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President Donald Trump on Tuesday night made a public plea for a wall along the U.S.-Mexico border, claiming that law enforcement officials are the ones demanding it, while blaming Democrats for the prolonged government shutdown that has resulted from an impasse over how to pay for the barrier.

The president opened his address by stating that the United States is suffering from a humanitarian and security crisis at the border, as he urged Congress to provide billions of dollars for a steel barrier, calling it “absolutely critical.”

“As part of an overall approach to border security, law enforcement professionals have requested $5.7 billion for a physical barrier,” Trump added, even though the wall proposal is his own core campaign promise that he has struggled to fulfill.

Trump so far has forged ahead with his demands for $5.7 billion in wall funding, while Democrats, including House Speaker Nancy Pelosi (D-Calif.), have called his proposal “immoral.” The standoff has pushed the government into one of the longest shutdowns in U.S. history.

Congress alone has the power of the purse under the Constitution. But presidents are able to use unobligated military funds during a national emergency. Whether such a crisis exists, of course, is hotly contested, with Democrats noting that there are actually fewer border apprehensions over the past year than in past decades.

An emergency declaration would inevitably invite a court challenge that would leave Trump no closer to getting his wall, even if it would provide the president cover with his base.

The White House counsel’s office has been reviewing the legality of an emergency declaration since last Thursday, according to a source familiar with the process.

Democrats were also eager to make their case. After demanding equal airtime, Pelosi and Senate Minority Leader Chuck Schumer (D-N.Y.) offered a rebuttal to Trump’s speech Tuesday night, accusing the president of stoking fear and reiterating their calls for him to end the shutdown.

“President Trump must stop holding the American people hostage, must stop manufacturing a crisis and must reopen the government,” Pelosi said.

Schumer called on the president to separate the shutdown from the debate over border security and asked that he take up legislation passed by the Democratic-controlled House last week that would reopen the federal government.

White House communications adviser Mercedes Schlapp said Democrats had made a strategic mistake by calling the situation at the border a manufactured crisis, according to a person who participated in the Tuesday-night conference call. She said Democrats were in “denial” about the humanitarian crisis at the border, adding that Trump’s proposals amounted to “common-sense solutions.” White House press secretary Sarah Huckabee Sanders said Trump had shown “incredible leadership” in trying to solve the alleged crisis, the person said.

Andrew Restuccia, Marianne LeVine, Eliana Johnson, Burgess Everett and Heather Caygle contributed to this report.
WASHINGTON — President Trump raised the possibility on Friday of declaring a national emergency to allow him to build a wall along the southwest border without congressional approval, hours after Department of Homeland Security officials requested additional support to erect temporary barriers between the United States and Mexico.

“We can call a national emergency and build it very quickly,” Mr. Trump told reporters in the Rose Garden when asked about an emergency declaration.

Under the National Emergencies Act of 1976, presidents are allowed to take unilateral action in times of crisis, provided they notify Congress, specify the circumstances that necessitated the declaration and document all uses of executive authority that are covered by the emergency.

Officials at the Homeland Security, Justice and Defense Departments have researched the issue for Mr. Trump. However, no emergency order has been drafted or approved, one official with knowledge of those plans said.

The Homeland Security Department submitted an official request for assistance from the Pentagon on Friday, a Defense Department official said. But the military has yet to determine what resources are needed and if any additional troops are required for the mission, the official said.

Administration officials have been scrambling to tackle the legal and logistical problems involved with steering previously allocated funding toward any project that can be described as a wall, a fence or a barrier.

The definition of a wall has grown ever more elastic.

The White House and homeland security officials have been pushing the Pentagon to continue to use military troops at the border — mainly to install, extend and repair a section of concertina wire used to stop immigrants from entering unmanned sections of the southwest border.

Mr. Trump tweeted last month that “the Military will build the remaining sections of the Wall” — a reference to several hundred miles of fencing along the border.

The temporary troop deployments are just one of many recommendations that the homeland security secretary, Kirstjen Nielsen, and her staff have made to the Pentagon.

One possible solution, in the absence of new congressional allocations, is figuring out a way to steer contracts already planned for Army Corps of Engineers projects toward some kind of barriers. But lawyers at the Homeland Security and Justice Departments have yet to determine if doing so could withstand court challenges, two senior administration officials said.
With Congress so far unwilling to fund a wall at the Mexican border, President Trump has suggested he may do so unilaterally by declaring a national emergency, a possibility he may address in his speech to the nation Tuesday night.

Some questions and answers about the legal underpinnings of such a move:

*What is a national emergency?*

Federal law doesn’t define an emergency, and for much of American history such declarations largely were ad hoc. President Lincoln, faced with a rebellion as he took office in March 1861, quickly issued several emergency orders to blockade enemy ports, enlarge the armed forces and suspend habeas corpus. While perhaps not “strictly legal,” Mr. Lincoln wrote, he had to act unilaterally as Congress wasn’t in session. After it convened, Congress ratified Mr. Lincoln’s actions.

According to a report by the Congressional Research Service, the first formal emergency proclamation was issued by President Wilson in 1917, limiting the transfer of American-owned ships to foreigners during World War I. President Roosevelt was the next to issue an emergency proclamation, declaring a “bank holiday” to suspend financial transactions after taking office in March 1933 in the midst of the Depression.

After World War II broke out in September 1939, FDR issued two emergency declarations asserting presidential authority to safeguard American interests, which were superseded when Congress declared war following the attack on Pearl Harbor.

*What has Congress done to restrict emergency declarations?*

By the 1970s, lawmakers were worried about emergency declarations that had been issued and never rescinded. “These proclamations give force to 470 provisions of Federal law” that allow the president to exercise powers normally belonging to Congress, said one committee report. “This vast range of powers, taken together, confer enough authority to rule the country without reference to normal constitutional processes.”

In response, Congress passed the National Emergencies Act, a bipartisan measure placing limits on presidential discretion. Among other provisions, it allows Congress to terminate an emergency declaration, and it automatically ends an emergency after 180 days unless the president renews it.

*What exactly are the president’s emergency powers?*

The National Emergencies Act doesn’t outline specific powers. Instead, those are laid out in hundreds of specific statutes that give the president extra leeway in a declared emergency. For instance, the International Emergency Economic Powers Act authorizes the president to block financial transactions or freeze assets in response to foreign threats.

In November, for example, Mr. Trump declared that Nicaraguan President Daniel Ortega’s campaign to suppress political opposition constituted such a threat, and he froze the assets of individuals involved in stifling protests against the Ortega regime.

