

CONSTITUTION, STRESS, AND CULTURE

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Constitution, Stress, and Culture

What happens when the course of events creates tension within a political culture or puts pressure on a constitution or a polity? All organic systems, including the intricate organic whole made up of constitution, polity, and culture, constantly undergo stress. Stress is the common condition, the normal state, of living human association, as it is of a living human body. Stress can come from brief events, such as those that occurred in the United States on September 11, 2001, or those that occurred in Germany on November 9, 1989. Stress can take the form of a series of increasingly severe tests, perhaps culminating in a serious rupture such as took place in the United States in the late 1850s and 1860s. Stress can be so extreme that constitution, polity, or even culture fractures, dissolves, explodes; extreme degrees of stress can be fatal to a constitution, even to a political culture, just as they can be to an individual. Revolutionary moments—such as those in England in the 1640s, America in the 1770s, France from 1789 to 1799, Eastern Europe in 1989 and 1990—offer examples of such extreme degrees of stress. In this paper I want to explore the terrain of constitutional and political endurance; I want to think about distinctions between types of stress and examine the ways in which constitutions, bodies politic, and political culture respond.¹

Constitutions and Stress

Constitutions are embedded in time and have a symbiotic relationship with the political culture out of which they emerge and into which they are thrust. Constitutions do not come out of nothing; rather, they involve the rise to prominence of certain aspects of a culture, and the submergence of other aspects, in a creative endeavor to order the political world through the use of words. The words used, the ideas expressed, the ideals espoused, even the alternative frameworks considered, rejected, or adopted, pre-exist the constitution (using “constitution” here to refer to a written or unwritten text that seeks to found a polity). That is to say, culture provides the constitutive materials for constitutions. But more interestingly, a constitution *creates* a political culture because it is an intervention in time, specifically into the political time that characterizes a particular polity. The constitutional enterprise entails the making of new political worlds, based on new political principles (or old principles re-conceived), the creation of something new in words and its projection into reality. Constitutions have a paradigmatic quality, configuring and reconfiguring political culture by configuring and reconfiguring the polity itself.

Once thrown into the world, a constitution flows within boundaries set by the political culture and by the terms of the constitution itself. Over time, one may justifiably claim to step into the same stream—to engage with the same constitution—though the identity of the stream at any given moment is complex, with its components in constant flux. Constitutions, like the cultures from which they spring and in which they act, are Heraclitean creations, ever in motion, ever being redefined. They are emphatically not, even though some of their framers may hope they can be, unchangeable Platonic ideals, once-for-all creations that resist the tendency of material reality to change, to degenerate, to metamorphose with the passage of time and the action of humans. Political culture provides the terms

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¹ I should make clear at the outset that my argument must be confined to Western-style constitutions and political bodies. Many non-Western systems or constitutions look and act differently from the American and German constitutions with which we are familiar. As a result, they may well react differently to stress.

within which this change takes place, and the results of the process itself produce alteration in political culture. Constitutions are ongoing interventions in political time.

There is a dual constraint at work here. On the one hand, political culture constrains both the original act of constituting and the ongoing reconstituting that characterizes a vibrant polity. On the other hand, the political culture itself—the ways in which people think about politics, the language used to discuss public matters, the bounds of the speech and action that make up the political—is constrained within the terms of the constitution. Working constitutions provide the framework, the language, the interpretive schemas for making sense of the political, just as the political itself (particularly its past and ongoing development) lends meaning to the terms of the constitution.² This is not to say that political culture is the only source of constitutions, nor is it to say that constitutions are the only influence on the development of political culture. It is to say, however, that this crucial relationship between constitution and culture lies at the heart of a people's political life as it evolves over time. A constitution at odds with or disconnected from a political culture cannot succeed.

Constitutions, particularly written constitutions (which are the clearest examples of reflection and choice applied to the problems of political order), perform many functions. Constitutions generally seek to form more perfect unions, to transform political communities, to *found* something new. Constitutions self-consciously design political institutions, institutions that will work to ensure tranquility, defense, justice, and the general welfare. Constitutions have both aspirational functions, setting out terms that capture the political ideals of a people (witness the extensive lists of protected rights that lie at the beginning of so many constitutional documents), and realistic functions, both creating and limiting governmental power.³

But for our purposes, the key function served by constitutions, particularly written constitutions, is to create an order in words that is *designed to withstand stress*. Stress lies at the very heart of the idea of constitutionalism. Constitutions seek to frame a political world that will overcome conflict, persist through change, and secure its blessings to posterity. Constitutions are designed to endure despite the challenges posed by times of stress. Most importantly, constitutions are conceived as orders imposed upon chaos, capable of ending revolution and disorder and preventing their recurrence.⁴

Words play a critical role in constitutions. This is a subject that has been handled very effectively by others, and so I will not spend much time on it here. Suffice it to say that constitutions are orders created in words and then cast into a chaotic political world in an effort to structure, to impose order upon, that world. Constitutional words, henceforth, both provide a solid, seemingly changeless touchstone for the development of the polity and a medium through which the constitution, the principles on which it is founded, and the goals it is intended to serve, may be communicated, debated, interpreted, re-interpreted, re-visioned. Because they are structures of words, constitutions are both changeless (though they may be amendable) and developing. Constitutions are not once-for-all,

² That means that a constitution begins to fail to the extent that this constraint fails—for example, when the constitution becomes irrelevant to ongoing political construction of the polity, as it does in both times of revolution and when interpretive schools arise that pose either a constitution so alive as to offer no firming footing for political understanding or a constitution emphatically dead because it has been confined to the mental limits of its drafters.

³ A fuller discussion of the functions served by constitutions can be found in Beau Breslin, *FROM WORDS TO WORLDS: EXPLORING CONSTITUTIONAL FUNCTIONALITY* (2009).

