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Introduction

Michel Rosenfeld advances a provocative argument for the role of political violence in the founding of constitutional orders in *The Identity of the Constitutional Subject*. He observes that historically, the transition from authoritarian rule to constitutional democracy has "traditionally involved violent breaks with the past."[1] But Rosenfeld goes further, and argues that political violence is "a necessary precondition to a successful implantation of constitutional democracy" for two reasons.[2] First, violence is required because "despots have not been prone to relinquish their powers willingly,"[3] and indeed, there needs to be an "interim period for settling old accounts"[4] unfettered by institutionalized procedures to satisfy the demand for retribution by "those oppressed by the old regime" and to quickly dislodge those who "refuse to relinquish their privileges."[5] Second, the "period of anarchy" that accompanies the use of violence assists in "undermining prevailing submissive mentalities and self-images nurtured to suit the *ancien régime*,"[6] thereby allowing "the possible emergence of a constitutional identity."[7]

There is a deep tension between Rosenfeld's argument for the alleged functional necessity of violence to the process of constitution-making, and the very project of constitutionalism itself. Rosenfeld offers one account of what this tension is: the launching of a project of constitutional government according to the rule of law through a process that is self-consciously illegal and flaunts established constitutional proce-

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1 MICHEL ROSENFELD, THE IDENTITY OF THE CONSTITUTIONAL SUBJECT: SELFHOOD, CITIZENSHIP, CULTURE, AND COMMUNITY 128 (2010).
2 *Id.* at 129.
3 *Id.* at 128.
4 *Id.* at 190.
5 *Id.* at 133.
6 *Id.* at 128.
7 *Id.* at 133.

dure. As he observes, this gap creates the need for "constitutional boot-strapping," in Jon Elster's memorable turn of phrase. However, Rosenfeld's way of framing the tension between violence and constitutionalism does not fully capture the dissonance between the two. To understand why, we need to recognize that while violence connotes illegality, the converse is not true. It is possible for constitution-making to be illegal, but peaceful—as occurred during many paper declarations of independence in postcolonial states. Violence poses its own special challenge to the very idea of constitutional government, which peaceful illegality does not exhaust. Above all, the basic mission of a constitution is to channel political conflict and disagreements that would otherwise spill into the streets and be settled through force or fraud, into institutions that operate peacefully according to the rule of law and reach decisions that members of a political community accept as authoritative. Constitutionalism is rooted in the fundamental rejection of violence as a means to settle political disputes. The use of violence to inaugurate a constitutional regime contradicts the very point of what a constitutional order is supposed to achieve.

So perhaps we should not be surprised that the link between violence and moments of constitutional origin has been rendered largely invisible to contemporary constitutional theory. The assumptions are that constitutional change should occur through the rule of law, and if illegal constitutional change does occur, it must take place against the backdrop of peace. Theorists who explain and justify constitutional practice through historical examples deploy an account of a pristine past. Bruce Ackerman's theory of "constitutional moments," which is a leading account of the phenomenology of extra-legal constitutional change in the United States, is an illuminating illustration.[8] For Ackerman, constitutional moments consist of highly intense moments of mass public deliberation on a precise set of constitutional questions, and are the outcome of a determinate set of interactions among the various institutions of the American constitutional system, which achieve constitutional change outside the Article V process for constitutional amendment.

In light of Rosenfeld's highlighting of the role of violence in constitutional regime change, we should revisit Ackerman's historical account. Ackerman claims that the Civil War amendments were produced through this special, and peaceful, constitutional process. But entirely absent from his analysis is that these amendments were adopted in the immediate aftermath of what remains the bloodiest war in American history. Indeed, at the time the amendments were adopted, the South

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8 *See* BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (2000); BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991).

was under military occupation and rule. With respect to the Fourteenth Amendment, Congress refused to seat members of Congress from each southern state until the state had ratified that Amendment and the Amendment had received a sufficient number of ratifications to come into force—an act of political coercion. The question is whether Acker- man's bracketing of the Civil War diminishes our understanding of this critical juncture in American constitutional development.

