It seems logical that any discussion of constitutional functionality should properly start at the chronological beginning, with the exploration of the inevitable transition and rebirth that accompanies constitutional foundings. Indeed, constitutional foundings are curious and complicated moments. For some polities the founding moment as well as the statesmen and stateswomen who participate in it are viewed with deep respect and reverence. For others, especially those states whose foundings occurred more gradually over a period of time, calls to celebrate political rebirth may not be quite as visible. Constitutional foundings can also vary widely, depending on the circumstances that gave rise to the need for reform. They can be more administrative and less deliberative; they can occur because a political regime is in crisis or because a new source of power has emerged; they can even come about completely by accident.

Yet no matter how they occur, all constitutional foundings share a few critical features—first among them is the power of transformation. One function of modern constitutional texts is to transform political communities. Regimes today are born out of the literal or figurative ashes of previous political communities; they emerge from, and are influenced by, the institutions and structures of prior political worlds. In the modern era, that is, all nations were at one time or another fundamentally different political societies. Here again, the question of how a regime alters its collective identity through the process of constitutional transformation depends on the specifics of a polity’s particular historical narrative: no two transformations are exactly alike. Indeed, some have undergone dramatic reform, while others have witnessed far more subtle conversions. Some acknowledge a feudal past, while others admit to a former colonial existence. Still others boast neither a colonial nor a feudal tradition but recognize that regime change has occurred as a result of such forces as industrial development, military coups, revolutions, post-Enlightenment rationalism, and so on.

The point is that all nation-states can look to some moment in their histories and see a different political world, one that no longer exists. Something sparked a
transformation from a previous political world to a new and different one. Even regime change that seeks only to recover a previous vision of politics or that maintains a preexisting constitutional text with dramatically altered values and rules (such as in the case of the American Constitution after the Civil War) has to admit to some structure—some constitutional vision—that is no longer present. The concept of regime change, if it means anything, requires that there be some difference between the envisioned political structure and the unworkable one currently ordering the polity. There must be some transformation, for to replace the current constitutional system with an identical constitutional system is not to undergo regime change at all. It is telling that more and more often the practice of drafting constitutional documents has come to represent the particular moment of transformation.

The reality of regime change—of constitutional transformation—holds important lessons for the study of constitutional functionality. In other words, we can learn much about what a constitution is supposed to do by looking at the moment in which it is made. That moment (or moments) reveals not only the priorities of the new order but also the broad contours of what the political community should look like. Insofar as most contemporary political societies look to constitutional texts as the primary mechanism to announce and organize a collective existence, it can be said that constitutional foundings now serve a dual theoretical role. The initial role they play is most certainly negative: the adoption of a new constitutional charter represents the destruction of an existing political design. It represents the end of the past political world. The second and equally important role is more positive: constitutional foundings also represent the birth of a new community, the reformation of an altogether different political structure. Not always well-designed or even good in the moral sense of the term, a new political society emerges from a constitutional founding. Recall the words of Nelson Mandela, who understood the dual nature of constitutional foundings. He insisted that the founding moment represented a break from the past and a simultaneous “rebirth” for all citizens of South Africa. He further understood that what is most intriguing about this duality is that, rather than existing in tension, the destructive and renewal qualities of constitutional foundings operate together to bring about tangible constitutional transformation.

Constitutional Destruction

To begin, let us consider a constitutional founding’s mostly negative role. New constitutions emerge out of the destruction of old and dysfunctional political
orders. They are largely reactions to the faults and miscalculations of past political leaders. In the words of K. C. Wheare, constitutions emerge “because people wish to make a fresh start . . . to begin again.” Carl Friedrich described the emergence of constitutional texts as “flow[ing] from the negative distaste for a dismal past.” Peter Russell’s claim is even more startling: “No liberal democratic state has accomplished comprehensive constitutional change outside the context of some cataclysmic situation such as revolution, world war, the withdrawal of empire, civil war, or the threat of imminent breakup.” Jon Elster, who notes that the “link between crisis and constitution-making is quite robust,” further insists that the great paradox of founding moments is that “the task of constitution-making generally emerges in conditions that are likely to work against good constitution-making. Being written for the indefinite future, constitutions ought to be adopted in maximally calm and undisturbed conditions.”

