From Words to Worlds

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To this point most of our discussion has focused on a constitution’s literal introduction (preamble) and chronological beginning (founding). We have explored the process of constitutional transformation and the practice of embedding specific aspirations within the constitutional text. It is not yet time to abandon completely our examination of constitutional beginnings, since the legacy of constitutional framers endures long after these statesmen and stateswomen have completed their original task. Yet it is appropriate to turn our attention now to what many consider the heart of the text—the articles and clauses that create and define the specific institutions of the polity. The aim of this chapter is to examine the third function of a modern constitutional instrument—designing the various political institutions of the community in a self-conscious way. The concept of constitutional design refers both to the process of situating the institutions of a polity in a specific and particular manner and to the general architectural nature of the modern constitutional instrument itself. More to the point, this chapter will explore how framers, and eventually ordinary citizens, order the institutions of the polity by creating, empowering, and limiting them within the constitutional form so as to achieve the polity’s expressed objectives. The values and aspirations of a polity, in other words, will not easily be realized without the proper institutional design to help deliver them. It is in the constitution where that design is most clearly expressed.

Order Through Design

All constitutions purport to design the political apparatus of constituted communities: what form of government should be adopted and what arrangement of political institutions is necessary to adequately constitute an imagined community. It might be useful to recall that the definition of constitution includes the principle of self-conscious design: to constitute means “to order,” to make up or to place the component parts into a clearly defined configuration. It might also
be useful to add one important element to this simple definition: a constitution’s design—its institutional configuration—will reflect a country’s break with its past and its hopes for the future. That is an important theme throughout this chapter’s discussion. There is, in other words, a direct and substantial connection between the design of political institutions, the polity’s historical past, and the likelihood of the constitution’s promoting (and delivering) those aspirational values imagined at the founding.

It would hardly be surprising, then, to learn that the majority of time spent in any constitutional convention is devoted to ordering the specifics of a political system, including identifying the particulars of the public institutions that will, once the constitution is ratified, enforce the rules and advance the aspirations laid out in the text. Framers are fixated on such questions as What should government institutions look like? and What role should they have (both independently and together) in the process of ordinary governance? The question of the proper political order is precisely what occupied the minds of James Madison, James Wilson, Gouverneur Morris, and all the other delegates to the American constitutional convention. Various general plans for ordering the institutions of the polity were proposed, including the Virginia Plan submitted by Madison and the New Jersey Plan introduced in response. Each, if endorsed, would have created a political structure distinct from the one ultimately adopted. Eventually, the delegates to the convention settled on a compromise plan, including portions introduced by representatives from Connecticut, which altered once more the overall arrangement of America’s political institutions.

Those framers knew that a polity’s long-term success in achieving its desired goals is based in large part on the type of political system endorsed through the constitutional document. A federalist system will doubtless produce different political processes and outcomes than a system based on the principal of unitary centralized power. That is because the institutions required to manage politics in the former structure will differ from those institutions needed to regulate the political scene under the latter system. Similarly, a system of government designed around the principle of countervailing power will produce vastly different political effects than would a system in which power resides in a single institution (say, an executive). So too would a system that favors a loose confederation, or a canton political structure, or a parliamentary system, and so on.

One of the principal functions of a constitution, therefore, is to organize or coordinate the institutions of the polity. The self-conscious distribution of political power to various derivative political offices is a complicated and often delicate endeavor. Walter Murphy, who clearly understands the design function of a
constitution, writes: “At a minimum, an authoritative constitutional text must sketch the fundamental modes of legitimate governmental operations: who its officials are, how they are chosen, what their terms of office are, how authority is divided among them, what processes they must follow, and what rights, if any, are reserved to the citizens.”

Echoing the reality of many recent constitutional transformations, Murphy further notes that constitutions design political institutions not randomly, but rather for a particular purpose. It is barely possible, he writes, “to conceive of a constitutional text as solely ordering offices . . . . Easier to imagine is a text that would attempt to arrange offices to carry out particular kinds of norms, perhaps those of democratic theory.”