Indeed, in a large number of contemporary cases, constitutions have been crafted against the backdrop of violent conflict on a mass, organized scale. On occasion, the parties to the violent conflict have been both domestic and international, and constitutions have been drafted under, or soon after, foreign military occupation (e.g., Afghani- stan, Bosnia, and Iraq). The dilemmas attendant in these cases of "im- posed constitutionalism"—informed by the classic cases of post–Second World War Germany and Japan—have dominated academic analyses of constitution-drafting after violence. In no small part, this is because of the apparent contradiction between the imposition of a constitutional order through which to exercise the right to self-determination, and that right itself, which extends down to the most basic questions of constitu- tional design. But in a larger number of cases, constitutions have marked the end of civil wars between domestic political actors, with foreign involvement limited to material and personnel support to one or more combatants (e.g., Sudan and Nepal). Organized, armed violence between two or more parties within a state is the immediate backdrop for many of the most high-profile contemporary examples of constitu- tion drafting. Indeed, even in cases of imposed constitutionalism, case- study analyses have exposed the assumption that foreign actors direct the constitution-drafting process as simplistic. For example, in Iraq, domestic political actors and interests have shaped the development of its recent constitutional evolution.

It is striking that the leading academic treatments of constitutional design devote relatively little attention to addressing what implications, if any, civil war has for the process and substance of contemporary con- stitutionalism. Consider the two central debates that have dominated the literature on constitutional design over the past three decades. First, there is the choice between presidential and parliamentary government, in which Juan Linz and Donald Horowitz have figured centrally.[9] Se- cond, there is the closely related debate between Horowitz and Arend Lijphart, on the incentives-based and consociational constitutional models for crafting constitutional government in societies that are deep-

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9 *See* Donald Horowitz, *Comparing Democratic Systems*, 1 J. DEMOCRACY 73 (1990); Juan J. Linz, *Perils of Presidentialism*, 1 J. DEMOCRACY 51 (1990).

ly divided on the basis of ascriptive differences.[10] This debate encompasses not just the design of the executive and executive–legislative relations, but also the electoral system and federalism.

This is a literature built around case studies. Many of these cases (e.g., Nigeria and Lebanon) involved episodes of constitutional design against the backdrop of civil war. Yet civil war does not figure into the assessment of the relative merits of different constitutional options. Linz, Horowitz, and Lijphart—who otherwise disagree sharply on constitutional fundamentals—appear to share Ackerman's assumption of a democratic peace within which fundamental choices regarding constitutional design can be made. Moreover, the models developed were advocated as competing solutions for countries in civil war at the time, such as South Africa and Northern Ireland. Yet these discussions did not signal the potential relevance of civil war to constitutional choice, which suggests that the violent backdrop to constitution-making was of no relevance.

Rosenfeld is right to bring violence back into the heart of constitutional analysis. The question I want to pose is how should the presence of civil war reorient contemporary debates about constitutional design?

I. HOBBES: CIVIL WAR AND THE BIRTH OF CONSTITUTIONAL ORDER

The question of the precise nature of the relationship between civil war and constitutionalism is nothing new. Indeed, it goes back to the origins of liberal constitutionalism itself, in *Leviathan*, which bears re-reading with contemporary concerns in mind. Hobbes argues that civil war is the central problem that constitutionalism seeks to solve. He defines civil war—i.e., the "war of every one against every one . . . where every man is enemy to every man"—very broadly. It encompasses not only "actual fighting" but also states of affairs when "the will to contend by battle is sufficiently known" and "there is no assurance to the contrary."[11] Thus, civil war is not merely widespread violence, but the probability of such violence lurking beneath the surface. Peace is the absence of civil war, secured by the right kind of constitutional order. Much of Hobbes's argument for a commonwealth turns on these definitions, and in particular, on the breadth of his definition of civil war. Thus, even a "system of laws, and public officers, armed, to revenge all injuries," is insufficient, for while it may prevent actual violence, it cannot eradicate

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10 *See* DONALD L. HOROWITZ, ETHNIC GROUPS IN CONFLICT (2d ed. 2000); AREND LIJPHART, DEMOCRACY IN PLURAL SOCIETIES: A COMPARATIVE EXPLORATION (1977).