⁴ This is true on two levels. Constitutions contain provisions specifically designed to structure change. Amendment provisions, such as Article V of the U.S. Constitution, or emergency provisions, such as Article 48 of the Weimar constitution, offer examples. On another level, however, it is the very essence of a constitution's being, the very core of constitutionalism itself, to endure, to live through stress and change.

though they are written precisely to limit change by institutionalizing it. Words in a living language have the fascinating quality of never quite coming to rest in terms of their meanings and implications; they are, in terms employed by H.L.A. Hart, “open textured.”⁵ Languages grow and shift as they encounter an ever-changing world. Consequently, constitutions—constructions of words cast into the world—develop over time, very much like the constitution of a human person, never totally, but nevertheless steadily. They progress from within but are designed to stop fundamental transformation. Constitution-makers seek to erect structures that resist fundamental change but allow for development, structures that flex but do not buckle under pressure.⁶

A constitution—conceived in words to have this growing, shifting quality—seeks to fashion a polity that can survive stress. The flexibility of language aids in this endeavor, though institutional design and many other factors are critical as well. Constitutions are designed for the tough times more than for the normal times; they seek to surmount the risk of revolution, to neutralize, to naturalize, to smooth out the rough edges of revolutionary times and gut the tendency of revolutionary moments to jettison the old and bring in some sort of new. Revolutions have a tendency to spin out of control. The success of the American Revolution as compared with the relative failure of the French lies in the fact that the American founders discovered a way to institutionalize the achievements of the revolution, to cut off the revolution before it went so far that the social world fell apart, so far that a turn to tyranny seemed necessary to bring stability to the political world.⁷ The great achievement of the successful constitution maker is the ordering of a crumbling political world, a world teetering on the verge of chaos, in such a way that the order persists. Of course it never persists in its original shape. But constitutions offer a framework for a turn when a break seems inevitable; they offer banks—but not dams—within which the stream can shift, rather than turning into a flood.

I have said that constitutions develop, and they do so by coping with stress. Constitutions do not eliminate conflict either on small-scale policy matters or on large-scale political cultural or institutional issues. Constitutions are Heraclitean, eschewing the attempt to mold the world into a timeless, unchanging form; that is, successful constitutions are designedly non-Platonic, even anti-Platonic. The American framers are noteworthy for many things, but one of those things is a recognition that a written constitution can work to balance the competing, conflicting forces within a polity. The result would be something like a timeless system, but it was not a Platonic kind of timelessness; it was, rather, an ever-changing balance of forces that would persist across time. Political systems, in the framers' view, survive because they successfully balance conflicting forces, not because they eliminate conflict.⁸ Significant episodes and historical turning points trigger these conflicts or amplify them. But neither the presence nor the amplification of conflict is a sign of constitutional failure, for conflict itself may be a sign of a vigorous constitution, a lively polity, a thriving social body. Successful polities, in other words, contain, they do not prevent, politics; they overcome, they do not rule out, conflict; they survive, they do not eliminate, change. A constitution is designed to adapt, to adjust, to be interpreted and reinterpreted, to flow through time. It is designed to avoid major breaks, to smooth out potential revolutionary moments, to institutionalize change so as to shut it off from its tendency to destroy all things.

⁵ H.L.A. Hart, *THE CONCEPT OF LAW* (1961).

⁶ I mean here something vastly different from any claim that constitutions are “living” documents in the sense often associated with Justice William Brennan. Brennan meant that constitutions should change in response to changing circumstances, and can be made to do so by the courts. But that is to make a constitution merely another sort of legislation, albeit judicial legislation, and to strip away the effort of the constitutionalist to create something more fundamental.

⁷ A point made brilliantly by Hannah Arendt in *ON REVOLUTION* (1963). A similar argument was made by Alexis de Tocqueville in his analysis of democracy in America.

⁸ Indeed, as Beau Breslin has argued, constitutions almost inevitably create conflict. Breslin, *supra* note 3.

A constitution, then, is the counter to Hobbesian chaos. In founding a new political order, the social covenant is new-fashioned as a barrier against the disorder of the state of nature. The aim of founding is to *ground* peace, to fashion an ordered universe out of chaos and buttress it with sturdy supports so that it can resist the lure of disorder, the pull of dispute, the dangerous slide into revolution. Constitutions create peace where previously war reigned; they permit both industry and leisure where once the former was to no avail and the latter was impossible. A constitution seeks to carve out of the abyss an ordered area, to impose rules upon unruly proto-political matter. The whole point of a constitution, then, is to resolve disorder into order, to prevent the re-emergence of confusion; constitutions, and the laws they make possible, plant a hedge against disorder, creating a safe haven offering shelter from the unintelligibility, the incoherence, the disconnectedness that characterized the state of political nature.⁹ Constitutions attempt to create political meaning, rationality, order, and structure out of primordial chaos, and in doing so to quell the fears aroused by the unknown (because unknowable).¹⁰ They establish a public space in which “the mild voice of reason” can be heard over “the clamors of impatient avidity for immediate and immoderate gain,”¹¹ clamors more characteristic of the state of nature than of organized social life. Constitution-making, then, is counter-revolutionary in the sense that it seeks to found something that ends revolutionary momentum. Constitutions are designed for the ages, not for a time.