Most national emergencies have been similarly narrow, such as a 2001 declaration prohibiting the importation of rough diamonds from Sierra Leone, where they were used to fund a brutal civil war. That declaration was revoked in 2004 as the war ended.

An exception came three days after the Sept. 11, 2001, terrorist attacks, when President Bush declared a national emergency that has been renewed ever since, most recently by Mr. Trump. The same day, Congress passed its own resolution authorizing military force in response to the attacks. While some policies have been contested, there has been little dispute that
9/11 constituted a national emergency requiring an extraordinary response.

Do any emergency powers allow building a border wall?

One federal law states that when there is a declaration of war or a national emergency requiring the armed forces to respond, the secretary of defense can “undertake military construction projects…that are necessary to support such use of the armed forces” from the Pentagon construction budget without prior approval from Congress.

Currently, $13.3 billion in the Pentagon budget may be available, according to a congressional aide, enough to cover the $5 billion that Mr. Trump is seeking for the border wall. That would have to be diverted from projects such as military housing that Congress previously authorized.

Costs for the wall likely would include not only design and construction, but also purchase, potentially through condemnation, of private property along the border.

Still, Mr. Trump’s ability to redirect congressional appropriations this way could be short-lived. “We would look at every available [option] to stop this power from being abused, and that would range from a court challenge to changes to future appropriations bills” to block any construction of the wall, a Democratic House aide said.

Who decides what’s an “emergency”? Congress?

Congressional Democrats dispute that the border situation qualifies as an emergency and would likely go to court to contest such a declaration. When emergency authority has been invoked, “primarily it’s been done to build facilities in Afghanistan and Iraq,” House Armed Services Committee Chairman Adam Smith (D., Wash.) said Sunday on ABC’s “This Week.” “In this case, I think the president would be wide open to a court challenge saying, ‘Where is the emergency?’ ”

Steve Vladeck, a law professor at the University of Texas at Austin, said that without a statutory definition of “emergency,” courts are unlikely to second-guess the president’s judgment on that. The National Emergencies Act envisions that political checks, rather than litigation, will prevent abuse of executive authority, Mr. Vladeck said.

So far, that system has “largely worked,” with little dispute over the definition of an emergency, he said, but today “I think we have a president who, for better or for worse, is not as interested” in political norms and traditions.
Robert Costa and Philip Rucker, Trump aides lay foundation for emergency order to build wall, saying border is in ‘crisis,’ The Washington Post, Jan. 7, 2019

Trump administration officials made an urgent case Monday that the situation at the U.S.-Mexico border has reached a crisis level, laying the groundwork for President Trump to possibly declare a national emergency that would empower him to construct a border wall without congressional approval.

“There is a humanitarian and national security crisis,” Vice President Pence told reporters Monday, a line that he and Homeland Security Secretary Kirstjen Nielsen repeated several times. Pence also said he expected attempted crossings by undocumented migrants to “dramatically increase” as winter gives way to spring.

Many immigration experts, however, have said the Trump administration is exaggerating the security threat at the border and amplifying data in misleading ways or with outright falsehoods.

Although Trump has made “no decision” about a declaration, Pence said, lawyers in the White House Counsel’s Office are working to determine the president’s options and prepare for any possible legal obstacles.

“We will oppose any effort by the president to make himself a king and a tyrant,” House Judiciary Committee Chairman Jerrold Nadler (D-N.Y.) said Monday during a visit to the border. “The president has no authority to usurp Congress’s power of the purse.”

Jeh C. Johnson, who served in the Obama administration as secretary of homeland security and general counsel of the Defense Department, said the laws Trump could invoke with his national emergency declaration are designed to authorize military construction projects during wartime. He said using them for a border wall could curtail presidential powers in the years to come as lawmakers react to Trump and work to constrain him.

“The danger of using an authority like this and stretching it beyond its intended use is that Congress could then take it away, and it could not be used in situations where it’s really needed,” Johnson said.

Robert F. Bauer, a White House counsel under President Barack Obama, said Trump would be poorly positioned to defend such an action in federal courts, in part because his statements about the wall have been contradictory and have contained provable falsehoods.

“He has fatally compromised his ability to defend this,” Bauer said. “He has so politicized the issue, and he has been so reckless in his presentation of what the stakes are that he walks into court with two strikes against him, the ball about to break over the plate, and he’s swinging too late.”

Trump could theoretically use the National Emergencies Act of 1976 to declare an emergency, activating executive authorities including the reprogramming of some Defense Department funds.

Should Trump move forward, the political fallout probably would be significant. Democrats, newly in control of the House, have warned that doing so would be an abuse of power that would prompt investigations.

“I’m confident he could declare a national emergency, but what that may mean in terms of adding new elements to this — court hearings and litigation that may carry this on for weeks and months and years — to me, injecting a new element in this just makes it more complicated,” Sen. John Cornyn (R-Tex.) told CNN on Monday.

Trump’s advisers spent much of Monday laying the political foundation for the possibility of an emergency declaration should negotiations continue to deteriorate. At the White House briefing with reporters, Pence and Niel-
sen stressed a surge in migrant families streaming into the United States seeking asylum. They also highlighted the challenges facing border agents who are managing holding cells that have become dangerously overcrowded with children, many of whom are falling sick. Two Guatemalan children taken into U.S. custody died in December.

The administration is trying to highlight the security threat, with Nielsen saying there has been a spike in illegal drugs such as cocaine, heroin and methamphetamine at the border, as well as an influx of dangerous people.

For instance, Nielsen’s briefing on the border crisis stated that 3,755 known or suspected terrorists tried to illegally enter the United States in fiscal 2017. But she did not break down how many of these people showed up at airports vs. land crossings at the U.S.-Mexico border. According to separate Homeland Security data for 2017, most of the 2,554 people on the terrorist watch list who were encountered by U.S. officials tried to enter through airports (2,170) or by sea (49).
Paul Sonone, To build border wall as a national emergency, Trump would need to tap existing military budget, Washington Post, Jan. 7, 2019

If President Trump declares a national emergency to force the military to build a wall on the border with Mexico, the Pentagon may have to figure out which military construction projects around the world to cancel, pare back or put on hold to free up money for the initiative.

The law that authorizes the defense secretary to order military building projects in the event of a national emergency requires the Pentagon to draw upon funds that Congress has already appropriated for military construction. The result is that the administration could have to claw back money from projects Congress has debated and funded.

The president’s suggestion that he can build the wall by declaring a national emergency would likely hinge on a little-known section of the U.S. Code governing the military. 10 U.S.C. § 2808 gives the defense secretary the authority to undertake military construction projects “not otherwise authorized by law” to support any troops deployed in a national emergency requiring the use of the armed forces.