11 THOMAS HOBBES, LEVIATHAN: OR THE MATTER, FORME AND POWER OF A COMMONWEALTH 100 (Collier Books 1962) (1651).

the risk that such violence might occur.[12] What is necessary is "a common power to keep them in awe" who "hath the sovereignty, to be judge both of the means of peace and defence, and also of hindrances, and disturbances of the same; and to do whatsoever he shall think necessary to be done, both beforehand, for the preserving of peace and security."[13]

The contemporary study of civil war has taken issue with much of Hobbes's analysis. His definition of civil war has been discarded as too broad, and has subsequently been narrowed to organized, armed violence, which in turn has been operationalized through a set of standard definitions involving levels of causalities. His theory of civil-war onset, rooted in competition, diffidence, and glory, has given way to a rich debate over the respective roles of fear, greed, and grievance—and the cross-cutting factor of opportunity—in civil-war onset, duration, and settlement. Stathis Kalyvas has masterfully demonstrated that Hobbes's account of the phenomenology of civil-war violence—as a war of all against all—must be discarded and replaced with a much more nuanced account that describes civil war violence as the product of alliances between central and local actors that produces selective and uneven patterns of violence.[14]

Yet Hobbes's basic point for constitutional theory—that civil war should be central to our understanding of the project of constitutionalism—survives these contemporary refinements and qualifications, which are silent on the constitutional dimensions of his analysis. For Hobbes, the avoidance of civil war is a basic measure of constitutional success. Constitutions secure peace by preventing and holding civil war at bay. When defective constitutional design creates a constitutional blind alley that cannot be resolved from within the constitutional framework, and the pressure is on political actors to step outside the constitution and turn to violence to achieve their ends, a constitution has failed profoundly in securing one of its fundamental goals.

Hobbes argued that "the dissolution of commonwealths proceedeth from their imperfect institution," which cannot be avoided "without the help of a very able architect," attributing constitutional breakdown and the descent into civil war to defects in constitutional design.[15] For example, he attributes the onset of the English Civil War to flaws in its constitutional structure. Thus, he argues, "[i]f there had not first been an opinion received of the greatest part of England, that these powers were divided between the King, and the Lords, and the House of Commons, the people had never been divided and fallen into this civil war," and infers the general proposition that "a kingdom divided in

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[12] *Id.* at 100.

[13] *Id.* at 132, 137.

[14] Stathis N. Kalyvas, The Logic of Violence in Civil War (2006).

[15] Hobbes, *supra* note 11, at 237.

itself cannot stand"—i.e., such a kingdom will descend into civil war.[16] Likewise, Hobbes assesses different varieties of commonwealth in light of their "aptitude to produce the peace, and security of the people; for which end they were instituted."[17]

What I want to highlight is that *Leviathan* is ambiguous on the question of the sequencing of civil war and constitutional choice. For Hobbes, civil wars are certainly a *future* disaster to be averted through constitutional design. They are accordingly a danger that every political community must address as a fundamental question of constitutional design, regardless of whether that political community has in fact experienced civil war. But at many points in *Leviathan*, Hobbes refers to civil wars as an *immediate past* against which a constitution is adopted, the return to which it is imperative to avoid. For example, a monarch "is obliged by the law of nature" to ensure an orderly succession "to keep those that had trusted him with the government, from relapsing into the miserable condition of civil war."[18] In a crucial passage, Hobbes goes one step further, and describes a constitution as an instrument to end civil war—i.e., "of getting themselves out from that miserable condition of war, which is necessarily consequent, as hath been shown ... to the natural passions of men, when there is no visible power to keep them in awe."[19]

There are two ways to read Hobbes's references to an immediate past of civil war and to constitutions as instruments of civil-war termination. Hobbes defines civil war so broadly as to encompass any society that has yet to vest power in the sovereign, which would include nearly all societies. On this interpretation of *Leviathan*, most if not all constitution-making processes would occur during civil war, and would terminate it. Conversely, political communities in a state of peace could only be peaceful because they had vested absolute power in the sovereign, and would have no need to adopt a new constitution. Constitution-making during periods of Hobbesian peace is a null set.