The American constitutional enterprise is of a Hobbesian nature. The driving motive behind the framers’ work was fear—fear of the ongoingness of revolution, fear of public unrest, fear that nothing could be done if the people were too caught up in day-to-day government or obsessed with the common good. They sought to found a way of life, a structure of offices, a balance of forces, that would prevent the overflow of public passion into revolutionary fervor. The Constitution was designed to thwart excessive leanings toward democracy, to fashion a structure within which public discussion must take place and through which public passions would be filtered and tempered with the acid of reason, a quality found not in the people themselves (or at least not always) but in those who would rise through the complicated electoral system into positions of authority or who would be chosen by those who had so risen. Too much democracy means too much risk of a descent into the maelstrom. “Experiments” in the design of polities, Madison tells us, “are of too ticklish a nature to be unnecessarily multiplied.” For a Hobbesian constitution-maker, “frequent appeals” to the people will undermine the “requisite stability” of the system¹² and is as likely to uproot the “tree of liberty” as to water it “by the blood of patriots and tyrants.”¹³

The Constitution, of course, cannot be reduced to an attempt to get the people out of the government’s way. A constitution, if it is to truly become a way of life rather than a mere arrangement of offices, if it is to constitute a people as well as being constituted by them—this is the promise and the claim of the U.S. Constitution after all—must integrate the people in such a way that it becomes tied into their self-identity. A constitution helps define who “we” are, for it hones the notion of a people into a distinct identity. A constitution, in other words, takes on the character of what Jefferson called “a text of civil instruction.”¹⁴ This is the reason that Madison insisted that the constitution cannot be too subject to spur-of-the-moment change: a constitution that is easily changed has not become firmly

⁹ See William F. Harris, II, *THE INTERPRETABLE CONSTITUTION* (1992).

¹⁰ Sheldon Wolin, *THE PRESENCE OF THE PAST: ESSAYS ON THE STATE AND THE CONSTITUTION* 104-105 (1989).

¹¹ *Federalist* # 42.

¹² *Federalist* # 49.

¹³ The language is from Jefferson’s letter to William Stephens Smith, November 13, 1787.

¹⁴ Thomas Jefferson, First Inaugural Address, March 4, 1801.

rooted in the people; it cannot provide their identity, for identities cannot be so easily and quickly changed. Even the potential for too frequent change in constitution deprives the constitution of the sort of veneration we give to our inner nature, a veneration we do not give to our latest suit of clothes. A constitution is not clothing; it is the deep, inner identity of the body politic—at least this is what it aspires to be.

The American constitution-makers, then, envisioned a new type of constitution, a new fabric of government with “no model on the face of the globe.” They attempted to do something new, something unheard of, something never before tried. They spoke little about carrying on the traditions of the past; they spoke rather of creating the new, of innovation, of novelty, of government “new modeled,” of the founding of new political orders.¹⁵ They cast themselves as inhabitants of a truly Machiavellian moment. The contrast they set up, especially evident in the *Federalist Papers*, was between a staid reliance on the past and a revolutionary step into the future. They created systems of government that promised stability through change, a moving order, characterized by both permanence and development—a visionary rejection of the Platonic ideal of stability, changelessness, timelessness, and solidity. The very written-ness of the constitution contributed to this design, for the open texture, the open-endedness, of words, as Madison understood, means they are never quite adequate to the complex ideas we seek to express.¹⁶ The open texture of language provides a mechanism through which the development of the constitution can occur, helping the constitution weather the inevitable crises of political life.

The Episodic Nature of Political and Constitutional Life

As British sociologist Anthony Giddens has said, the life of any society, any political culture, any governmental structure, is by nature episodic.¹⁷ Episodes can be large-scale, involving sequences of change affecting the major institutions of a particular socio-political whole (totality) or involving transitions between types of social wholes; episodes can also be, and most frequently are, smaller scale sequences affecting only parts of the social whole. Episodes are fragments arbitrarily carved out of the stream of time and contain innumerable continuities and links with that stream; reality offers us only a continuum. Episodes themselves, let alone the even smaller unit we call an “event” (as in the phrase “watershed event”), are composed of a string of incidents and actions, and it is only our mind that cuts up the string by creating neat little packages, separating them off from the surrounding moments and actions, picking out certain points as the opening of a sequence of change and tracing that sequence as a process of transmutation. Episodes, then, are products of human reflection; they are imagined and then pinned onto the world, or better, thrown into the world, there to control future perceptions.¹⁸

¹⁵ *Federalist* # 14.

¹⁶ *Federalist* # 37.

¹⁷ While I employ Giddens’ term “episode” in what follows, I have significantly altered and adapted his concept. See ANTHONY GIDDENS, *THE CONSTITUTION OF SOCIETY* (1984).

¹⁸ Indeed, the world we inhabit at every moment, the world into which we are “thrown” in Heidegger’s sense, is (in one aspect) a manufactured world that confronts us as real. Martin Heidegger, *BEING AND TIME* (1927; tr. 1962). Cutting into history, then, is both an arbitrary and a creative act. Our perceptions do not, as far as we can know, cut reality at the joints; nor does our language carve up the world in conformance to its natural shape. Rather, perceptions and language create the world we inhabit. As Kant saw, there is no perception without categories of understanding; and these categories, while they may be built-in by nature, develop over time as products of language (as both Heidegger and Wittgenstein made clear). That is to say, there is no unmediated reality to which we, lacking a God’s eye view, have access. Our experienced world is mediated by language, a mediation recognized (in their way) by eighteenth-century constitution makers, who sought to create a world in words and then inject it into physical reality. They intentionally fashioned a world—“by reflection and choice”—and then projected and inhabited that world. They were world-makers, as constitutional framers must be.