The law limits the spending in such cases. The Pentagon can draw upon only the money that Congress has appropriated for military construction projects but which has yet to be committed by contract to projects. These are known as unobligated funds. Sometimes, they are not all spent.

According to a congressional aide, there is about $10 billion left in unobligated funds for military construction in the current fiscal year’s defense budget, in addition to some $13 billion that has rolled over from previous years. The money, however, has been appropriated for specific projects. This aide, and another one, spoke on the condition of anonymity because they are not authorized to speak publicly about the issue.

The Pentagon’s leadership would be forced to decide which of the projects in various stages of completion should see their funds diverted or cut, according to the congressional aide and a defense official. The sorts of projects underway include child-care centers on bases and weapons-range complexes. Any decision to delay or scrap military construction projects on the home front could rankle local congressional delegations and cause political pain for lawmakers.

The use of the national emergency powers for military construction theoretically could open up the administration to legal action. The language in the statute allows the defense secretary to order military construction projects deemed necessary to support armed forces deployed in a national emergency. Whether the wall would count as a construction project necessary to support armed forces is unclear.

The Pentagon has used the emergency construction authority 18 times since September 2001, according to another congressional aide. In that time, the Defense Department has used the authority only once in the United States — in the aftermath of the Sept. 11 attacks to do construction at military installations storing sensitive materials or demilitarized chemical weapons.

All the other times the Pentagon has used the authority since 2001 have been overseas, in Afghanistan, Iraq, Djibouti and other locations in the Middle East. In those instances, the military has built barracks, power lines, roads and airfields to support troops at war or operating abroad. The same statute allows the Pentagon to undertake military construction to support troops in the event of a declaration of war.

Trump theoretically could also draw on the funds the military uses for stopping drugs from entering the United States if he presents the wall as a counternarcotics measure.
A separate U.S. statute [10 U.S.C. § 284] authorizes the administration to order military construction projects for the purposes of counternarcotics activities. But according to one of the congressional aides, that account contains only about $760 million in the current fiscal year budget, far below the more than $5 billion Trump wants this year for the construction of the border wall.

A study by Bernstein Research found that the border wall would cost at least $15 billion and as much as $25 billion in total. In January 2018, the Trump administration requested $18 billion over the next decade for the initial phase of the wall, but Congress did not approve the request.

According to a 2007 report from the Congressional Research Service, the president has broad ability to declare national emergencies, allowing him to establish martial law, seize property, regulate commerce and employ military forces overseas in a war- or peacetime situation.

Both Congress and the courts retain the ability to constrain that presidential power. During the 20th century, national emergencies have been declared related to issues such as the Korean War and a postal strike during the Nixon administration. The 1976 National Emergencies Act regulated how such emergencies can be declared and how long they last.

Since that law was enacted, national emergencies have been declared for a variety of reasons, including to prohibit trade with certain countries or block assets of suspected drug traffickers. The George W. Bush administration declared a national emergency three days after the Sept. 11, 2001, attacks.

“The president of the United States has an enormous amount of power,” Rep. Adam Smith (D-Wash.), chairman of the House Armed Services Committee, said, noting that the courts don’t have a long history of standing up to executive power. “It’s one of the reasons why we need to be really careful about who we elect president.”
Deanna Paul, Trump wants to declare a national emergency to fund a border wall. Here’s why it’s unlikely to work, Washington Post, Jan. 7, 2019

Is there an emergency power that will fund the wall?

Although no statute automatically allocates additional funding to the president during a national emergency, legal experts pointed to two emergency powers that could allow Trump to use Defense Department funding.

One federal statute [10 U.S.C. § 2808] makes available any unobligated funds originally set aside for military construction projects. The catch, according to Elizabeth Goitein, co-director of the Brennan Center’s Liberty and National Security Program, is that the national emergency must require the use of armed forces.

The second statute [33 U.S.C. § 2293] permits a president to divert funds from Army civil works projects and reprogram them.

“This is an emergency that requires use of armed forces,” Goitein told The Washington Post.

The reprogramming provision would give Trump the money, but not the authorization. The question, Goitein said, is whether there is an emergency power that allows him to build the wall without additional funding or legal authorization.

When a president activates his authority under the National Emergencies Act, he is required to notify Congress and specify which power he intends to use. Congress can then block it by passing a resolution in both chambers.

“There’s no easy path for him here. It’s not a slam dunk — there would be a legal fight, to be sure,” Goitein said.

Can Trump order the military to seize private land and build the wall?

The U.S. Constitution has an express provision about declarations of war. It is silent on emergency powers.

From the earliest days of the nation’s founding, there has been a debate over how to deal with an emergency, said Ilya Somin, a law professor at George Mason University.

Several attorneys, including Rep. Adam B. Schiff (D-Calif.) and Yale law professor Bruce Ackerman, argued Trump could not unilaterally decide the nation was undergoing an emergency.

Others disagree, averring that Congress yielded statutory authority to the president by passing the National Emergencies Act.

The federal government’s power to seize private property without owners’ consent is known as eminent domain.

Under the Constitution, the Fifth Amendment’s Takings Clause requires that the seizure be for “just compensation,” which is set at the fair market value, and that the property be for public use; there is no emergency power that undercuts these rules.

Private homeowners on the national border may try to resist government seizure of their properties, but as long as the procedural and payment requirements are met, Somin explained, once a court finds eminent domain is permissible, it is effectively a forced sale.

According to Gerald S. Dickinson, assistant professor of law at the University of Pittsburgh School of Law, the military has always had the authority to seize private land. But as a nation, he said, Americans have been uncomfortable with enforcing domestic law through the military.
President Trump on Friday said that he was considering the declaration of a “national emergency” along the border with Mexico, which he apparently believes would allow him to divert funds from the military budget to pay for a wall, and to use military personnel to build it.

While it is hard to know exactly what the president has in mind, or whether he has any conception about what it would entail, one thing is clear: Not only would such an action be illegal, but if members of the armed forces obeyed his command, they would be committing a federal crime.

Begin with the basics. From the founding onward, the American constitutional tradition has profoundly opposed the president’s use of the military to enforce domestic law. A key provision [18 U.S.C. § 1385], rooted in an 1878 statute and added to the law in 1956, declares that whoever “willfully uses any part of the Army or the Air Force” to execute a law domestically “shall be fined under this title or imprisoned not more than two years” — except when “expressly authorized by the Constitution or Act of Congress.”