But if we read Hobbes through the lens of the contemporary definition of civil war—that is, organized, armed violence between warring parties within a state—then there is indeed a distinction between constitution-making under peace and civil war. Most instances of post–civil war constitution-drafting occur in the teeth of a temporary cessation of hostilities, among parties who are still armed. The danger of sliding back into civil war is present throughout. The adoption of a new constitution is part of, and cements, the transition from civil war to peaceful politics. For the postconflict constitution to succeed, it must do more than pre-

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16 *Id.* at 140.
17 *Id.* at 143.
18 *Id.* at 147.
19 *Id.* at 129.

vent civil war through maintaining a stable and durable peace, as all constitutions must do. It bears the additional burden of settling that civil war and bringing about that peace. So the question raised by *Leviathan* is this: how does the creation of constitutional order occur in such a situation?

II. CEASEFIRES AS CONSTITUTIONS IN EMBRYO

Let us begin with the literature on constitution-making processes at moments of constitutional regime change. There are two leading schools of thought.

The first, best exemplified by the work of Vivien Hart, extols the virtue of mass and deep public involvement in the creation of new constitutional orders—what Hart terms "participatory constitution-making."[20] Hart draws a contrast between this emerging practice— which she argues is rapidly becoming the presumptive view of a normal and legitimate constitution-making process—and an older practice in which constitutions were drafted by an unelected elite in a nontransparent manner with little room, if any, for public participation. The new model of constitution-making, by contrast, involves the public at every stage. Public participation is not limited to a vote on a constitutional package negotiated in a closed-door process, whose terms hang together and are not open to renegotiation, through a referendum whose result is preordained. Rather, it operates throughout the constitutional process. Thus, in addition to a ratifying referendum, the public could set the constitutional agenda through mass public consultations, be given an opportunity to comment on a draft text, and participate in the proceedings of a constitutional convention or assembly that could amend that draft text in the course of proceedings that are transparent and open. Special measures would be undertaken to ensure that participation is open to as broad a cross-section of society as possible, especially the politically marginalized and disadvantaged. A public-education campaign to facilitate and enable constitutional debate would be of central importance. Hart argues that there might be a right to this kind of process under article 25 of the International Covenant on Civil and Political Rights.[21] Moreover, she anchors this account of constitutional process in an underlying theory of the nature of contemporary constitutions as "a conversation, conducted by all concerned, open to new entrants and

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[20] *See* VIVIEN HART, U.S. INST. OF PEACE, DEMOCRATIC CONSTITUTION MAKING (2003), *available at* http://www.usip.org/files/resources/sr107.pdf.

[21] *Id.* at 3 (citing International Covenant on Civil and Political Rights art. 25, Mar. 23, 1976, 999 U.N.T.S. 171).

issues," as opposed to a "contract, negotiated by appropriate representatives, concluded, signed, and observed."[22]

The second, reflected in the work of Jon Elster, offers a more cautious and tentative view of the nature and role of public participation. Like Hart, Elster proceeds from the starting point that the constitution-making process must involve public participation. Elster divides the constitution-making process into three stages: the "upstream" stage in which voters elect a representative body to draft a constitution; the process of drafting the constitution; and the "downstream" process of constitutional ratification.[23] Elster describes the case for public participation throughout as an argument for "process legitimacy" whereby "[t]he constitution will not appear as legitimate unless it has been hammered out in public, through public hearings, public debates, and public voting."[24] He argues for public participation at the beginning and end, not in the middle, meaning that "[t]he process as a whole ... should be hourglass-shaped."[25] For Elster, the principal responsibility of drafting a constitution falls on elected representatives, either sitting as members of a dedicated constitutional assembly, solely elected for that purpose, which does not wield legislative power and will not wield it under the constitution it drafts, or a constituent legislature, which combines both ordinary and higher law-making functions. On Elster's view, elites are by necessity at the heart of constitutional negotiations. Moreover, to allow this process to function properly, deliberations must occur in secret, since "[d]ebates in front of an audience tend to generate rhetorical overbidding and heated passions that are incompatible with the kind of close and calm scrutiny that ought to be the rule when one is adopting provisions for the indefinite future."[26]