Isolated events almost never call into question constitutional frameworks, though they may raise questions about the application of particular constitutional clauses. Events may startle; they may rouse people or politicians; they may breathe life into sleepy political views. But they do not, by themselves, alter much of long-term significance. No event, by itself, can have the kind of world historical force often attributed to 9/11. To the extent that 9/11 will have long-term effect, it will be because it is not merely a single event (or a momentous day) but part of an episode (a sequence of acts and events). Furthermore, our perception of historical significance is notoriously suspect and subject to change. The significance of virtually all episodes fades with the passing of time as the episode—that package we have carved out of time—fades back into the flow of history. This is due to the very nature of episodes, which *come in beside* other events, other acts, other sequences¹⁹; like the water of a tributary flowing into a larger stream, the importance of any given episode merges with the larger stream of history, intermingling with many other episodes. By itself, an episode seldom retains long-term significance, and up close it is impossible to tell what episodes will have staying power and what episodes will fade.²⁰ Historical processes, of course, can give meaning to events, can link them together in a chain of signification. It is only processes—paths of history, strands of time—that can raise the question of the validity and viability of a constitution, only processes that can uproot a culture. Those processes may be influenced by human modes of understanding and human acts, but they cannot be entirely within the control of human actors. The great threat posed by an incident like 9/11 lies in the way it gets defined as part of a larger episode and invested with the power to terrorize us.²¹ The circumstances that prompt significant constitutional change—the English, American, and French revolutions, the American Civil War, the rise to power of the twentieth century dictators, the two unifications of Germany in 1871 and 1990, the New Deal in America, the civil rights revolution in twentieth century America, the collapse of the Soviet Union, the end of apartheid in South Africa—are processes.

Episodes appear in a range of types and can be studied in terms of both intensity—how profoundly a series of changes disrupts or reshapes an existing alignment of institutions—and extension—how wide-ranging such changes are. Hence, within the larger realm of episodes there are both minor sequences—perhaps best described as times of controversy—when debate about fundamentals gets more heated, when questions are asked, when sides form in a minor culture war—and major, intensive and extensive, sequences. We must not mistake times of controversy for turning

¹⁹ The Greek word *epeisodios* means “coming in besides, or entering in addition.”

²⁰ Of course the tendency of an episode to fade into insignificance with the passage of time is often resisted by those who have a stake in its continued vitality. Politicians, government agencies, licit and illicit groups (some of which have come into existence in response to the episode's initial acts and events) often seek—usually for self-interested reasons—to halt the inevitable decline in importance.

²¹ Terrorists seek to elicit a dread that undermines the ongoing attempt to order the political world. They seek to fill the world with fear—an end toward which they are unwittingly aided by the cynical manipulators of public feelings, the fear-mongers, that inhabit every political order. Terrorists want to force a re-imagining of the world as pervaded by terror. It is not so much their acts of terror as their generation of a mood of dread that renders more difficult the ordering function of constitutions.

It has become customary, particularly in the United States and with typical American hubris, to talk about September 11 as a major watershed moment in the history of the world. There can be no question that 9/11 was a significant event, and it is possible that 9/11 will become part of a series of events that will combine into a turning point in constitutional history, though I find this unlikely. Like other important historical events, 9/11 altered state policies and provided a context within which subsequent political and constitutional discussions were (and still are to a limited extent) carried on. 9/11, and the response to it, produced a chain of consequences. But that hardly qualifies it as anything more than an episode in world political history. The inflated view—quite common in the United States and elsewhere—that 9/11 was a world-historical moment is more a product of clever manipulation by politicians and news media than of objective perception of reality.

points or fractures.²² Some episodes remain series of events that, in the long run, have relatively little impact on the history of a political culture—I would argue that 9/11 is of this nature. Other episodes threaten the viability of the constitution, the polity, even the culture, creating problems that compel a deep re-elaboration of existing structures and frameworks—what I will call “turning points”—or prompt the jettisoning or collapse of those structures and frameworks due to their inability to solve the problems posed—what I will call “fractures.”

While the language of continuum calls our attention to the flow of history and the capacity (and tendency) of the human mind to carve out bits of that flow into discrete units, other aspects of constitutional stress are captured better by a different image, that of a series of concentric circles, one inside (partially or entirely) the other, in a concatenation of ever larger circles. The idea is that one set of stresses includes other sets, which in turn include additional sets in the way that mathematical sets (for example, the set of whole numbers) include other, smaller sets (for example, the set of even numbers). For our purposes, episodes form the largest circle, within which lie turning points, some of which are true fractures (or *Zäsuren*). A full explication of this idea would add a third dimension, that of depth, to capture the fact that stress often builds, that it has the quality of growth—though, of course, that growth can be halted at any point in the process (as I have said, that is one fundamental purpose of a constitution).

Fractures

Some episodes involve critical thresholds of change that lead to transitions between governments, between constitutions, even between social totalities. At the root of these moments lies a perception by a people (or some number of them) that new features must be accounted for—new structural features, major changes in the social, political, economic, or natural environment—or that major conflicts deep within the constitutional identity of a people finally must be confronted. These situations seldom appear suddenly, though they may “suddenly” strike reflective members of a body politic when the weight of circumstances builds to a critical mass. The features themselves reach back into time and thrust themselves into the present. What sparks their apparent suddenness is the dawning perception that something major is out of balance, that there is a growing disjunction between developing cultural understanding and political and social reality, that there is an emerging incommensurability between constitution and events. At these points in time, the culture must come to grips with what it is and constitutions must adapt to, or collapse before, major new-found facets of the political and cultural landscape.

We can call these shattering episodes fractures, or *Zäsuren*.²³ Fractures are revolutionary times, Hobbesian moments, times of fear and crisis, times of war and death, times that see the collapse of order. In fractures, currents that have been dammed up spill over their banks, sweeping away

²² Nor should we conflate November 9, 1989, in Germany with September 11, 2001, in the United States. There is a crucial difference: while the former spawned the merger of two political and educational cultures—albeit with numerous points of contact, overlap, and similarity—within a single, unified system, the latter has really had few discernible, deep effects: greater restrictions on carry-on baggage do not amount to a significant re-arrangement of either political order or political culture. 9/11, as far as we can tell at this point, did very little to call into question fundamental principles or institutions and it did not prompt the sorts of constitutional and political and educational changes required by 11/9. While 9/11 did put some stress on fringe regions of the rule of law—mostly because there were those who sought to take advantage of the situation to achieve political and legal goals they had long pursued unsuccessfully—there was not a movement toward, or any real risk of, constitutional revolution, despite the hopes of those on the far right and the fears of those on the left.