Another provision [10 U.S.C. § 275], grounded in a statute from 1807 and added to the law in 1981, requires the secretary of defense to “ensure that any activity (including the provision of any equipment or facility or the assignment or detail of any personnel)” must “not include or permit direct participation by a member of the Army, Navy, Air Force, or Marine Corps in a search, seizure, arrest, or other similar activity unless participation in such activity by such member is otherwise authorized by law.”

In response to the Hurricane Katrina disaster in New Orleans, Congress created an express exception to the rules, and authorized the military to play a backup role in “major public emergencies.” But in 2008 Congress and President Bush repealed this sweeping exception. Is President Trump aware of this express repudiation of the power which he is threatening to invoke?

The statute books do contain a series of carefully crafted exceptions to the general rule. Most relevantly, Congress has granted the Coast Guard broad powers to enforce the law within the domestic waters of the United States. But there is no similar provision granting the other military services a comparable power to “search, seize and arrest” along the Mexican border. Given Congress’s decision of 2008, this silence speaks louder than words. Similarly, the current military appropriations bill fails to exempt military professionals from criminal punishment for violating the law in their use of available funds.

It is, I suppose, possible to imagine a situation in which the president might take advantage of the most recent exception [National Defense Authorization Act for Fiscal Year 2012, Pub. L. 112-81, 112th Cong., Dec. 31. 2011], enacted in 2011, which authorized the military detention of suspected terrorists associated with Al Qaeda or the Taliban. But despite President Trump’s unsupported claims about “terrorists” trying to cross the border, it is an unconscionable stretch to use this proviso to support using the military for operations against the desperate refugees from Central America seeking asylum in our country.

It is even less plausible for the president to suspend these restrictions under the National Emergencies Act of 1976. From the Great Depression through the Cold War, presidents systematically abused emergency powers granted them by Congress in some 470 statutes, culminating in the Watergate fiasco. In response, the
first section of the 1976 act terminated all existing emergencies and created a framework of checks and balances on the president’s arbitrary will.

If President Trump declared an emergency, Section Five of the act gives the House of Representatives the right to repudiate it immediately, then pass their resolution to the Senate — which is explicitly required to conduct a floor vote within 15 days. Since President Trump’s “emergency” declaration would be a direct response to his failure to convince Congress that national security requires his wall, it is hard to believe that a majority of the Senate, if forced to vote, would accept his show of contempt for their authority.

The Supreme Court’s 1953 decision in Youngstown v. Sawyer would be critical in Congressional consideration of such a decision. In a canonical opinion by Justice Robert Jackson, the court invalidated President Truman’s attempt in 1952 to use his powers as commander in chief to nationalize steel mills in the face of labor strikes. The decision imposed fundamental constitutional limits on the president’s power to claim that a national emergency — in this case, the Korean War — allowed him to override express provisions preventing him from using those powers domestically.
Building a wall was one of the central promises of Trump’s 2016 presidential campaign. The Trump administration initially requested that Congress appropriate $25 billion for the project after Mexico refused to pay for it, as Trump had promised on the campaign trail, but Congress specifically denied the funds in 2017 and 2018. After Congress passed a number of stopgap measures to continue funding the government while talks continued on money for the wall, on Dec. 22 Trump refused to sign another temporary measure, which caused the government to shut down.

The president is looking for a way to end the government shutdown while keeping his campaign promise to build the wall. But in the absence of an appropriate statutory authority on which to rely to build the wall, such action would be unconstitutional: Article I, Section 1 of the Constitution assigns the role of making laws to Congress, and Article I, Section 9 specifies that “[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.” The question, therefore, is what existing statutory authorities the president could reasonably rely on to use already-appropriated funds to build the wall.

Construction Authority
The first question is what legal authorities might actually be available for the purpose of using already-appropriated funding to build a wall on the U.S.-Mexico border. Congressional oversight of military construction programs is extensive, and as a general matter, all military construction projects must first be authorized by Congress. The General Accounting Office (GAO) in B-213137, 63 Comp. Gen. 422, 433 (1984) interpreted 41 U.S.C. § 12 to require specific congressional authorization for military construction projects and to prohibit the use of other, more general appropriations for such projects. Congress typically authorizes military construction projects in the annual Military Construction Authorization Act, with project authorizations broken down individually in the accompanying conference report. As such, the large general-purpose pot of Pentagon funding known as Operation & Maintenance (O&M) funding generally cannot be used for construction purposes.

But the Defense Department’s emergency military construction authorities contain two exceptions to this requirement of congressional authorization. The first, outlined in 10 U.S.C. § 2803, allows up to $50 million of appropriated funds for military construction to be spent on not-specifically-authorized construction projects if those projects are for the purpose of national security and protecting the safety of U.S. troops. According to Defense Department guidance from 2013, the relevant legislative history indicates that this authority may not be used for projects denied authorization in previous Military Construction Appropriations Acts—and unfortunately for the administration, the wall fits this description. In any event, the $50 million authorized under § 2803 would be a drop in the bucket of the $5.6 billion Trump is currently requesting and would fall well short of the estimated cost for the wall, which is likely somewhere between $12 billion and $25 billion.

The second exception, outlined in 10 U.S. Code § 2808(a), provides that:

“[i]n the event of a declaration of war or the declaration by the President of a national emergency in accordance with the National Emergencies Act (50 U.S.C. 1601 et seq.) that requires use of the armed forces, the Secretary of Defense, without regard to any other provision of law, may undertake military construction projects, and may authorize the Secretaries of the military departments to undertake military construction projects, not otherwise authorized by law that are necessary to support such use of the
armed forces. Such projects may be undertaken only within the total amount of funds that have been appropriated for military construction, including funds appropriated for family housing, that have not been obligated.” (Emphasis added.)

If such a national emergency is declared, the secretary of defense must notify the appropriate congressional committees and provide an “estimated cost of the construction projects, including the cost of any real estate action pertaining to those construction projects.” The authority terminates “with respect to any war or national emergency at the end of the war or national emergency.”

The portion of this law that references a “declaration of war” can be quickly dispensed with. There is no authority for the president to declare war: that power is expressly reserved to the Congress in Article I, Section 8 of the Constitution. Therefore, Trump could only invoke this authority by declaring a national emergency, consistent with Trump’s recent statements. Presidents have invoked § 2808 by declaring national emergency at least twice: in 1990 in Executive Order 12734 in response to Iraq’s invasion of Kuwait, and in 2001 in Executive Order 13235, following the terrorist attack of Sept. 11, 2001.