Some of the most famous documents in the history of humankind—including the premodern Magna Carta and British Declaration of Rights—materialized primarily from a shared belief that the sovereign had been overly abusive and that a new mechanism was needed to keep the monarch from continuing his abusive tendencies. That new mechanism was a written compact—a contract or constitution—signed by the parties involved and aimed at the regulation of previously unfettered power. In a very real sense, then, these constitution-like texts were a direct consequence of the previous events that gave rise to the call for new and different power arrangements. The ultimate contractual agreement between sovereign and subject—where each makes distinct promises of restraint and limitation of authority—thus represents a departure from a past political structure. The relationship between the king and certain citizens of the polity, in short, was fundamentally altered by a shared agreement, an agreement that, in the modern vernacular, resembles a constitutional text.

Accordingly, the process of altering existing political arrangements through constitutional fiat represents a destructive act. Insofar as a new constitutional regime has replaced an old one, the political relationships that governed the institutions of the prior regime have been destroyed. And the dynamic of destruction is not just limited to pre-Enlightenment political relationships like the one between King John of England and his barons in the thirteenth century. Exchanging a modern constitutional structure that created and maintained autocratic rule with one that favors liberal democracy (or vice versa) represents a similarly significant political transformation, one that is most likely a consequence of the failure of the previous polity’s specific design. Likewise, a constitutional transition that abandons a loose confederation of territorial units (as in the case
of the Articles of Confederation) and adopts a structure that embraces more concentrated national power (as manifest in the U.S. Constitution) represents a destructive act.

Constitutional transformation thus comes in a variety of ways: it can be relatively sudden, as in the case of Lesotho, a tiny country in southern Africa that has weathered almost continual change during a mostly violent postcolonial existence; or it can be deliberate, as in the case of the 1996 constitutional renovation in Lesotho’s surrounding neighbor, the Republic of South Africa. It can also reflect the values and principles of political regimes that are not necessarily close to home. To be sure, a large percentage of new constitutions adopted over the past half-century have been either borrowed or transplanted from texts in other parts of the world.

The actual drafting of a constitutional text often represents the polity’s literal break from a preceding political order. Fresh constitutions are symbolic of a new era, of a new and distinct attempt to cultivate a different political community. Robert W. Gordon has written that constitutional transformation is one “general approach that liberal societies have adopted to undo historical injustice.” It seems clear that the series of constitutional charters adopted in France in the last two centuries—over a dozen in all—attest to this point. Each text not only represents a particular vision and structure for the people of France—one that, in each case, simultaneously builds on a past political idea and yet abandons or discards it—but in important ways they each mark an historical transition to a new constitutional vision and political structure for French politics. Regime change and thus constitutional change, in short, doesn’t just arise from nowhere; it emerges from, and ultimately contributes to, the destruction of the community’s earlier political order.

Constitutional framers are by nature interpreters. They construct foundational documents meant to organize and define particular political spaces; their role therefore is perhaps unsurpassed in importance. Yet they are a decidedly reactive lot. They create constitutional documents largely by reacting to—or interpreting—the events of the past, by considering what did not work in the prior political design and trying to anticipate what might work with a different constitutional structure. About framers, Duchacek wrote, “Constitutions offer a shorthand record of both their memories and their hopes.” Like judges, they are regularly reviewing precedent (in this case, constitutional texts) for insight into the formula that will provide a stable and secure state. Like historians, they seek to learn those lessons from the failures and successes of past political regimes. Still, as a distinct type of interpreter, constitutional founders are inevi-
tably quite cruel. As Robert Cover put it, “When interpreters have finished their work, they frequently leave behind victims whose lives have been torn apart by [the] organized, social practices of violence.”14 This statement is all too true. Anti-Federalists, among others, were the victims of America’s constitutional transformation in the late eighteenth century,15 while Communist Party elites were the victims of constitutional reform in Eastern Europe insofar as they were forced to relinquish some of their considerable authority. Indeed, the current holders of power are always the primary sufferers when constitutions are replaced.