²³ The German word refers to something far more drastic than a mere turning point (*Wendepunkt*).

institutions and settled expectations. “All that is solid melts into air”²⁴ as stress exceeds the limits of what the system can tolerate. Fractures are moments of constitutional failure.

To see why, we must return to the relationship between constitutions and stress. Bodies politic exist in a world of confusion in which they are constantly put under pressure by the forces of disorder. The stress on the constitutional structure, its polity, and its culture, from these forces—as well as from internal forces set loose by the inadequacy of constitutional language to smoothly manage every changed circumstance—should not be imagined to be a catastrophe to be avoided at all costs (as Hobbes surely saw it to be).²⁵ As Machiavelli recognized, some stress is necessary for growth and for the maintenance and increase of strength. Machiavelli actually encouraged princes and republics to engage in behavior pointedly designed to create stress. In his view, constitutional strength only came from encounters with resisting force. Strong constitutions, whether in an individual person or in a nation, develop from the measured application of stress; exercise is essential to their continued vitality. Far from being a threat, stressful episodes—sequences of events that encourage conflict and re-examination of constitutional principles and their application—actually strengthen the constitutional system and re-confirm the fundamental constitutional principles that lie at the heart of the political culture.

Because culture is more deep-seated than political policy or legislative agendas, isolated events rarely have much impact on culture; indeed, they frequently reaffirm basic cultural principles—those principles, indeed, may only come to consciousness in times of stress. Pressure can reinforce—and re-enforce: breathe force back into—principles rooted in political culture.²⁶ Culture changes slowly, and though stressful episodes will press the culture to change, the culture provides a context in which the pressure is perceived. Even fractures tend to flow out of the political culture of a place, and their development is generally structured by the existing political culture. That is to say, culture persists across fractures, though it may, in the long run, be transformed.

Machiavelli insisted that strong polities, in a sort of measured application of stress, periodically return to first principles—and by first principles is meant not so much *original* principles as *fundamental* principles. To return to original principles is to re-enter the minds of the founders of a polity; but that would be to attempt to turn the clock back, to re-enter a world well lost. A return to fundamental principles is a return to the basics of a polity, to debate and deliberation about the grounding principles of a constitution and a culture, to the fear that accompanied the founding of the body politic. Of course, while the basic problems of political order remain the same, fitting answers to those problems can change because they are subject to the will of the people posing the problem. I think this is what Jefferson had in mind when he contended that a periodic return to first principles makes for a stronger, healthier, more vibrant polity. Constitutional conflict of this sort generates both development and reaffirmation of the constitutional core—the core problems, and the core commitment to their solution by a single people. Stress of this kind demonstrates the capacity of a constitution to flex yet remain solid and vibrant. As a result, pressures placed on the polity, especially opportunities to test constitutional principles, should be valued rather than bemoaned.

²⁴ Karl Marx & Friedrich Engels, *Manifesto of the Communist Party* (1848).

²⁵ Because he did not fully appreciate the value of stress on a polity, Hobbes sought to eliminate all tension from the world inside the polity and strengthen the polity to such an extent that it can always resist the tension of external forces. But like Plato in his *Seventh Letter*, Hobbes came to realize that no polity can be entirely successful in these regards; all political systems inevitably degenerate. See Hobbes’ discussion of the failure of the social compact in *LEVIATHAN*, bk. II, ch. 21.

²⁶ As John Stuart Mill observed, ideas are most firmly held, and most likely to be correct, when they are regularly challenged by alternative ideas, when they have to confront critics and opposing ideas and defend themselves. John Stuart Mill, *ON LIBERTY* (1859).

But stress is easily misapplied. The fear provoked by intense pressure on the known world can drive a people to redefine, even reconstitute, themselves. Fear of disorder may, as Machiavelli and his English followers hoped, trigger re-examination of first principles, but more frequently it prompts a still deeper chaos. Such deep-seated fear is most likely a harbinger of constitutional failure and the return of the state of nature where life is “solitary, poor, nasty, brutish, and short.” Fear can provoke destruction as easily as it can prompt reinvigoration. Destruction occurs when the constitutional system is sick to start with. If conflict, debate, and deliberation can no longer take place within shared understandings of problems, within shared expectations about potential solutions, within the presupposition that some things—in particular basic rights and other commitments—must not be sacrificed to the vagaries of quotidian politics, then events will move the system beyond crisis toward a real fracture involving the utter destruction of the old system and its replacement with something new. The history of constitutions in Latin America provides numerous examples of just such fractures. Risk lurks within stressful days, just as it lurks within physical exercise. Stress can kill; it can trigger processes, rooted in fundamental organic weakness, that can threaten or end the life of the organism. Stress can be severe enough to destroy an unhealthy constitution. It can even be severe enough to deal a fatal blow to a political culture, particularly when it comes in the form of massive outside interference in an ongoing culture—this is precisely what happened when the European nations colonized once-vibrant cultures in Africa and Latin America.

Deadly stress can be triggered by a failure of the constitution to serve the purposes for which it was designed, or which human speech and action have pinned upon it—in particular a failure to manage and find solutions for the problems posed to the body politic by the exigencies of life or by the persistence of deep-seated conflict within the political culture. Overwhelming stress can be the source of revolution, as Locke and Jefferson noted. A time can come when an existing polity no longer serves (for a wide range of reasons), when an old order no longer achieves the purposes of men, when the old must be torn down and replaced by something new.