Under a plain reading of this language, it would seem the authority to engage in military construction projects would only apply to national emergencies that require use of the armed forces—and construction done pursuant to the authority would also need to be related to that specific use of the armed forces. In other words, the ongoing conflict in the Democratic Republic of the Congo, for example, could not serve as the basis for a national emergency that would authorize building the wall on the border with Mexico. The president also likely couldn’t declare a national emergency with respect to the Mexican border and then construct something that would not in any way support the mission of the U.S. armed forces in responding to the supposed emergency.

It is not obvious that the current situation at the U.S.-Mexico border requires the presence of the military. According to a report by Customs and Border Protection (CBP), CBP apprehensions along the southwest border plummeted by approximately 80 percent from Fiscal Year 2000 to FY 2017, from a high of over 1.6 million to around 300,000. Though numbers rose slightly in FY 2018, the administration has not presented evidence that CBP officials require military assistance to prevent immigrants from entering the country.

Nonetheless, in November 2018, a White House memo reportedly “authorized a more forward-leaning role for the active-duty forces, permitting troops to work alongside Border Patrol agents in duties such as crowd control and temporary detention.” Trump’s deployment of troops to the border in October was widely criticized as an election-year ploy, but it also may have had the effect of laying the groundwork for a national emergency determination that would allow Trump to build the wall using existing military construction funds pursuant to 10 U.S.C. § 2808(a). That is, because troops are currently stationed at the border, there is a better case that an emergency related to the border would require the use of the armed forces under § 2808(a).

But what would the basis of the emergency be? The government might point to an alleged crisis in border enforcement generally, though as noted, publicly available data does not indicate such a crisis. Recent statements by administration officials suggest that the government may also seek to make a more specific argument about terrorism. Various administration officials, including Secretary of State Mike Pompeo, Secretary of Homeland Security Kirstjen Nielsen and White House Press Secretary Sarah Huckabee Sanders, have publicly made the link between terrorism and what is happening at the southern border. On Jan. 6, for example,
Sanders said in an interview that “nearly 4,000 known or suspected terrorists come into our country illegally [in FY 2018]. And we know that our most vulnerable point of entry is at our southern border.” (Though the source of Sanders’s information is unclear, NBC has since reported that CBP stopped only six individuals listed as known or suspected terrorists from crossing the U.S.-Mexico border in the first half of FY 2018.)

If the president finds that the situation at the border “requires the use of the armed forces,” the next question is whether construction of a wall could be construed as “necessary to support such use of the armed forces.” This, in turn, raises the issue of what U.S. troops are actually doing and responding to at the border. The New York Times has reported that the approximately 5,900 American troops on the border are spread between southwestern Texas and southern California in small bases, where they have helped set up concertina wire and other security barriers. USA Today reported on Jan. 4 that the Department of Homeland Security requested from the Department of Defense more support from active-duty military troops to bolster CBP officers along the southern border, in particular more combat engineers to install concertina wire and more aircraft and crews to transport CBP officers. One can imagine the administration making an argument that the troops need the wall for their mission to keep terrorists and/or civilian invaders out of the United States, and the concertina wire they are laying is not sufficient for them to respond effectively. How convincing one finds this argument is a different question.

### Declaring Emergency

Beyond the limitations outlined in § 2808(a), the statute does not provide any explicit criteria or guidance for the president regarding what type of circumstances would qualify as a “national emergency” for purposes of this construction authority. Both the courts and Congress have typically been deferential to presidential declarations of national emergencies. For example, in the context of economic sanctions under the International Emergency Economic Powers Act (IEEPA)—which was enacted in part to limit the president’s ability to declare unending national emergencies—courts have generally deferred to the executive’s decisions regarding whether a particular foreign policy issue creates a national emergency sufficient to invoke IEEPA’s authorities, along with the underlying factual determinations by the executive branch.

If the administration were to tie the need for a wall to the threat of terrorism, it might seek to piggyback on the national emergency already declared in Executive Order 13224 by President George W. Bush, which authorized the use of economic sanctions to address terrorism and threats of terrorism committed by foreign terrorists against U.S. nationals or the United States. An executive order by Trump to extend that national emergency declaration to cover construction pursuant to 10 U.S.C. § 2808 would look very similar to the two prior executive orders in which § 2808 was invoked: these orders rested on national emergencies that had already been declared.

§ 2808(a)’s reference the National Emergencies Act (50 U.S.C. 1601 et seq.), which was enacted in 1976 as a way to rein in the proliferation of emergency powers, provides the affirmative authorization to the president to issue a national emergency declaration. But it also provides a process-oriented framework for congressional involvement in the event the president declares such a national emergency. Under the National Emergencies Act, any such declaration of a national emergency must “immediately be transmitted to the Congress and published in the Federal Register.” A national emergency covered by these provisions terminates if either a joint resolution is enacted or the president issues a proclamation terminating the emergency. Such a joint resolution terminating
the emergency would enjoy expedited consideration in Congress but would still need either the signature of the president or enough votes to override a presidential veto. The statute states that every six months “each House of Congress shall meet to consider a vote on a joint resolution to determine whether that emergency shall be terminated.”

This language, however, is not legally binding on Congress. And as Elizabeth Goitein points out, the law has neither stemmed the declaration of national emergencies nor encouraged declarations that the national emergency is over.

It is worth noting that under these provisions, even a valid termination of the national emergency by the president or via a joint resolution would not affect “(A) any action taken or proceeding pending not finally concluded or determined on such date; (B) any action or proceeding based on any act committed prior to such date; or (C) any rights or duties that matured or penalties that were incurred prior to such date.” This raises the question of whether these sections would allow the project to go forward if, for example, the administration were to sign a contract obligating the funds to build the wall before Congress terminated the national emergency.

**Other Possibilities**

Several other legal authorities are worth mentioning in the event the Trump administration decides to invoke them in connection with a national emergency declaration.

Over the years, myriad national emergency authorities have been given to the president through legislation, and the Brennan Center for Justice usefully categorized them last month. These authorities authorize a panoply of types of activities—related to things like public health, federal personnel, and criminal prosecution and detainment—that would not by their terms authorize construction of a wall. In my review, only about few would seem close to being on-point for the purpose of constructing Trump’s proposed wall:

- Under 33 U.S.C. § 2293, the secretary of the Army may terminate or defer any Army civil works project and apply the resources, including funds, personnel, and equipment, of the Army’s civil works program to authorized civil works, military construction, and civil defense projects that are essential to the national defense, without regard to any other provision of law "in the event of a declaration of war or a declaration by the President of a national emergency in accordance with the National Emergencies Act [50 U.S.C. §§ 1601 et seq.] that requires or may require use of the Armed Forces."

