clarity and stability? Even when the Justices do aim to stabilize the regime, this effort rarely generates the clarity that Chinn hypothesizes – rather the reverse. As we all know, the typical unanimous opinion is generally full of obscurities and incongruities – as the Justices struggle to paper over their underlying disagreements. The judicial quest for stability generates legal obscurity, not clarity.

There are exceptions to this rule. *Darby* and *Wickard* – the Court's famous opinions codifying the New Deal — are unanimous *and* clear. But this is because Roosevelt and his Democratic Congresses had already stabilized the new regime by the late 1930s through a series of landmark statutes and transformative Supreme Court appointments. This permitted the Court to announce to the legal world what everybody-already-knew: that the American people had decisively repudiated the principles of limited federal government that had guided the Republic between 1868 and 1932.

If you want to find real clarity, the place to look is the solo dissent: Harlan or Holmes or Brandeis or Scalia can be clear because they have given up on their colleagues and are appealing to some future age for redemption. If an opinion-writer is trying to win the support of a decisive majority, compromise will often lead to doctrinal confusion.

Moving beyond small group dynamics, clarity can also be counterproductive in stabilizing the larger regime. Sometimes it is better for the court to hide the ball as it creeps toward the elaboration of a

clear principle – this is, at least, the lesson of Alex Bickel's *Least Dangerous Branch*; and Cass Sunstein is even more timid, worrying that the clear statement of any strong principle is apt to generate destabilizing backlash.

So muddling through might sometimes be the best way to stabilize – assuming (which I don't) that this is what the Justices are invariably aiming for.

To sum up; Chinn's article is a real breakthrough – inviting all of us to ask important new questions. But I don't think he has answered his questions in the right way.

But I'm sure that Chinn will have lots to say in his defense – leading both of us to glimpse better answers than those which we can presently envision. Perhaps others will join in as well. Whatever the future holds, Professor Chinn has certainly earned a place at the table! ▣