Locke and Jefferson, of course, imagined a world filled with enlightened people, who examine their situation, their place “in the course of human events,” and choose to act. But accident and force generate constitutional collapse just as frequently, perhaps more frequently, than do reflection and choice. Indeed, stressful times generally provoke emotional responses to circumstances, and where emotions run rampant, careful reasoning (“reflection and choice”) becomes difficult and rare. So fractures can occur that do not have the intentional quality of revolution, when a constitution simply collapses in on itself, when the edifice crumbles leaving nothing but wreckage. Internal stress (or a combination of internal and external stress) can produce what political scientists call a “failed state”—we can think here of places like contemporary Somalia. Other combinations of internal and external stress can lead to a polity being conquered by another, stronger, more vigorous polity. Both involve political and cultural failure as well as constitutional failure.

As Mark Brandon has shown, constitutional failure can take many shapes,²⁷ and fractures entail only the most extreme types of failure. Fractures are the severest sort of change, for they cast a people (perhaps no longer even constituted as a single people) into a veritable state of nature in which nothing is defined—not good or evil, not moral or immoral, not just or unjust—because of the absence of a single power or any shared agreement to enforce the definition. Fractures involve the failure of whatever constitution structured the polity (and fashioned the people) and the destruction of old forms,

²⁷ Mark Brandon, *Constitutionalism and Constitutional Failure*, in *CONSTITUTIONAL POLITICS: ESSAYS ON CONSTITUTION MAKING, MAINTENANCE, AND CHANGE* (Sotirios A. Barber & Robert P. George, eds., 2001).

systems, institutions, patterns. At the extreme, they may involve a total failure of constitutionalism in general, the disappearance of a language and the end of the constitutional enterprise among a certain population; and this may betoken a collapse of central structuring principles of the political culture. At this extreme, what replaces the old may be a sort of power—a Caesar, a man on horseback, a totalitarian ruler, a Leviathan, a foreign invader—but it is emphatically not a polity ordered in a constitutional manner.

Consider, for example, the fate of the Weimar Republic. The republican constitution of 1919, an effort to combine European parliamentary government with an America presidential system, was a significant political act inserted into a tense and turbulent German political scene. Parliamentary government had shallow roots in German culture, and the ground around those roots had been bulldozed by the events leading up to the First World War and by the social revolution that came with the end of that war.²⁸ This transitioning political culture, with its short and tumultuous history, struggled with a political ethos rooted deep in history that was both favorable to and familiar with strong executive leadership. Though initially it seemed to have strong public support, the republic struggled to cope with the existence—and ultimately the growth—of political parties at both ends of an extraordinarily broad political spectrum, parties with no commitment to constitutional government and bent on undermining the system. Germany in the 1920s also faced overwhelming economic challenges, including hyperinflation and depression, exacerbated by the mandates of the Treaty of Versailles. The constitution itself contained the now-infamous Article 48, which was intended to permit the constitution to flex in times of crisis by lodging emergency powers in the hands of the president of the republic. In a culture, and in a political atmosphere, more suspicious of executive power, such a provision may have worked to cope with potential crises by permitting the system to adapt. But in Weimar Germany, it only contributed to the dissolution of the republican system from within. By the early 1930s, extremist parties had gained significant ground at the expense of centrist, pro-republican parties, and, increasingly, government was only possible through frequent presidential decrees under Article 48. In the end, the *Verordnung des Reichspräsidenten zum Schutz von Volk und Staat* (Presidential Decree for the Protection of People and State) gave Hitler's government complete authority to curtail constitutional rights, leading the way to the total collapse of the republican system. With the failure of the republic, German constitutionalism itself whimpered and died, until yet another period of extreme stress, another fracture brought about by defeat in war, prompted a rebirth of a constitutionalist mentality.

Fractures, even though they entail constitutional collapse, may be a good thing. We must recall that human beings create constitutions in order to achieve certain ends (rights, welfare, the common defense, domestic tranquility) by imposing an order onto chaos. A sick constitution no longer serves these ends and there is no virtue in propping it up; rather, a constitutional break may be necessary to get closer to these goals. As the German experience shows, sometimes it is only through destruction that we can revivify our ideals and recreate order by erecting new edifices on the ruins of the old. The drafters of constitutions are themselves revolutionaries. To make a new constitution is to fracture the old system, to dislodge an old polity and put a new one in its place, to rip an old constitution out of the culture and forcibly insert a new constitutional language, with all that means for the functioning of the polity and the shape of the culture. All fractures produce something new. They spew forth new polities,

²⁸ The literature on the Weimar Republic, particularly the literature seeking to explain its failure, is enormous. Particularly helpful on the political background of the republic is Carl Schorske, *GERMAN SOCIAL DEMOCRACY, 1905-1917: THE DEVELOPMENT OF THE GREAT SCHISM* (1955; rev. ed. 1983).

new constitutions, new social orders, and vastly different cultural webs. But no break creates an entirely clean slate. Fractures feature both the arrival of the new and the persistence of the old; they are characterized by both continuity and innovation. As the experience of the Weimar constitution demonstrates, the basic building blocks provided by the ongoing political culture of a place persist, though they may be re-packaged or re-structured in significantly new ways. What changes is often more the organization of these building blocks than the blocks themselves, though new blocks will be cast up by the upheaval.