Notwithstanding their fundamental difference on the nature and character of public participation, Hart and Elster share a common, if unarticulated assumption—that the constitution-making process occurs without recourse to force or fraud. The only difference between them is the degree to which real-world processes should institutionalize the ideal commitment to deliberation among citizens considered free and equal. To be sure, both Hart and Elster are deeply aware that constitutions might be drafted against the backdrop of violent conflict. But they differ in their recognition that this violence might have been a civil war, and that there is threat of a relapse into the civil war that preceded the constitution-making process. Elster enumerates several situations where

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22 HART, *supra* note 20, at 3.
23 Jon Elster, *Legislatures As Constituent Assemblies, in* THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE 181, 197 (Richard W. Bauman & Tsvi Kahana eds., 2006).
24 *Id.* at 197.
25 *Id.*
26 *Id.* at 191.

new constitutions have been drafted by constituent legislatures—transitions from authoritarian regimes, defeats in war, the end of war, the creation of new states (including through decolonization)—but does not include civil war, and for those cases in which constitutions have been drafted after violence, seems to assume that the moment of violent conflict has passed. The danger of the *relapse* into civil war does not exist as an analytical category. Civil war is at most a *fresh* danger, which arises in a process where a constitutional assembly and legislature work in parallel and compete with each other.[27] The idea that this violence might mark a return to, and is continuous with, a civil war that predates the constitutional process is not one that Elster considers. By contrast, in describing the South African experience, Hart observes that "outbreaks of violence threatened the process."[28] But this danger has no bearing upon how she constructs the participatory constitution-making model.

Now let me complicate this picture. In a constitution-making process that occurs after civil war, there are a number of stages to the trajectory from armed, violent conflict to the adoption of a new constitution. The preliminary stage is the negotiation of a ceasefire. Although there is no standard definition of a ceasefire that dictates what provisions it must include, the United Nations has suggested that at the minimum it contains clauses that: terminate hostilities; delineate ceasefire lines, areas of control, and possibly demilitarized zones; freeze the current balance of armed personnel and military hardware; permit the redeployment of armed personnel behind lines of control; allow for the deployment of military observers to supervise compliance with the ceasefire; and create processes and institutions to permit armed parties to exchange information and communicate in order to avoid armed incidents and prevent a return to violence.[29] A ceasefire—either as part of the initial agreement, or at a subsequent stage—may also provide for demobilization, disarmament, decommissioning, integration, etc.

When a constitution is drafted in a civil-war context, a ceasefire nearly always precedes the constitution-making process (with the Somalian constitutional process currently underway being the major exception to this rule). Indeed, there are two ways to think about the constitutional functions of ceasefires, which I term the thin and thick views. On the thin view, a ceasefire provides the political space for a constitution-making process to occur. It takes armed violence off the table, and allows parties to a ceasefire, and perhaps other political interests, to participate in a peaceful constitution-making process. It says

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27 *Id.* at 196.

28 HART, *supra* note 20, at 8.

29 *See Peace Agreements*, U.N. DEP'T POL. AFF., http://peacemaker.unlb.org/index1.php (last visited Mar. 15, 2012).

nothing about the precise contours of that process—for example, about the debate between Hart and Elster over the appropriate degree of public participation—or about the outcome of the constitutional process. On the thin view, the rules for reaching constitutional agreement and making decisions in the absence of agreement are not to be found in a ceasefire agreement. Ceasefires have a negative constitutional function: they say how parties may not act in the constitutional process, not how they must act.