The dynamic of constitutional destruction is also captured when we consider that most foundings typically occur at distinct moments in time. The events that might give rise to a constitutional founding will no doubt vary, but often we can identify a roughly fixed period that marks the emergence of a new constitutional regime. In the United States, we might agree that the constitutional founding took place in the late eighteenth century. More precisely, we might narrow that founding period to the time that began with the opening of the constitutional convention on May 25, 1787, and concluded with the ratification of the original text by New Hampshire, the ninth state to ratify, on June 21, 1788. Surely some will disagree with the dates, and in some sense every critique about the “period” surrounding the founding is justified (after all, foundings don’t always represent fixed moments insofar as the act of amending the text represents a rebirth of sorts).16 Yet a literal interpretation of constitutional founding—limited as it were to the time in which the text was drafted, debated, and ratified—comprehends a beginning and an end to the process.

More important, though, is the question of why it is important to identify the specific historical moment for a constitutional founding. Because foundings represent fixed moments in time, they symbolize a specific and usually identifiable political and/or cultural transformation. They are historical markers; they denote change. We regularly refer to different periods in a nation’s history by which constitutional document is authoritative at that particular moment. Some constitutional transitions have a greater global impact than others, and some are realized only after the text has been in place for a long time; but all constitutional foundings represent some kind of replacement. Again, the conversion from an old regime, with presumably a different constitutional text, to a new political order can be dramatic, as in the case of those polities that witnessed revolutionary founding moments. Or it can be less dramatic, as illustrated by constitutional foundings that don’t necessarily accompany acts involving force. History demonstrates, in other words, that certain constitutional transitions, like those that
occurred in the twentieth century as a direct result of the events surrounding World War I and II, emerged in response to bloodshed and warfare. Others, like those in the United States in 1787 or Canada in 1982 were less obviously so. Still, regardless of how they came about, the birth of a new constitutional regime signifies a break from the past, a transformation of the old into something new. For that reason it is useful to see constitutional foundings as occurring more or less at precise moments in a nation’s history.

Often a newly formed constitution will reflect procedural changes (going from a centralized system of government to a decentralized system, for example), but just as often the change in constitutions marks a dramatic shift in the substantive priorities of a polity. In many Eastern European countries, the abandonment of socialist-inspired constitutions and the embrace of more liberal and capitalist texts provide a perfect illustration of dramatic and substantive constitutional change. Drafting constitutions to capture the goal of more open, liberal, democratic, and capitalist societies characterized Eastern European constitutional reform movements of the early 1990s. Parallel illustrations can be found in both Canada and South Africa. In South Africa, the newly ratified constitution signaled a fundamental shift in the priorities of the (newly empowered) sovereign people. Equality and, to a slightly lesser extent, liberty, became the dominant constitutional principles in a state that had, for half a century, zealously spurned any effort to advance universal civil liberties or remedy racial and ethnic imbalances. The institutions of government were altered as a consequence of a new South African constitution, but more striking were the profound modifications to the substantive priorities of the democratic peoples. Chapter 1 of South Africa’s now decade-old constitution is illustrative. It identifies the country’s “Founding Provisions.” Not surprisingly, the very first of these relates a commitment to “human dignity, the achievement of equality and the advancement of human rights and freedoms.” The legacy of apartheid is thus reflected in the new constitutional charter, and the result is not only a dramatically different procedural order but also a new substantive perspective. It appears as if the old principles of distrust, inequality, and hatred are replaced, at least in writing, by a new and powerful belief in reconciliation, freedom, and hope. The new constitutional document is an important component in that transformation.