Murphy is not the only constitutional thinker to recognize that a central purpose of constitutions is to devise a specific structure for government; history provides a number of additional examples. William Penn, writing as early as 1682, insisted that the chief task of a constitution is to fashion a frame of government that would minimize the evils of sin. Seventy years later, Montesquieu spoke of institutions being arranged so as to produce moderation in government. Thomas Jefferson understood that the health of a republic depended on the compatibility of society’s priorities with the constitutional structure of government. When they were in sync, he argued, the polity would likely function efficiently. Yet when there was an incongruity between the particular interests of a people and their constitutional design, the polity would inevitably disintegrate. “Each generation,” he wrote, “is as independent of the one preceding as that [one] was of all which had gone before. . . . It has then, like them, a right to choose for itself the form of government it believes most promotive of its own happiness.” Jefferson’s solution to this problem was to convene a constitutional convention every generation—every nineteen years or so—to draft a new plan for government. He understood, like Montesquieu before him and the framers of modern constitutions after, that a country’s fundamental law could not qualify as a constitution if it did not at least include a clear design for governance.

As an important part of the deliberative ordering of institutions, a modern constitution creates the conditions for the emergence of a distinct national identity. Through the process of ordering (or reordering) political institutions in a particular way, the text ushers in a new vision of politics, a new direction for the collective people of the polity. Murphy, Fleming, Barber, and Macedo capture the point most accurately when they refer to a constitution’s simultaneously narrow and broad character. “In its narrowest sense” they write, “the term constitution connotes government organization and processes and, in it broadest sense, a people’s way of life; a constitutional text refers to a document or set of documents...
that claims to describe as well as prescribe the political order.” The point is that constitutions are the reflections of the framers’ self-conscious choices regarding institutional configuration. They are the architectural blueprints for the construction of distinct political societies. They set up an arrangement of political offices and institutions that will, in the eyes of the constitutional designers, maximize the possibility of achieving the polity’s endorsed aspirations.

Two things thus emerge from the type of deliberations typically heard in constitutional conventions, each of which contributes to the creation of that new “way of life.” First, a plan for a broad system of governance (say, a federal system with coordinate national branches) is needed. Once that plan is envisioned, the specific institutions required to manage that broad system must be constructed. In America, the Constitution creates a federal republic where power is shared (and often times contested) between various branches of the national government, and between those particular institutions and the branches of the subordinate state governments. The constitutional document thus identifies the major institutions of the public realm (legislative, executive, judicial, state, administrative, and so on), imbues them with more or less precise powers (Article I, Section 8, for example, specifies the powers designated to the U.S. Congress), and considers in a very basic way how they must interact with each other to achieve certain policy objectives.

The U.S. Constitution is not unique in this respect. Other regimes have embraced similar structural models. Germany, for example, boasts a federal republic where regional governments share power with centralized political offices. Similarly, Nigeria and Ethiopia insist that their constitutions generate federal republican systems. Certainly, many constitutions share design features with the American model—bicameral legislatures, independent judiciaries, overlapping and countervailing powers among them—but others have chosen to adopt political structures that appear markedly different than the ones most Americans are accustomed to. New Zealand’s political structure is one of those distinctive designs. It derives from its 1986 Constitution and is best described as a “parliamentary monarchy,” where a prime minister, a unicameral legislature, and the Queen of England (designated as the “Head of State”) share political authority. For obvious reasons, New Zealand’s constitutional structure is not like the American example; it more closely resembles the parliamentary style of most Western European nations. It is important to note that New Zealand’s constitutional engineers have created their own political order, one that is deeply influenced by the country’s colonial heritage.

A contemporary sweep of constitutionalist constitutions reveals that a sub-
Substantial variety of forms and designs exist; seemingly no two constitutional texts are exactly alike. Still, there is at least one similarity among modern constitutional documents: an acute awareness of the past. It would be exceedingly rare, in other words, to locate a single constitutional text that is not in some sense reflective of its country’s historical legacy. One of those many constitutional systems whose design features have been influenced by its recent history is the focus of a short case study below. The story of South Africa’s constitutional rebirth effectively illustrates a number of important lessons related to the general principle of constitutional design. Why do framers construct constitutional polities the way they do? Does a constitution that begins its arrangement of political institutions with a description of legislative power mean that the regime’s framers favor a legislative-centered government? What point are constitutional draftsmen making when they place institutions in a specific order within the document? Do we learn anything about the founders’ priorities or vision when the text opens rather than closes with a list of rights and liberties? Do we learn anything about the politics, culture, and history of a place when constitutional designers choose to adopt certain institutional configurations in favor of others? If so, what are those lessons learned?