I suspect the thin view of the constitutional function of ceasefires underlies most of the contemporary literature on constitutional design. But the thick view—call it the Hobbesian view—sets out a very different picture of the constitutional function of ceasefires. I come at this through the security-dilemma school of civil-war onset and settlement, through the work of David Lake, Barry Posen, and Donald Rothchild.[30] In a nutshell, security-dilemma theorists posit a link between civil war and state collapse. On this view, the primary function of a state is to provide physical security for its citizens, and in an ethnically divided society, to arbitrate among competing ethnic groups. State weakness creates a security dilemma for ethnic groups, which results from the interaction of information failure and problems of credible commitment. Ethnic groups arm for reasons of self-defense. It is difficult, if not impossible, to distinguish defensive from offensive armament. Ethnic groups can signal their defensive intentions through the provision of information, but this would compromise their defensive abilities. Self-defense can be misinterpreted as an aggressive measure that fuels a spiral of armament, leading to conflict. Moreover, credible commitments are difficult in the absence of a state to enforce political compacts that would restrain violence.

A ceasefire must address the security concerns of the combatants, in order to provide them with the incentive to lay down their arms and to allow a constitution-making process to begin. These security concerns give rise to demands, inter alia, for power-sharing. Power-sharing can occur along two dimensions. First, power can be shared at the center in the executive, most centrally through the distribution of political offices (the presidency, prime minister, key cabinet ministries, speaker of the legislature), but also with respect to control over the coercive apparatus of the state (the military, the police, the intelligence service). The norms governing the distribution of political offices can be crude— for example, the allocation of certain ministries to members of certain armed groups—or complex, such as adding additional seats to the legislature for armed groups and the operation of the normal rules of cabinet

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[30] *See* David A. Lake & Donald Rothchild, *Containing Fear: The Origins and Management of Ethnic Conflict*, 21 INT'L SECURITY 41 (1996); Barry R. Posen, *The Security Dilemma and Ethnic Conflict*, 35 SURVIVAL 27 (1993).

formation. Second, power can be shared territorially. A ceasefire agreement can acknowledge the governmental authority of an armed group over territory that it controls, especially in long-running civil wars where rebel groups have established parallel public administrations. Its jurisdiction in those areas could be exclusive or concurrent.

Power-sharing provisions in ceasefire agreements shape subsequent constitutional negotiations. Ceasefire agreements select particular political actors—those who wield military power—and clothe them with institutional power. Those political actors have the incentive to use this power to shape the procedural framework for the subsequent constitution-making process, so as to preserve their relative power. They enjoy a comparative advantage over those political actors—typically, those who were not armed—who lack these institutional roles and powers, and therefore cannot protect their interests in the same way. Moreover, political actors who wield power under ceasefires are likely to favor elite-dominated processes, which are not transparent, over those that involve widespread public participation. Indeed, it is helpful to think of ceasefires as constitutional processes in embryo. This is very different from the thin view of the constitutional function of ceasefires, in which they have no bearing on the design of constitution-making processes.

Moreover, the decision rules embodied in ceasefires are more than constitutional processes in embryo; they are constitutions in embryo. A great deal turns on the specificity and detail of the ceasefire agreement and how complex its institutional arrangements are. But the power-sharing provisions—on power at the center and territorial autonomy—anticipate future constitutional arrangements that provide for comparable guarantees. Ceasefire agreements set down constitutional baselines that political actors who wield power under those agreements will be unwilling to bargain away. Moreover, their institutional status and power makes it easier for those actors to defend these constitutional baselines against actors who lack comparable powers and status to shift to a different set of constitutional arrangements. Indeed, they may simply be unwilling to let the constitution-making process proceed unless their core constitutional goals are satisfied. As Donald Rothchild and Philip Roeder have observed with respect to the Afghan and Iraqi constitutional transitions, "the decisions made at each stage constrain the choices made at the next. At each step the interim institutions empowered a specific cast of political actors . . . who then become the dominant parties in the negotiations over the design of the next set of political institutions."[31]

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31 Donald Rothchild & Philip G. Roeder, *Dilemmas of State-Building in Divided Societies, in* SUSTAINABLE PEACE: POWER AND DEMOCRACY AFTER CIVIL WARS 1, 14 (Philip G. Roeder & Donald Rothchild eds., 2005).