The painstakingly deliberative process that distinguished constitutional foundings in countries such as South Africa, Poland, and Canada further demonstrates the point that the political climate in these countries is somehow different after the adoption of a new constitutional charter. Again, the ratification of South Africa’s constitution finally shattered the formal political apparatus that
supported the practice of apartheid. It did not completely alter race relations or class stratification—some might even argue that it further aggravated them—but it did signal the destruction of an old regime and the birth of a new one. Consider once again Nelson Mandela’s words on the eve of South Africa’s constitutional ratification. “And so it has come to pass,” he said, “that South Africa today undergoes her rebirth, cleansed of a horrible past, matured from a tentative beginning, and reaching out to the future with confidence.” Later in the speech he describes the new constitutional draft as placing all South Africans on a “new road” with an altogether different “soul.” It seems reasonable to conclude that the notion of political identity is captured in his understanding of a new political “soul.” His concluding remarks give further credence to the argument that the founding moment represents a sharp departure from a prior world, as he pledges not only to achieve a shared future but also never to repeat the mistakes of the past. He concludes, “Our pledge is: never and never again shall the laws of the land rend our people apart or legalize their oppression and repression. Together, we shall march, hand in hand, to a brighter future.”

At one level, then, all constitutional transitions are inherently damaging. A constitutional transformation, assuming the text is not a sham, destroys an old way of life, and the act of destroying is inevitably a violent act. Here I am not referring to the type of violence that often precedes a constitutional founding moment, the type of physical violence that is the central component of most rebellions or revolutions, the type, in short, that Walter Benjamin famously described as “predatory violence.” Instead, I am referring to the metaphorical violence that marks a paradigmatic shift in political identity. To put it simply: new constitutional orders destroy—or do violence to—old constitutional orders at the precise moment of constitutional adoption. Law, as Benjamin, Cover, and other scholars have noted, is a violent institution. When the American framers met in Philadelphia during the summer of 1787 to revise the Articles of Confederation, they understood that the consequence of their deliberations would be a distinct political society, not just a different configuration of political institutions. The fact that they decided to discard the Articles of Confederation and start anew with a novel constitutional charter simply resulted in a more dramatically different vision for the country. Both the original plan to revise the Articles and the eventual decision to abandon them, in other words, did not change the fact that either text, if ratified, would have generated a new political world. Both plans did violence to the existing polity.

The same can be said for all constitutional foundings. The founding moments
Constitutional Transformation

in places like Israel, Ghana, and modern Germany are characterized by fairly
dramatic shifts not only in the structure of government, but also in the political
lives of the countries’ inhabitants. Institutions of government changed (or were
created) in these countries when new constitutions were adopted, and thus the
relationship of the citizens to each other and to their political agencies was al-
tered. That is not to say that everyone was affected by the changes or even that
most citizens supported them. It is to suggest that constitutional foundings create
new political worlds on the ashes of destroyed ones. Even though it is perhaps
only marginally recognizable in many geographical regions of these countries or
the changes themselves are not felt for a long time, a new polity was born out of
these constitutional transformations.

Constitutional Creation

There is, of course, much more to the notion of constitutional founding than
its destructive power. Alongside the destructive tendencies of constitutional
foundings, the process of constitutional formation represents another, equally
important component of this unique transformation. Indeed, along with the in-
evitable destruction of an old polity comes the next step: the creation of a new
political community, with a new conception of citizenship and a revised gov-
ernmental design. Constitutions, that is, are quite unique in that they perform a
critical creative function as well. More than perhaps any other single institution
in a new political regime, constitutional texts contribute to a different vision for
the polity, a new direction for the people of that particular political community.
They reflect the wishes of a new (and not always just) sovereign. They typically
identify a polity’s substantive priorities, and they aim to set the polity on a re-
newed course. Constitutions are, in Friedrich’s words, “symbolic expressions of
the unifying forces in a community and they are supposed to strengthen them
further.” Often a new constitutional text will be introduced with fanfare, cel-
brations will ensue, and even in some cases a new flag or national symbol or
emblem will accompany the moment. These are all symbolic of the polity’s new
direction, its new vision.