Fresh in our memories, South Africa’s struggle for constitutional transformation is a useful case study because it not only addresses many of these (and other) questions but its constitutional construction is also a purely modern constitutional construction. The design features of the South African text, including the governmental structure adopted, the detail and length of the text itself, and the penchant for frontloading the list of rights and liberties, is emblematic of so many constitutions drafted in the last half-century. It is, in other words, representative of the type of constitutional design that many contemporary framers now favor. Equally important, though, is the fact that South Africa’s constitution elucidates more clearly than most one of the primary themes of this chapter: that a constitutional text will reflect, in its design, the principal aspirations of the polity.

One related lesson evident in the South African illustration that warrants mentioning here involves the relationship between the process of drafting the text and the structure of the institutions that text creates. Indeed, the relationship between process and structure is crucial, since it implicates the credibility of the entire constitutional instrument. In the modern era, where the legitimacy of so many constitutional texts is anchored to the transparency of the drafting process, it is important to consider how those moments leading up to the opening of a constitutional convention actually affect the eventual design of political
institutions expressed within the constitution. That is, to focus entirely on the product of constitutional framing—the specific institutions and how they relate to one another—is to view only a partial image. There should be no doubt that the principle of constitutional design requires that observers pay significant attention to the outcome of constitutional deliberations: Which political institutions are created by the text? How are they arranged? How do they work together to achieve common aims? But that, of course, is not the whole picture. Process affects design, and the South African case is the best example of that. Our brief story begins, therefore, with the events that gave rise to the drafting of a permanent constitutional text in South Africa.

South Africa’s Constitutional Design

When South Africans set out to construct a post-apartheid nation, they insisted that their first order of business was to erect a constitutional structure. It would prove an arduous task. The process of engineering a new constitutional order for South Africa was long and complicated, commencing (symbolically) with the 1990 release of Nelson Mandela from prison and the eventual collapse of apartheid. By 1994, however, an interim constitution was in place that set out the rules for adopting a more permanent text. Chapter V of that interim constitution stipulated when a permanent constitution would be in force (“within two years as from the date of the first sitting of the National Assembly under this Constitution”), what body would write it (the Constitutional Assembly), and even the intricate process of ratification (including provisions for supermajorities, simple majorities, and public referenda). Less than three years and one serious judicial setback later, the permanent constitution was ratified.7 In the words of one observer, “The leaders of all the participating political parties signed the [interim] agreement bringing into effect the single most dramatic political change ever experienced in South Africa. The agreement reached was more than a legal contract: it set the basis for a new constitutional order. It was in effect a peace treaty that sought to relegate conflict and civil strife . . . to the status of a shameful blemish on South Africa’s history, and marked the beginning of the democratic era.”8

The Constitution of the Republic of South Africa, 1996—the permanent text—was thus born primarily out of careful and inclusive deliberation, which in itself represents a deliberate choice on the part of the regime’s founding generation. Beginning with the Interim Constitution of 1994, the entire constitutional project consisted of a nationwide conversation about values, goals, and legacies.
It is probably an understatement to say that an enormous variety of groups—including governmental officials, constitutional experts, lawyers, economists, common citizens, traditional regional and ethnic constituencies, whites, blacks, Indians, ex-pats, political prisoners, oppositional parties, members of the African National Congress, members of the predominantly white National Party, members of so many other political parties and organizations (the list is almost endless)—enjoyed a stake in the eventual product of their endeavors. As one participant put it: “To each party the negotiations were as much about constitutional change as pursuing the interests of its constituency. On the other hand, fundamental to the success of the process was its inclusiveness, which clothed the Constitution with the legitimacy it needed as the supreme law. Accordingly, the process was designed to give parties the confidence that they could achieve their objectives through negotiation, and that their success was not entirely dependent on their voting strength.”

Altering the design of a political society as complex as the one in South Africa required a shared commitment to a radically different future. That is, for the next phase of the country’s history to be successful, South Africa’s constitutional draftsmen had to encourage intense collaboration at the same time that they were seeking dramatic change. Most importantly, they had to convince many segments of society of the inherent value of attending to the common good. Consider a few difficulties: How does a country with no experience in universal democratization construct a polity that rests almost entirely on that very principle? How does a majority population that has been disenfranchised and powerless for generations buy into the idea that political power ought to be shared with their oppressors? How does a country without a tradition of constitutional government suddenly spawn the necessary faith that is required to lend credibility to the new constitutional experiment? More practically, how does a country decide who warrants a place at the drafting table?