- Under 50 U.S.C. § 98f(a)(2), any officer or employee of the United States designated by the president may order the release of materials in the strategic raw materials stockpile for use, sale, or other disposition, if the officer or employee determines that the release is required for purposes of the national defense during a national emergency.

- Under 40 U.S.C. § 905, procedures for providing notice to local government and prospective purchasers before purchase or sale of real property in urban areas by an administrator of general services may be waived during a period of national emergency proclaimed by the president.

- Under 7 U.S.C. § 4208, legal provisions intended to protect farmland do not apply to the acquisition or use of farmland for national defense purposes during a national emergency.

- Under 42 U.S.C. § 4625 (c)(3)(B), a provision that persons displaced by a federal project may not be required to leave their dwelling unless they have had a reasonable
opportunity to relocate to a comparable replacement dwelling does not apply in the case of a national emergency declared by the president.

- Under 10 U.S.C. § 2662 (f), the secretary of the military department concerned, or the secretary of defense with respect to Department of Defense transactions, may waive advance reporting requirements for real property transactions "if the Secretary concerned determines that the transaction is made as a result of … a declaration of a national emergency by the President pursuant to the National Emergencies Act (50 U.S.C. §§ 1601 et seq.)."

Another statutory authority that could potentially be used to support construction of the wall, and which would not require the declaration of a national emergency, is 10 U.S.C. § Section 284, which authorizes the secretary of defense to “provide support for the counterdrug activities or activities to counter transnational organized crime of any other department or agency of the Federal Government or of any State, local, tribal, or foreign law enforcement agency” for the purposes set forth in the section if requested by another Federal agency or State, local, or tribal governments in support of law enforcement efforts. Those purposes include, among other things, “[c]onstruction of roads and fences and installation of lighting to block drug smuggling corridors across international boundaries of the United States,” as well as the “[t]he establishment (including an unspecified minor military construction project) and operation of bases of operations or training facilities for the purpose of facilitating counterdrug activities or activities to counter transnational organized crime of the Department of Defense or any Federal, State, local, or tribal law enforcement agency within or outside the United States” (emphasis added).

The wall would almost certainly not qualify as an “unspecified minor military construction project,” because the cost is too high. But if the Trump administration decided the wall was really a “fence,” it might be well on its way to making the argument that the administration may send Pentagon funds to the Department of Homeland Security or another agency to build a wall.

**Conclusion**

At first glance, the president’s proposal to build a wall as a matter of national emergency in the face of a government shutdown over the refusal by Congress to provide funds for such a wall seems like an end-run around Congress’s constitutional prerogatives to make laws and appropriate funds. But on closer inspection, the potentially relevant statutes delegate substantial authority to the president, and it is possible to imagine arguments that members of Congress, or the courts, could find convincing if they are predisposed to defer to the president on questions of what constitutes a national emergency at the border. The responses to such an action by the president will be both political and legal. It remains to be seen whether actions and statements by the president and other administration officials that are not readily supported by facts and data can overcome more basic constitutional concerns that the president is abusing his power at the expense of the legislative branch.
President Trump is looking for ways to get his wall on the southern border built, but Fox News senior judicial analyst Judge Andrew Napolitano said he does not have the authority to declare a national emergency and use the resources to build the wall.

“The Supreme Court has made it very clear – even in times of emergency – the president of the United States of America cannot spend money unless it’s been authorized by the Congress,” Napolitano told FOX Business’ Maria Bartiromo on Monday.

Trump said on Sunday that he may declare a national state of emergency to secure funding for his border wall, which has rejected. Trump first proposed the idea during a press conference on Friday.

"I may declare a national emergency dependent on what's going to happen over the next few days," Trump told reporters before leaving the White House for Camp David.

In 1950, President Harry Truman proclaimed a state of emergency during the Korean War to nationalize the steel industry, but the Supreme Court struck it down.

“When there was a steel strike during the Korean War he asked the Congress to seize the steel mills and operate them against the striker’s wishes and produce steel for our troops who desperately needed [it] in the Korean War,” said Napolitano. “The Supreme Court said no, you can’t do that. Congress can do it. Congress can pay for the steel mills and operate them but the president can’t do it on his own.”

Trump has demanded more than $5 billion in wall funding, but neither the president nor House Democrats, who now hold the majority, have been able to strike a bipartisan deal.

But in Napolitano’s opinion, Trump is using this as a bargaining chip.

“I think the president knows that we need comprehensive immigration and border security reform,” he said. “And the time to do that is not when there is a gun to somebody’s head … but in a patient atmosphere of a debate – a great national debate about how we want to treat those who want to come here.”
Our democracy is built on a structure of limited and separated governmental powers. The Founders took pains to prevent the amassing of too much power in any one branch of government. In times of emergency, however, it might be necessary for the president to have greater-than-normal powers and flexibility in order to respond adequately to quickly unfolding events. But what extra powers should the president have, when should she be able to access them, and how should they be constrained in their use? To answer these questions, it is important to understand what the emergency powers landscape looks like today.

There are many types of emergency powers, some set forth in laws passed by Congress, others contained in secret presidential orders. We discuss these general categories of powers, along with specific examples of emergency authorities, in an article published in the current issue (January/February 2019) of The Atlantic.

One particularly important subset of these powers is a diverse collection of special statutory authorities that become available when the president or Congress declares a “national emergency.”

Both the president and Congress are free to declare a national emergency whenever they wish; there are no limits on what type of event qualifies. Under the National Emergencies Act, which went into effect in 1978, an emergency declared by the president will terminate after a year unless she renews it — but such renewals happen routinely. And while Congress may vote to terminate a presidentially declared state of emergency, it has not done so since 1978.

Building on previous research in this area, the Brennan Center has identified 136 statutory powers that may become available to the president upon declaration of a national emergency. We created a database that assembles these powers by subject matter, specifies the conditions triggering their use, and lists the occasions, if any, on which they have been invoked. (The methodology we used to compile the database is available here.) We have also developed a running list of national emergencies declared since the National Emergencies Act went into effect.