The specific definition of constitution may be helpful here. To constitute is to
make up, to form, to take disparate parts and shape them into a more or less co-
herent whole. The word itself implies transformation, the fashioning of a single
identity from noticeably distinct parts or constituencies. When a constitution is
born, the hope (in most fully operative and constitutionalist regimes) is that the
text will unite similar or dissimilar peoples and give everyone a common founda-
tion on which to live. Joav Peled referred to the power of some forms of constitutional government as establishing a type of citizenship whereby individuals enjoy the sense that they are contributing to the common good, that they are partners in deciding the collective destiny of the political community. A constitutional founding, therefore, represents the original transformative moment, the commencement (it is hoped) of a polity’s unified, and unifying journey.

The most obvious definition of the term “founding” suggests that something was, at least until recently, lost or misplaced. Yet there is another definition of the concept that seems even more consonant with the idea of constitutional order. A founding is a “beginning,” a “renaissance,” an “origin” of sorts, a “birth.” Hassen Ebrahim notes that a “constitution represents a discovery of nationhood because it reflects the soul of the nation.” It is the realization that something is adrift or astray and that specific action can set it on a noticeably different path. In the arena of constitutional politics, what was adrift, and what requires discovery, is a country’s political identity—its collective character—as manifest not only in what Mandela and Ebrahim referred to as the country’s “soul” but also in the precise design of the governmental institutions themselves. When a constitutional document no longer captures the particular identity of a political regime, the time has come for renewal, for finding a new collective identity. Jefferson, of course, thought that such a time came every generation. Other founders, from Madison to Mandela, were less sanguine about frequent constitutional conventions, but even they would admit that once a constitutional text is so out of step with the political ideals of a nation it is time for a constitutional correction. Madison, after all, was one of the more vocal proponents of scrapping the Articles of Confederation—a constitutional text less than a decade old—and replacing it with an original constitutional design.

Notable scholars have wrestled with the principle of constitutional transition. In referring to the United States, Akhil Reed Amar put it best: “The Constitution, after all, was not just a text, but an act—a doing, a constituting. In the Preamble’s performative utterance, ‘We the people . . . do’ alter the old and ordain and establish the new.” Amar’s point is to suggest that there is something transformative about the adoption of a new constitutional text. The event, or act, itself transforms, and thus creates, a citizenry.

On this point, Walter Murphy is additionally insightful:

The goal of a constitutional text must . . . be not simply to structure a government, but to construct a political system, one that can guide the formation of a larger constitution, a “way of life” that is conducive to constitutional democracy. If constitu-
tional democracy is to flourish, its ideals must reach beyond formal governmental arrangements and help configure, though not necessarily in the same way or to the same extent, most aspects of its people's lives.  

Referring to the constitutional foundings in Eastern Europe, Murphy equates the transition from one constitutional people to the next with a certain degree of complexity: “It is one thing to master academic political science or legislative drafting; it is quite another to convert an entire population into a people who have internalized a new set of attitudes about relations towards government, the state, society, and themselves as citizens, who not only possess rights but are responsible for their own conditions.” 27 Frequently, ordinary citizens are not directly involved in the task of constitution making. Even so, they are affected by changes in institutional design and a polity’s substantive priorities. Murphy refers to that impact as the act of constitutional “conversion.” It is, in short, the act of constitutional “transformation,” where an entire people are transformed by the adoption of a new fundamental law.