These and many other issues faced the people of South Africa as they contemplated a new constitutional order. One thing was certain: the process of constitutional construction would be deliberate and transparent. The discussions had to be slow, and they had to be visible not only to the South African citizens directly affected by any change in constitutional structure but also to an international community clamoring for free and fair elections. As we now know, the discussions were productive, and they eventually led to an entirely new political design (many describe the South African constitution as a testament to the power of consensus and collaboration). Amid violence in the cities and townships, creeping unemployment, and increasing frustration over lingering apartheid policies,
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delegates to both Conventions for a Democratic South Africa (CODESA I and II) plotted a strategy for new constitutional governance. To be sure, one of the primary reasons for their success was the painstakingly slow deliberation that occurred because so many interests were represented at the convention. But that was of course necessary in South Africa. As Patti Waldmeier notes, constitutional formation in South Africa is best described as “negotiated revolution.”

The Constitutional Text

Turning directly to the particulars of the permanent text, the constitutional description of South Africa’s political institutions begins with an acknowledgement of the country’s unpleasant past. In fact, one important conclusion that emerges from viewing the entire text is that its design is influenced in many ways by the fear of a return to the kind of intolerance and oppression that necessitated a constitutional transformation in the first place. The preamble, quoted in chapter 3 above, explicitly mentions the historical abuses endured by the majority black population. It speaks of “recognizing the injustices of the past” and “honoring those who suffered for justice and freedom in our land.” The constitution’s first chapter—titled “Founding Provisions”—also seemingly addresses the country’s history of racial oppression. Chapter I, Article 1, reads: “The Republic of South Africa is one, sovereign, democratic state founded on the following values: (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms. (b) Non-racialism and non-sexism. (c) Supremacy of the constitution and the rule of law. (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.” Other provisions articulating the framers’ prioritization of the “supremacy of the Constitution,” the principle of “equal citizenship,” and the importance that all major languages spoken have equal political status, follow.

The tone of these “Founding Provisions” is purely aspirational. They create an expectation of universal equality and individual liberty that spills over into the text’s second chapter on the Bill of Rights. Interestingly, the document’s Bill of Rights commences with a self-referential statement relating the necessity of a list of freedoms for promoting those values, like democracy, that are essential to the country’s reconstituted political experiment. The chapter’s first article reads, “This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality, and freedom” (emphasis added). Continuing, the next article
insists that the state must “respect, protect, promote and fulfill the rights in the Bill of Rights.”

This entire chapter produces a set of expectations similar to the aspirational claims made in the Preamble and Chapter I. Constitutionalizing the promise to “protect, promote, and fulfill” individual rights is potentially dangerous business, especially when one considers that other expressed freedoms in the document include the “right to have access to adequate housing,” the “right to access to health care services,” the “right to sufficient food and water,” the “right to a basic education” and the right to “further education, which the state, through reasonable measures, must make progressively available and accessible.” From the perspective of expectations potentially unmet, it is noteworthy that a 30-page pamphlet explaining the provisions of the complex constitutional charter, and aimed at the mostly undereducated citizens of South Africa, accompanied the public release of the constitutional text. In it, the narrator vows that the “government must try to make sure that everybody’s basic needs are met!”

The collection of additional rights in Chapter II reads at times like the more familiar grants of freedom found in other constitutional texts. There are provisions for safeguarding the right to free expression, privacy, association, religion, property, assembly, and movement. There is also a provision—found in Article 35 of Chapter II—that resembles the U.S. Constitution’s Fourth through Eighth Amendments’ protection of the rights of the accused. Coupled with the fundamental right of individuals to “access the courts” found in the text’s previous article, Article 35 is exhaustive, covering areas such as the right to a “fair trial,” habeas corpus provisions, and the specific protections enunciated in America’s “Miranda” warnings. It is important that these rights not be discounted because they are so familiar to us; they too advance the underlying theme that the country’s defenses against oppression require the status and authority of the regime’s fundamental law.