But the fact that fractures both reaffirm (while reconfiguring) fundamental principles of a political culture and spawn new institutional and cultural arrangements founded on those principles must not blind us to the fact that fractures also mutilate a familiar world. The danger of revolutionary transformation is that it so easily spins out of control, so quickly undermines even the most basic agreements among people, destroying the basic covenant that binds people together as it explodes a failing polity. Fractures can tear political cultures asunder and lay waste the social bond. In other words, revolution can veer abruptly from Jeffersonian to Hobbesian modes, casting us back into a state of nature, back to that gaping void at the beginning of creation in which life is inevitably a war of all against all.

Turning Points

Not all episodes of constitutional or cultural significance are fractures, and as I have indicated, a successful constitution works through institutional design precisely to prevent fractures from occurring. In a turning point the stream of constitutional, political, cultural development slowly changes its course, rather than being re-directed all at once or obliterated entirely. Turning points are constitutional successes, no matter how significant the shift may seem from pre- to post-. The distinctive feature of a turning point is that the constitution and its symbiotic political culture adapt to changed circumstances, thereby avoiding a revolutionary fracture. Adaptation may have been hard to achieve; the continuation of the constitutional framework may have been wrenched out of threatening chaos; the success may have risen out of the ashes of seeming failure. But because the constitution (and its polity and the culture associated with both) survived the incredible stress of the times, the denouement should be seen as a constitutional consummation, a triumphal achievement, rather than a failure.

Consider as an example of a turning point, the American Civil War. What emerged constitutionally out of the Civil War was not so much a new constitution (though there are those who would contend that the Civil War amendments did indeed create a new constitution²⁹) as a significantly revised constitution, a constitution re-oriented, in the face of systemic crisis, toward a more perfect union, a consummation of sorts, an achievement of the highest moment.³⁰ The events leading up to the war, events on the battlefield, in the fields of the nation, in the halls of government, and the events surrounding the denouement of the war—all those events we package together as a single whole called the “Civil War”—forced statesmen to confront, in a way they had not previously been compelled to do, the implications of the conflict between a liberal desire to protect the individual from the state or the dominant social class and a civic republican glorification of the community and its good. This conflict, which Madison and others had sought to transcend through a re-conceived republican realism, lies at

²⁹ Perhaps the most prominent proponent of such a view is Bruce Ackerman. *See WE THE PEOPLE, VOL II: TRANSFORMATIONS* (2000).

³⁰ In many ways the post-Civil War constitution was a return to the original design, albeit with adjustments made necessary (or seemingly necessary) by the changed circumstances and the chaos threatened by the war itself.

the heart of American constitutionalism. The resolution chosen after much deliberation at the end of the Civil War sought to re-focus the Constitution and the laws, politics and government, as well as language and culture, without jettisoning the original document and its attendant political institutions and cultural elements. The shift did not happen all at once. Indeed, it took until well into the twentieth century for the results of the shift to become apparent as a re-constitution of a way of life, a culture, a language, and a politics. In the process, the nation endured times of tremendous strain as the implications of the refocused constitution came into conflict with deep-seated cultural and political factors with their roots far in the American past. The tides of change inevitably ebb and flow over time. And there is reason to think the shift is still occurring today.

Turning points are characterized by a vigorous politics. Members of the body politic, upon perceiving the pent-up forces of change, the disjuncture between framework and framed material, throng to the public square, speaking and acting, debating and deliberating over the ways in which the system should respond. On one side, these moments have a tendency to spawn calls for uniformity, for a re-invigorated patriotism intolerant of diversity, difference, and dispute. A sort of fundamentalism grips the political protagonists, generating black-and-white thinking and frequently featuring claims of the “you are either with us or against us” variety. Turning points call forth a negative sort of republicanism, a glorification of a Rousseauist general will with the concomitant Rousseauist rejection of difference and a willingness to “force” people to be “free.” The general will (a term rarely used but often implied) is defined in terms of a set of cardinal, axiomatic principles supposedly underlying the constitutional framework and the body politic. Rousseauist republicanism seeks to create a unified, homogenized citizenry, passionately devoted to—obsessed with—the common good defined in a particular way. This sort of civic republicanism flowers during turning points, often to the exclusion of alternative views. The claim is made—or implied—that one’s commitment to the common good must outweigh any local, personal, particular commitments, as well as the parchment barriers that stand between those personal commitments and the state as representative of the common good. The symbols of commonality are given overwhelming importance, outweighing other considerations and principles, no matter how central to the collective enterprise some may imagine those other concerns to be.³¹

This fundamentalism in times of stress is often matched by a politics of the local, the personal, and the particular, evident either in a more confined, parochial sort of republicanism—such as that propounded by many of the so-called anti-federalists at the time of the adoption of the American Constitution. Republican fundamentalism of either sort—the nationalist or the local—almost inevitably triggers opposition by a staunchly liberal, rights-based sensibility that emphasizes the protection of the individual from the overreaching of the state—a common and frequently bemoaned turn in American politics.³² Both local republicans and universal liberals fear that over-emphasis on the common good defined at a national level can lead to tyranny. The American anti-federalists, in fact, illustrate the fascinating possibility of combining local republican and universalist liberal sentiments; in the body of anti-federalist work, and sometimes in the same writer, we see rejection of the Constitution because it will destroy local communities (viewed as the only true basis for a republic) *and* because it creates a

³¹ “The ultimate foundation of a free society is the binding tie of cohesive sentiment. Such a sentiment is fostered by all those agencies of the mind and spirit which may serve to gather up the traditions of a people, transmit them from generation to generation, and thereby create that continuity of a treasured common life which constitutes a civilization. ‘We live by symbols.’ The flag is the symbol of our national unity, transcending all internal differences, however large, within the framework of the Constitution ... The influences which help toward a common feeling for the common country are manifold. Some may seem harsh and others no doubt are foolish. Surely, however, the end is legitimate.” *Minersville School District v. Gobitis*, 310 U.S. 586, 596 (1940) (Frankfurter, J.).