No matter what one may call it, few would argue that for the past two hundred years constitutional foundings have occurred all over the world, many of which have been successful in constituting a new polity. The transition from the ineffective Articles of Confederation to the newly drafted Constitution of the United States marked not only a change in the design of governance (altering the old) but also a conscious act of rebirth (establishing the new). Similarly, the crafting of new constitutional orders in the former Soviet bloc was (and is) memorable precisely because they were (and are) characterized by more than just a simple institutional shift in authority. New constitutional charters in Eastern Europe resemble old ones in the West. In fact, constitutional framers in these countries anticipated new systems of government, and a noticeably different conception of citizenship has emerged from many of these constitutional foundings. Just one indicator is the increased engagement and participation in civic life of many Eastern Europeans over the past decade. 28 A people do not simply continue unaffected once a new constitutional document is founded or ratified. They are changed by the event just as much as the institutions of government are changed.

Jurispathic and Jurisgenerative Constitutions

To this point, the discussion of constitutional transformation has focused on foundings as single, isolated events. The broad claim has been that one function of modern constitutions is that they both destroy old regimes and create new ones.
Their founding typically represents fixed moments in time, and the documents themselves aspire to reflect some shared consensus about a renewed political order. Although deliberate on my part—as I’ve noted, any examination of constitutional functionality must begin with the founding moment—such a claim remains underdeveloped. It does not account for the complexity or subtlety of what emerges out of a constitutional transformation. It does not provide a glimpse into the ongoing practice of constitutionalist politics and why those original acts of constitutional destruction and creation continue even after the “founding period.” It does not consider those moments in a polity’s life when a constitution is so dramatically reconceived as to resemble an entirely new document.

In the remainder of the chapter, therefore, we should consider the following questions: What is the relationship between the original constitutional founding, as a destructive and creative act, and the ongoing practice of politics? Does the violence stop once the immediate responsibility for writing and ratifying the text is completed? How exactly do the newly crafted priorities of a regime dovetail with and/or replace the priorities of the past? What happens when segments of the citizenry do not subscribe to the recently created constitutional vision? Many of the answers to these (and other) questions can be found in the related concepts of jurispathic and jurisgenerative constitutionalism.

Perhaps no scholar was more curious about the transformative power of law than was the late Robert Cover. In his classic foreword to the 1983 *Harvard Law Review*, “Nomos and Narrative,” Cover analyzed the relationship between the imperial state and the many insular, or paideic, communities that inhabit the polity. Eschewing the traditional arguments about the supremacy of courts to interpret the law, he maintained that all communities, whether large or small, create their own worlds, their own narratives of legal meaning. Inhabitants of those communities construct stories, in other words, that not only represent their particular collective interpretation of the law but also place their paideic communities within the context of the larger imperial state. He called the process of creating legal narratives “jurisgenesis” and the act of creation “jurisgenerative.”

Cover was particularly interested in the delicate balance that exists when the identity, or narrative, of an insular religious community is threatened by the authority of a secular regime. The State, after all, is entitled to its own legal narrative. What happens, he asked, when the way of life of the Old Order Amish in the United States conflicts with the will of state and federal authorities over such subjects as the proper education of children? The Amish represent a distinct, insular community within the larger polity, and they have created their own legal narra-
tive, based entirely on their collective religious convictions, that forbids children from attending public school after they reach a certain age. The State, on the other hand, wants to see all children attend school. And therein lies the tension. Referring specifically to liberal-democratic polities, Cover defines this tension as “the problem of the multiplicity of meaning—the fact that never only one but always many worlds are created by the too fertile forces of jurisgenesis—that leads at once to the imperial virtues and the imperial mode of world maintenance.”

In describing scenarios in which differing normative worlds collide, it is clear that Cover was troubled by the capacity of the State to monopolize legal meaning. Insofar as the relationship between political regimes and insular communities is one of unbalanced power, the likelihood that a community like the Amish can perpetuate and maintain its particularistic nomos is dubious. Cover argued that it will inevitably succumb to the power of the State, and its narrative will be altered as a result: “Law is a force, like gravity, through which our worlds exercise an influence upon one another, a force that affects the courses of these worlds through normative space.”