Continuing, Article 36 and Article 37 are two of four articles that conclude South Africa’s Bill of Rights. They are unusual in that together they create a mechanism for South Africa’s political officials to limit or check the literally hundreds of rights protected by the Constitution’s earlier provisions. Article 36, labeled in the text as the “limitation of rights,” explicitly empowers the government in certain rare instances to make “reasonable and justifiable” restrictions on individual freedoms so long as they are done openly and in accordance with “human dignity.” Article 37 enables the government to curb the text’s extensive list of freedoms during “states of emergency.” To be sure, the constitution stipulates that Parliament is authorized to declare states of emergency only in certain situations.
(when the nation is “threatened by war, invasion, general insurrection, disorder, natural disaster, or other public emergency”) and only for a designated and relatively short period of time (“21 days unless the National Assembly resolves to extend the declaration”). Perhaps most interesting is that there is a structural check on the power of the legislature to declare states of emergency: Article 37, subsection 3, claims that “any competent court may decide on the validity of (a) a declaration of a state of emergency; (b) any extension of a declaration of a state of emergency; or (c) any legislation enacted, or other action taken, in consequence of a declaration of a state of emergency.” The provision for judicial review of states of emergency obviously complements the text’s more general themes of tolerance, transparency, and accountability.

Scrutinizing the more conventional sections of the text—Chapters III–XIV, which design and energize governmental institutions—we see that again there is an almost continuous attempt to remind both citizens and officials of the racial and ethnic troubles that divided the country under apartheid. Immediately, the tone is set for cooperative governance when, in Chapter III, the text speaks of the need for all spheres of government to “preserve the peace . . . secure the well-being of the people of the Republic . . . provide effective, transparent, accountable, and coherent government . . . and, perhaps most importantly, not assume any power or function except those conferred on them in terms of the Constitution.” Constituting only one page of the lengthy document, Chapter III on “Cooperative Government” is nicely reflective of the new South Africa, a country whose constitutional form is preoccupied with maintaining principles of fairness, transparency, and justice. There are even clauses in the chapter that mandate “cooperation with one another in mutual trust and good faith by fostering friendly relations, assisting and supporting one another, . . . [and] avoiding legal proceedings against one another.”

The text then enters more familiar constitutional territory. The next several chapters involve the division of power among the various government entities, specifically stating which institutions will control which political functions. South Africa’s constitution identifies three branches of the federal government, a separate provincial authority, and a derivative local level. The national government is divided into three independent branches—a bicameral Parliament, the National Executive, and the Constitutional Court. Resembling in structure the American system of separation of powers, the South African constitution also includes provisions for the overlap of authority, more commonly known as a system of checks and balances. The powers of the bicameral federal Parliament (consisting of the National Assembly and the National Council of Provinces),
for example, are laid out in Chapter IV. Chapter V, in contrast, identifies executive power, beginning with the selection of a single president from the ranks of the National Assembly. Chapter VI describes provincial power, Chapter VII local power, and Chapter VIII the power of the South African judiciary. Altogether, the constitution incorporates a familiar design, for the framers of the South African text took their cues mainly from Western constitutional models.

Chapter IX is most interesting in that it creates State-sponsored institutions whose sole purpose is to “foster and support constitutional democracy.” Consider how these constitutionally authorized offices contribute to erasing, or at least numbing, the memory of the country’s past. In Chapter IX, Article 182, the Office of the Public Protector is established. This office is constitutionally empowered to investigate any potentially improper government conduct. Similarly, in Chapter IX, Article 184, a Human Rights Commission is set up to “monitor and assess the observance of human rights in the Republic.” Perhaps unsurprisingly, the constitution mandates that complimentary commissions will be established in other areas, including ones to “Promote and Protect the Rights of Cultural, Religious, and Linguistic Communities” (Chapter IX, Article 185), to ensure “Gender Equality” (Chapter IX, Article 187), to monitor all elections (Chapter IX, Article 190), and to regulate the media (Chapter IX, Article 192). It hardly bears repeating, but the impetus for giving these offices constitutional status rather than simply legislative authority is to further fortify them to defend the powerless against the authoritarian and often oppressive whims of political leadership.

The Framing Process

Designing the South African Constitution consisted of blending many different constituencies and influences. On the one hand, significant portions of the text have been transplanted from the constitutions of other nation-states; on the other hand, it is all too clear that the text is a unique reflection of South Africa’s historical legacy. And then there is the process of drafting the text: the story of South Africa’s path to relative constitutional stability provides fascinating insight into the mind of the modern constitutional designer. In the past, the process of constitutional engineering was handled in ways that are noticeably dissimilar to the ways in which we construct constitutions (and constitutional regimes) today. In the first place, constitutional texts are now designed through the process of exhaustive deliberation and, in the best-case scenario, widespread consensus. South Africa’s example is just one of many where the perceived legitimacy of the text depends in large part on the inclusiveness of the drafting process. That, of course,
was not always the case. As Alexander Hamilton pointed out, constitutions of the past were usually born out of “accident and force” rather than “reflection and choice”; they were, in other words, often the consequence of aggressive political forces seeking to expand their dominion over neighboring territories. Even Hamilton’s own constitutional convention can not be considered inclusive; his notion of who may “reflect” on the design of a new constitutional text or “choose” a different constitutional structure did not include a number of constituencies that became subject to the text’s principles and rules.