There is a deeper conceptual point here. A basic ambition of con-
stitutionalism is for institutional decisions to produce political settle-
ment. To do so, institutions and their decision-making procedures must
be viewed by political actors as standing outside the terrain of politics, as
constituting and regulating political life and not forming part of it, and
as being indifferent among the competing political positions on the ta-
ble. This is true not just for the rules governing normal political deci-
sion-making, but for those that govern constitution-making as well. But
the problem is that constitutionally created procedures—both for nor-
mal and constitutional politics—are far from substantively neutral. Po-
litical procedures reflect competing conceptions of the very sorts of val-
ues that are the bread and butter of both normal and constitutional
politics. By determining which individuals and communities can partic-
ipate in political decision-making, and what role those individuals and
communities play, decision rules reflect controversial judgments about
the locus of political sovereignty and, by an extension, the very identity
of a political community. Rules governing constitutional amendment
reflect the ultimate locus of political sovereignty, and accordingly mirror
a conception of what a political community is. The politics of the consti-
tution-making process therefore takes place on two levels. At one level,
it is based on calculations of strategic interest—i.e., which set of proce-
dures will increase the likelihood of success in the constitution-making
process. But it is also a symbolic politics, a struggle over the very mean-
ing of the polity.

Rules governing ceasefires, because they are constitutional process-
es in embryo, are functionally analogous to rules governing constitu-
tional amendment. So we should not be surprised that debates over the
terms of ceasefires raise the same sorts of issues. The terms of ceasefires
matter for strategic reasons, but they are also symbolically important
because they encode, albeit in embryo, a vision of the polity to emerge
from the conflict. The debate over the precise legal character of peace
agreements—which includes ceasefires—illustrates this point. As Chris-
tine Bell has observed, peace agreements in form appear to be interna-
tional treaties.[32] But since all the parties save for the state lack interna-
tional legal personality, they do not meet the definition of a treaty under
international law. Nonstate parties attempt to describe peace agree-
ments as treaties, whereas states resist this characterization. What un-
derlies this debate is not the concrete legal implication of such a catego-
rization, but rather, the relative status of the parties embodied in the
practice of treaty-making. Treaties are negotiated between parties of

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32 *See* CHRISTINE BELL, ON THE LAW OF PEACE: PEACE AGREEMENTS AND THE LEX
PACIFICATORIA (2008).

equal political status, and attempts to describe peace agreements as such are above all driven by this consideration.

CONCLUSION: RETHINKING PACTED CONSTITUTIONALISM

With this background in mind, let us revisit Rosenfeld's argument. Although Rosenfeld posits a necessary relationship between political violence and constitutional transitions, he sees the historical pattern of violent constitutional transitions giving way to a new norm of "peaceful transitions to constitutional democracy."[33] This shift was inaugurated by the Spanish constitutional transition, cemented in 1978 by the adoption of its post-Franco, liberal-democratic constitution, and would seem to encompass many of the constitutional transitions associated with the Third Wave of Democratization. Rosenfeld terms this the "pacted model" of constitutional transition. Its key components are (a) elite negotiations between "the leadership of the *ancien régime* and the proponents of a new constitutional order," (b) "the avoidance of violence," and (c) "legal continuity."[34] But attentiveness to the fact that many contemporary constitutions were adopted against the backdrop of civil war suggests that we should revisit a leading example of a peaceful constitutional transition via constitutional pact identified by Rosenfeld—South Africa's constitutional transition in the early 1990s. By way of conclusion, I want to offer a critical re-reading of the South African case to suggest that some pacted transitions may in fact be designed to settle— or avoid—civil war.

Rosenfeld asserts that the South African constitutional transition "fit[s] squarely" within the pacted model because of the avoidance of violence. But on the contrary, the South African constitutional transition took place against the backdrop of violent conflict between the African National Congress (ANC) and the government of South Africa, led by the National Party (NP). For decades prior to the democratic transition, the military wing of the ANC waged guerilla warfare against the South African Defense Forces (SADF) along South Africa's borders. Moreover, within South Africa, the ANC and its allies were locked in violent conflict, a situation of "virtual civil war."[35] One of the factors contributing to the decision to enter constitutional negotiations was military stalemate. Moreover, after negotiations commenced, the levels of violence within South Africa escalated dramatically. Between 1990

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[33] ROSENFELD, *supra* note 1, at 129–30.

[34] *Id.* at 197, 201.