³² See, e.g., Robert N. Bellah et al., *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* (1985; rev. ed. 1996); Mary Ann Glendon, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1993).

monster whose powers are unlimited by specifically defined individual rights.

Sometimes, too, the resistance to fundamentalist republicanism appears in the guise of a revamped constitutionalism, a claim that the body politic need not retreat into either the isolationism of community or individual or into Rousseauist commonality on a national level.³³ Indeed, the central thrust of many constitutions—including that in the United States and, I suspect, that in Germany—is to guard against an unfettered jump into either civic republicanism (nationalist or particularist) or full-blown rights-based, liberal universalism. For example, as I have argued elsewhere, Madisonian constitutionalism seeks to find a way to create a political world in which the reality of people's commitment to their private affairs and local communities can match up with a nation's need for committed citizens. Madison sought to temper republicanism, to meld it with liberal anti-political particularism, and thereby create a lasting polity fit for citizens as they really are as opposed to how they are imagined to be by either civic republicans or liberals. Madisonian constitutionalism seeks to create a space for particular identities, to avoid the homogenization of citizens, while at the same time creating enough stake in the national enterprise to bind citizens to the body politic. It seeks to create national ties through what Tocqueville would call “self-interest properly understood.”³⁴ A Rousseauistic republican vision of citizenship does not fit with this Madisonian vision; nor does a merely local republicanism or a rights-based liberalism.³⁵

Thus, the forces at work at many levels in turning points inevitably spark—or reinvigorate—the debate among alternative positions, spawning a vigorous politics that threatens to burst its bounds and fracture the polity and the culture. The politics spills over into cultural debates, including debates about the purpose and content of civic education. “Civic culture” becomes all the rage and many come to see the passive and active dimensions of that term. In one sense, culture is something given, something that surrounds us, something already there over which we exert little control. But in another sense, culture implies cultivation, not in the sense of being more sophisticated but in the active sense in which one cultivates a garden. Culture in this more active, and more interesting, sense requires active care. Political cultures—civic cultures—require cultivation. Their long-term health is dependent upon the active care, the concerned responsiveness—what Iris Murdoch called “loving attention”—of those who live within that culture or share its fundamental principles.³⁶ Civic cultures that do not receive this active care wither. In fact, the failure over time to tend a culture can lead to a transmutation of the culture into something quite different, dragging the polity and the constitution along with it. The enterprise of cultivation—civic education in the broad sense—frequently drifts along under the surface of a polity and culture, only to be shoved to the fore by stressful times. Support for civic education is likely to grow across the political spectrum in difficult days, while agreement about what should be taught beyond generally accepted facts of history and political science is likely to be harder to reach. Each party to the debate has a particular vision of the character of the culture and nation, a vision it

³³ A classic exposition of this view can be found in Justice Murphy's majority opinion in *West Virginia v. Barnette*, 319 U.S. 624 (1943), which overturned the Court's decision only a few years earlier in *Gobitis*, *supra* note 31.

³⁴ Alexis de Tocqueville, *DEMOCRACY IN AMERICA*, VOL. II (1840).

³⁵ Each has points of contact with the Madisonian vision, of course. Madison and his colleagues did not create their revised republicanism out of whole cloth; rather, as innumerable scholars have shown, it flowed out of existing cultural elements, among which were classical republicanism (Algernon Sidney, for example, or Montesquieu), seventeenth century liberalism (Locke), and Scottish skepticism (Hume).

³⁶ See Wolin, *supra* note 10, at 89; Iris Murdoch, *THE SOVEREIGNTY OF GOOD* (1970). Wolin argues that the Federalists sought to destroy a politics of “tending”—a face-to-face, active politics at the local and state level—and replace it with a politics of “intending,” a represented and therefore passive non-politics at a national level. His argument suggests that there may be a deep conflict between the aim of constitution makers to construct a national-level framework that will weather stress and the goal of fostering a vibrant civic culture.

would impose on everyone, usually to the exclusion of alternative visions. So along with the conflict between alternative visions of the underlying principles of the political culture, turning points feature as well a re-emphasis on civic culture in the active sense, turning civic education into a site of controversy.

Conclusion

I have been asked to speak about what changes in democratic civic culture in watershed moments. I have chosen to approach this topic obliquely for a variety of reasons. Before we can answer the question we must clarify the terms of the discussion, for these are terms liberally used and frequently misunderstood or misappropriated. That work of clarification is what I have set as my task. Fundamentally, the point of constitutions is to cope with stressful times—like skyscrapers, they are designed to bend in the wind and ride the waves of seismic shifts. This enterprise is both an ongoing attempt to craft and re-craft a political world through words and a potential victim of the chaos that surrounds any ordered political world. A constitution and its attendant culture are susceptible to fractures in which “the people become a confused multitude without order or connection” and “all those mischiefs of blood, rapine, and desolation, which the breaking to pieces of governments bring on a country” are unleashed on the world.³⁷

In the end, the answer to the question is “it all depends.” It depends upon the nature of the critical moment itself, keeping in mind that “moments” are processes encompassing multiple events and actions. It depends upon the strength or weakness of the constitution and its accompanying polity, on the features of the enveloping political culture, and on the depth at which the constitution is rooted in that culture. If the constitution weathers the storm, surviving the chaos that turbulent times threaten, the consequence is frequently a reinvigorated politics and a new, albeit highly political, focus on civic culture. Failure comes when the constitution cannot adapt, when its terms cannot be brought into accord with the revolutionary demands of the day, when the constitution disintegrates or itself becomes the weapon used by those who would uproot a polity and plant something entirely new.

³⁷ John Locke, *SECOND TREATISE OF GOVERNMENT*, secs. 219, 230.