Presently, we know that successful constitutions are often reflections of a country’s shared set of beliefs and values. They are typically a consequence of careful planning rather than imperial aggression. Groups (primarily through their representatives) convene to create constitutional documents that reveal the complexities of the modern heterogeneous state. As evidenced by the South African experience, one of the apparent goals of any constitutional convention now is transparency. In any political situation transparency is important enough, but when pursued in the context of constitutional framing, that particular ambition has a direct impact on other components of the creative process. Take ratification, for example. The contemporary insistence on transparency is so powerful that even when there are mechanisms that call for universal ratification—still the favored form of endorsing or legitimizing the document—the process of constitutional formation remains under scrutiny. It is no longer enough to say that the sovereign people retain the authority to approve and (more importantly) reject the proposed constitutional text through ratification; they must also have some role in supervising the actual deliberations that produced the document itself.

As a result, perhaps we are now two steps removed from Hamilton’s historical observation. The conception of how constitutional conventions should be organized has changed in the last century. The style of constitutional convention that gave rise to the American text—a constitutional convention shrouded in secrecy—has been discredited in the modern era. It seems reasonable, in fact, to assume that the initial vote to maintain secrecy during the American constitutional convention would, in the present, be viewed with deep suspicion. There is a sense of distrust that seemingly animates many modern constitutional foundings (a sense of distrust, I might add, that perpetuates the need for constitutional limits in the first place). This sense of mistrust reveals not only the difficulty of a framer’s task but also the significance of what is at stake. Constitutions are important documents, and their effect on institutions and individuals is genuine. Individuals now demand that the process be open and apparent. That demand
may correlate with the experience of many in late-eighteenth-century America who were troubled by the silence surrounding Pennsylvania’s statehouse during the summer of 1787. What has changed dramatically, however, is the fact that constitutional framers, unlike in the American example, now consent to those demands.

Such thinking animated the events leading up to the framing of the South African constitution, and with good reason. The divide between the economically and politically advantaged minority and the disenfranchised and powerless majority created an atmosphere of doubt surrounding the construction of a new constitutional instrument. The rules for governing a democratic and just South Africa would eventually emerge in a permanent constitutional document, but initially the rules for governing the transitional period between the end of white rule and the beginning of a post-apartheid regime had to be established. Those guidelines for ordering a transitional government were articulated in the 1994 Interim Constitution.

As it turns out, then, the process of constitution-making in South Africa was actually made up of a series of processes. All of the eventual steps that ushered in a new constitutional form were punctuated by the need to be inclusive and discernible. The important work that went into preparing for the constitutional convention—work such as inviting particular constituencies to the table, encouraging them to articulate a vision for a new South Africa, urging critical groups that walked away from the negotiations to return, and so on—was crucial to setting a tone and eventually lending important credibility to the entire constitutional project. In fact, the push for a pre-constitutional constitution—the Interim Constitution—is a direct consequence of the country’s anxiety over its history of oppression and the tendency on the part of political leaders to design polities that preserve their authoritative power. Not to be too casual about the terminology, but it should be noted that South Africans, in a sense, demanded the constitutionalization of the process leading to the adoption of a permanent constitutional text: they sought to establish specific though temporary rules that, if successful, would pave the way for the establishment of permanent governing procedures.

For our purposes, what is most important is that the South African experience is illustrative of a growing tendency among citizens of new or reconstituted polities to demand that there be clear mechanisms for constitutional accountability. Moreover, these mechanisms are not isolated simply to the drafting process. The change in approach to creating a constitutional polity, from one where secrecy during the constitutional convention is productive and efficient to one where a
constitution drafted in secret would lack significant legitimacy, has had a profound impact on the design features of modern constitutional texts. That is, the concern about transparent and deliberative processes has seeped into the tangible products of constitutional documents—the values and institutions themselves. Constitutions are now drawn up in such a way that the governmental bodies created by the text are described in great detail. The powers distributed to these political institutions are carefully outlined, and often the combination of political bodies creates a complex political structure. In short, the level of distrust that now animates all aspects of the creative process has deeply affected the specific design of constitutional polities.