These resources are eye-opening in many ways: in the nature of the powers provided, in how easily the executive can access them, and in how they have been used (or misused). Some highlights of the research include:

- Emergency powers cover almost every imaginable subject area, including the military, land use, public health, trade, federal pay schedules, agriculture, transportation, communications, and criminal law.
- Some of the laws stand out as particularly alarming in what they authorize and in their potential for abuse. One statute, for example, would allow the president to suspend a law that prohibits the testing of chemical and biological weapons on unwitting human subjects. Section 706(c) of the Communications Act of 1934 allows the president to shut down or take over radio stations. If she proclaims a threat of war, she can go further and take over wire communications as well. The International Emergency Economic Powers Act (IEEPA) allows the government to freeze any asset or block any financial transaction in which a foreign national has an interest, even if the asset belongs to an American or the transaction is between Americans. (See our piece in The Atlantic for more on these authorities.)
- Other powers seem almost absurdly mundane, to the point that it is difficult to see how they could help alleviate emergency conditions. One law, for instance, allows members of the Coast Guard to serve as notaries public in times of national emergency. Another allows the Secretary of the Interior to close the Fort McHenry National Monument.
- Of the 136 authorities available to the president in a national emergency, 96 require nothing more than her signature on the emergency declaration. Twelve contain
A de minimis restriction, such as a requirement that an agency head certify the necessity of the measure (something the president can presumably order the agency head to do). Fifteen contain a more substantive restriction, such as a requirement that the emergency relate to a particular subject matter or that it involve the use of armed forces. Only 13 require a congressional (versus presidential) declaration of emergency.

- These emergency authorities have accumulated over decades. Fifty-eight of the statutes were first enacted more than half a century ago. We could find no record of usage for many of the statutes— which raises the question of whether these powerful and potentially dangerous powers are even necessary. Indeed, more than half of the laws in the database (67 percent) appear to have never been invoked. At least four have been rendered facially obsolete since they were enacted. For instance, one statute provides powers regarding an island in the Panama Canal Zone that the United States no longer controls, and another one exempts World War II veterans from the draft.

- On the other hand, a few of the statutes have been used frequently, with six having been used more than 10 times. Most notably, the International Emergency Economic Powers Act has been invoked on an almost yearly basis since it was passed in 1977 and is cited in all but three of the emergencies ever declared under the National Emergencies Act. This level of reliance on an emergency power raises a different concern: that the actions being taken are not emergency actions at all, but the implementation of standard policy that should be bound by non-emergency law.

- Although the very concept of “emergency” suggests a temporary, short-term event, states of emergency last a long time, and they’re getting longer. Thirty-one of the 58 states of emergency declared since the National Emergencies Act was passed are still in effect today. The average duration of declared emergencies is 9.6 years. Twenty-five emergencies have lasted 10 years or longer; 13 of these were declared between 2001 and 2008. The longest-lasting emergency, Blocking Iranian Government Property, was first declared in 1979 on the heels of the hostage crisis and has been persistently renewed for 39 years.

- Emergency powers are being used as a pretext to deal with other problems. Presidents Obama and Trump invoked nonexistent economic crises to decrease or eliminate statutory pay increases for federal workers. (While there was arguably an economic crisis at the beginning of Obama’s administration, he continued to invoke this emergency law throughout his two terms.) President Trump invoked the 9/11 state of emergency in 2017 to fill a chronic shortage in Air Force pilots.

- In short, emergency powers offer a broad array of tools that would otherwise be unavailable to the executive branch. Some are highly potent and subject to abuse, while others are already being misused as convenient fixes to non-emergency problems. A large percentage of these authorities appear to be unnecessary and/or outdated. The president can invoke dozens of these laws simply by signing her name to an emergency declaration, and such declarations tend to linger on the books for many years. The bottom line: It is time to rethink whether our current legal framework for national emergencies is the right one, or whether changes are needed to preserve the balance of powers the Founders intended.
Taking advantage of almost a decade of political victories in state legislatures across the country, conservative advocacy groups are quietly marshaling support for an event unprecedented in the nation’s history: a convention of the 50 states, summoned to consider amending the Constitution.

The groups are an amalgam of free-market, low-tax and small-government proponents, often funded by corporations and deeply conservative supporters like the billionaire Koch brothers and Donors Trust, whose contributors are mostly anonymous. They want an amendment to require a balanced federal budget, an idea many conservatives have embraced, many economists disdain and Congress has failed to endorse for decades. . . .

The process, which is playing out largely beyond public notice, rests on a clause in Article 5 of the Constitution that allows the states to sidestep Congress and draft their own constitutional amendments whenever two-thirds of their legislatures demand it.

That will by no means be easy. Even if the two-thirds threshold were reached, a convention would probably face a court battle over whether the legislatures’ calls for a convention were sufficiently similar. And as with any amendment that Congress proposes, state-written amendments would need approval by three-quarters of the states — either by their legislatures or by state conventions — to take effect. . . .

So far, 28 states have adopted resolutions calling for a convention on a balanced-budget amendment, including 10 in the past three years, and two, Oklahoma and West Virginia, this spring. That is just six states short of the 34 needed to invoke the Article 5 clause.

“I think the prospect is very good in 2017,” said Gary Banz, a Republican who is the majority whip in the Oklahoma House of Representatives. “You can look at any number of states that are not on board yet, and they’re controlled by very conservative elements.”

Including nominally nonpartisan Nebraska, Republicans now control 31 state assemblies — more than double the number in 2010. Of the 11 states advocacy groups have targeted for pro-convention lobbying next year, Republicans control both houses of the Legislature in seven.

Representative Banz is among those leading the charge. In addition to his statehouse job, he is the national secretary of the American Legislative Exchange Council, known as ALEC, a nonprofit financed by corporate and private donors, including the Kochs, that is at the center of the convention effort.

At ALEC’s annual meeting, in Indianapolis last month, another leading advocacy group, the Balanced Budget Amendment Task Force, staged a seminar for legislators on an amendment convention.

Citizens for Self-Governance, a Texas-based group with Tea Party roots, has ALEC backing for a more sweeping goal: an amendment that would “impose fiscal restraints” on the federal government, reduce its authority and limit the terms of federal elected officials. . . .

Supporters say the philosophy that state governments and ordinary people usually adhere to — that it is wrong and destructive to spend beyond one’s income — should apply to the federal government as well. In that view, the $19.4 trillion national debt threatens to destroy Americans’ future prosperity. “It’s immoral for one generation to borrow and spend beyond its means and leave the bill to the next generation,” said Scott Rogers, the director of the Balanced Budget Amendment Task Force.

But opponents say an amendment, not the deficit, is the threat. A government that could not run deficits, they argue, would not be able to stimulate the economy during recessions, when job-creating spending is most needed. And it would not be able to elude budget ceilings for benefits like Social Security, or for job-creating projects like highways that are financed with debt.

In truth, they say, debt is a fact of life for both states and ordinary households — in bond issues that finance revenue generators like convention centers and bridges, and for ordinary necessities like cars, kitchen remodelings and homes. Banning deficit spending, they say, would bring the economy to a halt.