He insisted that this is precisely what happened when Bob Jones University, an evangelical institution of higher learning located in the American South, was forced to alter its policy of refusing to admit unmarried African Americans (and prohibiting interracial dating) in order to avoid losing its tax-exempt status. The state’s authority overwhelmed the Christian college and, sadly for Cover, the normative world created by the “citizens” of Bob Jones University was affected.

The Supreme Court was at the center of this clash. Institutions like courts regularly impose their interpretation of law onto paideic communities, but Cover insisted that there is more to it than that: the political institutions of the State seek not only to force their will onto insular communities but also to maintain their coercive power. The process of coercion and maintenance, therefore, is a violent act. “Judges,” he writes, “are people of violence.” “Because of the violence they command, judges characteristically do not create law, but kill it. Theirs is the jurispathic office. Confronting the luxuriant growth of a hundred legal traditions [or narratives], they assert that this one is law and destroy or try to destroy the rest.” Every interpretation of the law that somehow interferes with the way an insular community conducts its collective existence, therefore, is an example of state-imposed violence. When Cover references the death of the law, he refers specifically to the destruction of the normative world that is created within sub-polities by their capacity to write their own particular narratives. Rarely is the paideic community able to combat the power of the State, thus permitting Cover to remark that judges often become agents of official violence. Cover ar-
gued that “[u]ltimately, it is the state’s capacity to tolerate or destroy [the] self-contained nomos that dictates the relation of the [paideic] community to its political host.”

Cover’s analysis of the relationship between violence and the law also applies equally well when we think about fundamental law, about the relationship between new constitutional foundings and the past political identities that are always replaced at the moment of adoption or ratification. To put it plainly, if judges are violent people, then so are founders. Like the judge who alters or even destroys the narrative of the insular community when he refuses to adopt an alternate—or even contrasting—interpretation of the law, the founder does violence both to the regime’s past identity (its past narrative) and to those who may still subscribe to it. To borrow from Cover’s famous concluding phrase, constitutions “invite new worlds.”

Cover makes two important points in this passage. First, he argues that many view the constitutional document, and thus the founding itself, as marking the beginning of a newly emerging national narrative. The Constitution becomes the plot of the new story while simultaneously replacing the former narrative. Secondly, he notes that by virtue of its central place in the national narrative, the Constitution also significantly informs the ongoing narratives of insular and imperial communities. This latest document, because of its foundational position as the fundamental law of the land—indeed, because of its importance as the primary source of political power and authority—will inevitably affect the stories that continue in smaller, more insular sub-polities. It can’t be helped; in the world in which we live, very few paideic communities, Cover says, can hide from the reach of the nation’s constitutional charter. The narrative force of the Constitution tugs both from above and below.

Perhaps unsuspectingly, the modern penchant to see the written constitutional text as an indispensable tool to announce a country’s arrival on the inter-
national scene, or as the remedy for achieving a high degree of domestic legitimacy, has contributed to the ongoing violence against sub-national enclaves. (It is probably appropriate to note that, at last count, close to three-fourths of all the nations of the world have adopted new constitutional texts in the past half-century). There is now a dominant national narrative that is primarily reflective of the interests and values of the country’s constitutional framers—often a very small elite. Such a narrative will inevitably alter the legal boundaries of every paideic community that resides within the larger polity. Recognizing this reality, Cover preferred a constitutional design that prioritizes the principle of tolerance, or that at least permits paideic and imperial communities to coexist. But the prevalence of constitutions more generally as the ultimate source of political power renders the prospect of diminished violence to the traditions of distinct communities unlikely.