The Relationship of Institutional Order to the Bill of Rights

Returning again to the realm of theory, framers are the architects of new political orders. The texts, therefore, are the blueprints for constructing those institutions that eventually carry out the draftsmen’s expressed vision. Cass Sunstein is thus accurate in claiming that constitutions are “pragmatic instruments” aimed at achieving particular structural objectives. They are designed to promote and foster specific ambitions (including, in Sunstein’s estimation, the conditions for meaningful democracy), and, as is so often the case in the contemporary political world, if the principal ambition of a political community is the protection of individual rights and freedoms, that too will be reflected in the design choices that eventually make it into the constitutional draft. Surely, the South African example is illustrative of this functional reality. While almost certainly more explicit than most, South Africa’s constitution is not distinct on this point.

It is surprisingly true that citizens around the world (and especially in the United States) often forget that one of the primary functions of the modern constitutional text is to order the institutions of the polity in a self-conscious way. Ironically, a principal reason for this occasional neglect can be attributed to the specific design of many current constitutional documents. Anecdotal (and some survey) evidence suggests that citizens in a variety of countries can relate more readily to the concept of individual rights than to the structural particulars of legislative, executive, and judicial branches. They see more easily how they are affected by the specifics and the overall scope of constitutional rights than by the system of political institutions created by the text, and they clamor more loudly for the protections that accompany a constitutional bill of rights. It is thus realistic to assume that a constitution’s list of freedoms will inevitably eclipse the more routine and less sexy design features of the text in the minds of the consti-
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This is especially true now that constitutional framers prefer to place the inevitable list of freedoms at the beginning of the document rather than at the end. Both literally and figuratively, the constitution’s role in organizing various political institutions is now overshadowed by the perception that the text’s first priority is to identify and protect individual rights. In the modern era, where most polities are judged on their capacity to protect and even promote individual freedoms, it would not be too surprising to see contemporary constitutional framers embrace a model that privileges individual liberty within the nation’s fundamental law. The framers of the South African constitutional draft did just that.

History demonstrates that leading off a constitutional document with a list of rights has not always been the preferred practice of constitutional founders. The early American state constitutions typically commenced with a comprehensive listing of rights, but according to Donald Lutz it was not entirely clear that these bills of rights carried the same status as the structural chapters of the document. Lutz writes, “When it finally came time to write state constitutions, Americans frequently distinguished between the bill of rights and the constitution proper. The bill of rights usually came first, as part of or along with the preamble. Then the second section of the document was entitled the constitution, thus leaving open the question whether the bill of rights was part of the constitution.” At the time, a number of American constitutional framers, led most vocally by Alexander Hamilton, wondered about the necessity of adding a bill of rights to the text. “The truth is,” Hamilton famously remarked, “that the Constitution is itself, in every rational sense, and to every useful purpose, a Bill of Rights.” It is in the nature of a constitutional charter, he insisted, that individuals find their greatest protection from the abuses of political authority. Hamilton’s principal argument was that because the Constitution grants only limited power to the political branches, and the authority to infringe on individual rights is not among those delegated powers, the structure of the constitutional design made it essentially unnecessary to include a list of rights and freedoms. He insisted that adding a bill of rights to a constitutional text was mostly redundant.

Of course we now know that Hamilton lost that battle: America’s present Bill of Rights is the product of a political concession made to Anti-Federalists in exchange for their support during the ratification debates. And yet, for a time, he may have won the theoretical war. By a considerable margin, constitutions drafted during the nineteenth and early twentieth centuries either did not include bills of rights, or, following the American lead, placed those rights at the end of the document. While most American state constitutions maintained the...
practice of including a statement of rights immediately following the text’s preambulatory, or introductory, statement, many of the most influential international constitutions, including the Spanish constitution of 1812, the Bolivian constitution of 1826, the German constitution of 1848, the Swiss constitution of 1848, the Canadian constitution of 1867, and the Meiji (Japanese) constitution of 1889, either omitted a bill of rights altogether or at least began the document with descriptions of the structural designs of government institutions.\(^{17}\)