[35] Gavin Cawthra, *Security Transformation in Post Apartheid South Africa, in* GOVERNING INSECURITY: DEMOCRATIC CONTROL OF MILITARY AND SECURITY ESTABLISHMENTS IN TRANSITIONAL DEMOCRACIES 31, 34 (Gavin Cawthra & Robin Luckham eds., 2003).

and 1993, there were approximately 14,000 deaths due to political violence between the ANC and so-called "third force" elements of the state security forces, as well as between the ANC and the Inkatha Freedom Party (IFP) in KwaZulu-Natal.[36] Political violence occurred alongside the constitutional negotiations. Indeed, political violence was politics by other means. Moreover, both the ANC and the South African government remained armed during the negotiations.

The constitutional settlement reached in 1993—the Interim Constitution—has to be interpreted against this backdrop. It had important ceasefire-like features.[37] For example, it provided for the creation of a government of national unity. Parties obtaining at least five percent of the seats in the National Assembly obtained cabinet seats, with parties obtaining at least twenty percent entitled to appoint an executive deputy president. This guaranteed the IFP and the NP representation in the cabinet. The Interim Constitution was in force until 1996. The procedure for the adoption of the Final Constitution incorporated power-sharing elements to secure the participation of minorities. The adoption of the Final Constitution required supermajority approval (two-thirds) by both chambers of Parliament sitting in joint session. In addition, the Constitutional Court was required to certify that the Final Constitution complied with thirty-two principles of constitutionalism that had been agreed to by the NP and the ANC during the constitutional negotiations. The Interim Constitution created a federal form of government with nine provinces, with boundaries drawn to increase the probability that two would be opposition-controlled. The Interim Constitution also protected property rights, an important source of economic power for the white majority that counterbalanced its loss of political power to the black majority.

Through the lens of violent conflict, other aspects of South Africa's pacted constitution take on greater importance than they have been accorded in the mainstream literature. The Interim Constitution firmly established civilian control of the military, by providing that the President is the Commander-in-Chief. But it also provided for rigorous parliamentary oversight, through a special parliamentary committee in which parties with at least 2.5% of the seats were entitled to membership, thereby providing an institutional forum for minorities to protect their interests. In parallel with the constitutional negotiations, the SADF and the armed wing of the ANC were engaged in separate negotiations on a policy framework for a post-apartheid military, which provided for the integration of ANC personnel into the regular armed forces.[38]

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[36] *Id.* at 32.

[37] Timothy D. Sisk & Christoph Stefes, *Power Sharing As an Interim Step in Peace Building: Lessons from South Africa, in* SUSTAINABLE PEACE, *supra* note 31, at 293, 302–03.

[38] For these and other details, see Cawthra, *supra* note 35.

The South African case suggests that we ought to reinterpret the relationship between Rosenfeld's pacted transitions and violence. Far from being entirely absent, violence may be a central issue in negotiated constitutional transitions. In South Africa, violence was already underway, and increased, during the constitutional negotiations. A key function of South Africa's pacted constitution was not only to prevent violence in the future, but to bring about an end to violence through guarantees that gave parties sufficient security to lay down their arms. The pacted constitution was a ceasefire that paved the way to normal, democratic politics. We should revisit other instances of pacted constitutionalism with a critical eye to unearth the role of violence on the structure of constitutional process and the substance of the ensuing constitutional settlement. The story may differ from the South African case. Consider Spain, Rosenfeld's central case of a nonviolent pacted constitution. While the negotiating parties were not engaged in violent conflict, the possibility of violence lurked beneath the surface, with the memories of the Spanish Civil War still fresh. The transition was framed with the short-term avoidance of civil war very much in mind.

The broader point is this: while Rosenfeld may see a shift away from violence as necessary to constitutional transitions, the reality is more complex. It is certainly true that civil war is not necessary to get constitutional orders off the ground. But many constitutional transitions commence during a civil war that the constitution must settle, or occur during the threat of a civil war that the constitution must avoid. The central role of actual or threatened violence should direct our attention to the constitutional functions served by other instruments, such as ceasefires, which can serve as constitutional processes and constitutions in embryo.