At this point it is important to admit the obvious: that a fresh constitutional identity is not meant to suggest that all members of the polity will subscribe to the replaced narrative, that there will be no losers, or that a new constitution will seamlessly reflect the values of a new citizenry—far from it. Different narratives will be born, many of which will arise in direct response to the latest identity of the State. Some narratives, in fact, may persist even after the institutions of the State have tried to destroy them. Certainly, some insular communities will remain mostly untouched by the constitutional transformation, but no paideic community will be completely unaffected. And dissent may emerge. In fact, Cover is careful to note that at some level the legal meaning that derives from an insular community, when juxtaposed against that emerging from the State, will always be tinged with hostility. When compared to the narrative of the State, a paideic community’s story may be subtly different or it may be dramatically different, but it will most certainly be different.

The success of a new constitutional regime depends on the level of commitment both the State and the various insular communities have to each other’s jurisgenerative authority. That is, a fully operative and constitutionalist text will successfully constitute a population if, on the one hand, the State permits insular communities to create their own normative worlds, while, on the other, the paideic communities recognize and accept the right of the State to identify its own overarching nomos. There must, in short, be a shared level of commitment to the new constitutional narrative. That commitment does not have to be unconditional (consider the case of the Amish in the United States), nor does it have to occur only in liberal-democratic regimes (consider the communitarian example of Israel, where communities of non-Jews are afforded some jurisgen-
Nonetheless, a successful constitutional experiment requires, at a minimum, that there be some recognition that each population enjoys the power to construct its own legal meaning.

In the end, a commitment to coexistence is a dominant characteristic of most liberal constitutional regimes, but it is not unique to them. To provide but one example, the German Basic Law has been described as a semi-liberal constitutional polity in that many traditionally liberal freedoms are balanced within the constitutional text by equally powerful communitarian principles. And yet the German Basic Law also depends on the acceptance that some sub-polities will exist in relative opposition to the State’s primary constitutional interpretation. Of course, such levels of commitment mean that the power of the State is always being tested. The constitution, that is, is always under scrutiny from those insular communities that seek to encourage constitutional destruction. Indeed, the prevention of constitutional revolution requires a somewhat delicate balance between paideic communities and imperial forces.

Cover understood constitutions. He insisted that a constitution will not only affect the citizenry at the moment of founding, creating a new collective identity for the entire polity, but it will continue to influence the various relationships those citizens cultivate within their insular communities and with the larger imperial regime. Thus the continuing influence of the constitutional document on the lives of its citizens mirrors the impact of the original founding moment: an enduring constitution—even one that spans a long period—will most likely be destructive, as in the case of the inescapable conflict surrounding differences in legal meaning or narrative.

Cover’s intellectual relationship with constitutions, therefore, is most curious; and yet I think it is the troubled relationship he explores that most accurately reflects the dual nature of the constitutional enterprise. On the one hand, the late scholar was intensely disturbed by the power of constitutional texts. “Revolutionary constitutional understandings are commonly staked in blood,” he wrote. “In them, the violence of the law takes its most blatant form.” And yet it is equally clear that he admired the positive force of liberal constitutionalism. He was quick to admit that constitutions were inherently creative, especially in their capacity to “generate” distinct paideic and imperial narratives.

In the end, then, Cover knew that violence has multiple meanings in the context of constitutional transformation. Throughout history leaders have resorted to violence, typically in the form of warfare, both to demonstrate a degree of power and, in the more extreme cases, to topple a neighboring regime. But the
violence doesn’t end there. It continues as long as constitutions (and those institutions that give meaning to the text) occupy a position that encourages the systematic disregard of competing narratives. Violence thus has regularly been used in a variety of ways as a tool to mark political change. The great irony of the first function of a constitutional text—and one that did not escape Robert Cover—is that these instruments are, in many ways, drafted precisely to deter the inevitable: among their many goals is one that aims to regulate the hubris of men, which history demonstrates has so often led to violence and destruction. Because they are written to provide future stability to a new polity, constitutional texts are meant to forestall the destructive capacity of potential constitutional transformations.