As international scrutiny of political abuses intensified and the idea of individual liberty emerged as the dominant universal value, the relationship between bills of rights and constitutions proper changed. Indeed, the present reality that many constitutional draftsmen prefer to locate bills of rights at the beginning of the document is itself a comment on the design of contemporary constitutions. More importantly, it is equally evident that the major point Lutz makes about American state constitutions—that it was not clear whether a list of freedoms at the beginning of the text even carried the same authority as other parts of the document—no longer holds true. If anything, a contemporary constitution’s bill of rights is now its most commanding feature. Of the 147 active constitutional texts reviewed, 128 (close to 88%) place a list of rights before any article that discusses the institutional structure of the political regime; all but 19 texts essentially begin with an examination of the individual freedoms retained by the people. Of the remaining 12 percent, only a handful (approximately five) hail from regimes with some recent history of imperial control, national instability, or internal political oppression.\(^{18}\) The remaining 14 constitutionalist polities whose texts still place the list of rights after the description of institutions have enjoyed relative political stability over the past half-century. One conclusion we are able to draw from these numbers is that constitutional framers, especially those found in historically oppressed regions of the world, presently favor constitutional texts that highlight those declarations of individual freedom that were largely absent from previous constitutional systems.

South Africa is just one of the newly constituted nations that has certified its strong commitment to the principles of tolerance, freedom, individualism, and human dignity by frontloading a list of individual safeguards. Other regimes that have endorsed a similar design statement include many of the former Soviet republics. The Estonian constitution, for example, begins with a preamble and a short chapter outlining the constitution’s “General Provisions,” which include a sovereignty statement, an adherence to the rule of law, and a declaration of the country’s national colors and official language. Then there appears an extensive list of rights and freedoms, including forty-seven separate articles devoted to in-
dividual rights. It is not until Chapter IV, Article 59, that the constitution finally turns to the structure of the Estonian government.

Like so many countries in the region—and indeed, across the globe—Estonia has emerged from a situation in which imperial forces dictated the nature of most political relationships. Rights were restricted under Soviet control as everything flowed through the party apparatus. One commentator notes that from the end of World War II until the collapse of the Soviet Union in 1991, Estonia was “a captive nation, existing as a republic, or administrative unit, of the Soviet Union.”

That same commentator goes on to highlight the “degrading effect that the Soviet system had on the rule of law. Ideology, not law, was king, and the role of law was to serve Soviet ideology. Courts provided what was known as ‘telephone justice.’ After a trial, the judge would call the party headquarters to find out what to do.”

Those freedoms most Americans take for granted were not available to Estonians during the period in which their country was occupied by the Soviet Union. Considering this historical backdrop, it is perhaps not surprising that independent Estonia altogether reformed its constitutional charter in 1992 and began its text with an exhaustive list of rights and liberties. The polity’s specific constitutional design, in other words, is reflective of its recent historical journey.

Conclusion

At the risk of overstating the point, it might be argued that the changing design of constitutional texts—including the insistence on highlighting bills of rights, the deliberative and transparent nature of constitutional framings, and (recalling themes more thoroughly discussed in an earlier chapter) the abandonment of brief and general texts in favor of detailed and lengthy ones—signals a shift in the design priorities of the modern constitutional document. What was once a blueprint for governance—a design for political order—is now equally and explicitly a celebration of the principles of freedom, liberty, equality, and tolerance. Constitutions are still architectural documents aimed at structuring political communities, but they are now far more individualistic in language and purpose. It is true that a constitution is still responsible for constructing a political order, but alongside that duty stands an equally powerful obligation to pacify citizens of the polity who remain constantly fearful of the power of political authority. Throughout history, constitutions have protected personal liberty. What is different about constitutions drafted in the contemporary era is that now announcing the commitment to individual rights and liberties appears to be their principal function.
Although perhaps unique in terms of an historical narrative, the consequence of South Africa’s struggle with consensus—the Constitution of the Republic of South Africa, 1996—appears remarkably similar to the traditional model of modern constitutions. Its central feature, in short, is not only the construction of particular political institutions and the ultimate division of power among those separate institutions but also the steadfast defense of individual rights. These are arguably the most common and most obvious features of contemporary constitutional charters. Indeed, constitutions inevitably create and design governmental institutions. They provide the blueprint for how political branches will be arranged, and in doing so, they imbue those institutions with distinctive powers. They also regulate that power in the name of the individual.

Most constitutions around the world have followed the American lead and have fashioned separate legislative, executive, and judicial bodies, giving to each a unique set of powers. Other constitutions have constructed different institutional arrangements—some are legislative-centered, while others are executive-centered; some have powerful judiciaries, while others do not. Still, the point is that one of the primary functions of modern constitutions is to articulate a particular design for the governmental institutions of that polity. They pattern the divisions of government in a self-conscious way. Quite simply, they design polities.