But the basic argument for federal frugality has broad appeal. Polls generally indicate strong support for a balanced-budget amendment, and advocates persuaded 32 state legislatures to back an amendment convention during the Reagan administration.
Congress defused the movement by passing the Gramm-Rudman-Hollings Balanced Budget and Emergency Deficit Control Act of 1985, which pledged — toothlessly, it turned out — to eliminate annual federal deficits within six years. Over the next three decades, many legislatures rescinded their convention calls. Only recently has the movement seen a revival.

Amendment conventions are not exclusively a conservative cause. With liberals’ backing, four states have passed resolutions advocating a convention to overturn the Supreme Court's Citizens United ruling on campaign finance.

Yet debate over an amendment’s merits has taken a back seat to a more fundamental question: whether delegates to a convention could be trusted not to tinker with other parts of the Constitution.

Article 5 places no limits on a convention’s power. Some experts note that the Constitution itself arose from a convention called to amend its predecessor, the Articles of Confederation — and tore up the document and started from scratch. That convention even scrapped the Articles’ terms of ratification — unanimous approval by the states — and substituted a lower barrier, three-fourths of states. (Some pro-amendment conservatives argue that the delegates to Philadelphia did not go rogue, but always planned to rewrite the Articles.)

So what rules would an amendments convention follow? “The answer to almost every question you could ask is ‘We don’t know,’” said Michael J. Klarman, a constitutional law expert at Harvard whose book on that convention, “The Framers’ Coup: The Making of the United States Constitution,” will be published in October. “I think a convention can do anything they want — re-establish slavery, establish a national church. I just don’t think there’s any limit.”

Michael J. Gerhardt, a University of North Carolina law professor and scholar in residence at the National Constitution Center in Philadelphia, said Article 5’s reticence gave states leeway to improvise. “Once you have a convention, then in some respects it becomes a free-for-all,” he said. “All bets are off.”

History suggests at least one Founding Father had similar qualms. During the drafting of the Constitution, James Madison did not oppose the Article 5 clause, but worried “that difficulties might arise as to the form, the quorum.”

Advocates scoff at the hand-wringing. Conventions of states, they say, are nothing new: About three dozen met from the 1700s to 1922 — most before the Constitution was drafted — considering everything from trade to slavery to divvying up the Colorado River’s water. Most did not include every state, but each generally followed a preset agenda. A convention to draft amendments, they say, would be no different.

“There’s never been a convention where the delegates went wild,” said Rob Natelson, a former University of Montana constitutional scholar who wrote an amendment convention handbook for ALEC and is now a fellow at the conservative Independence Institute in Denver. “They all negotiated a deal, came to an agreement or didn’t, and went home,” he said.

There is, though, one signal difference: None of those meetings bore the Constitution’s blessing. One, in 1861, did propose an amendment to avert an impending civil war, but it was an ad hoc affair, not an Article 5 meeting.

At least one contrarian liberal agrees with Mr. Natelson. Lawrence Lessig, the Harvard Law School professor and recent, if brief, Democratic presidential candidate, said he doubted that an amendments convention would run amok, rewriting the nation’s seminal rules.

But even if it did, he said, he would not be especially concerned: After all, a convention only proposes amendments.

“The very terms of Article 5 state that proposals aren’t valid unless they’re ratified by three-fourths of the states,” he said. “There’s no controversial idea on the left or the right that won’t have 13 states against it.”
APPENDIX

THE AMENDMENTS

An Amendment to Establish
Term Limits for Members of Congress

SECTION 1: No person may serve more than twelve years as a
member of Congress, whether such service is exclusively in the
House or the Senate or combined in both Houses.

SECTION 2: Upon ratification of this Article, any incumbent
member of Congress whose term exceeds the twelve-year limit
shall complete the current term, but thereafter shall be ineligible
for further service as a member of Congress.

An Amendment to Restore the Senate

SECTION 1: The Seventeenth Amendment is hereby repealed.
All Senators shall be chosen by their state legislatures as pre-
scribed by Article 1.
SECTION 2: This amendment shall not be so construed as to affect the term of any Senator chosen before it becomes valid as part of the Constitution.

SECTION 3: When vacancies occur in the representation of any State in the Senate for more than ninety days the governor of the State shall appoint an individual to fill the vacancy for the remainder of the term.

SECTION 4: A Senator may be removed from office by a two thirds vote of the state legislature.

An Amendment to Establish Term Limits for Supreme Court Justices and Super-Majority Legislative Override

SECTION 1: No person may serve as Chief Justice or Associate Justice of the Supreme Court for more than a combined total of twelve years.

SECTION 2: Immediately upon ratification of this Amendment, Congress will organize the justices of the Supreme Court as equally as possible into three classes, with the justices assigned to each class in reverse seniority order, with the most senior justices in the earliest classes. The terms of office for the justices in the First Class will expire at the end of the fourth Year following the ratification of this Amendment, the terms for the justices of the Second Class will expire at the end of the eighth Year, and of the Third Class at the end of the twelfth Year, so that one third of the justices may be chosen every fourth Year.
SECTION 3: When a vacancy occurs in the Supreme Court, the President shall nominate a new justice who, with the approval of a majority of the Senate, shall serve the remainder of the unexpired term. Justices who fill a vacancy for longer than half of an unexpired term may not be renominated to a full term.

SECTION 4: Upon three fifths vote of the House of Representatives and the Senate, Congress may override a majority opinion rendered by the Supreme Court.

SECTION 5: The Congressional override under Section 4 is not subject to a Presidential veto and shall not be the subject of litigation or review in any Federal or State court.

SECTION 6: Upon three-fifths vote of the several state legislatures, the States may override a majority opinion rendered by the Supreme Court.

SECTION 7: The States’ override under Section 6 shall not be the subject of litigation or review in any Federal or State court, or oversight or interference by Congress or the President.

SECTION 8: Congressional or State override authority under Sections 4 and 6 must be exercised no later than twenty four months from the date of the Supreme Court rendering its majority opinion, after which date Congress and the States are prohibited from exercising the override.

Two Amendments to Limit Federal Spending and Taxing

Spending
SECTION 1: Congress shall adopt a preliminary fiscal year budget no later than the first Monday in May for the following
fiscal year, and submit said budget to the President for consideration.

SECTION 2: Shall Congress fail to adopt a final fiscal year budget prior to the start of each fiscal year, which shall commence on October 1 of each year, and shall the President fail to sign said budget into law, an automatic, across-the-board, 5 percent reduction in expenditures from the prior year's fiscal budget shall be imposed for the fiscal year in which a budget has not been adopted.

SECTION 3: Total outlays of the federal government for any fiscal year shall not exceed its receipts for that fiscal year.

SECTION 4: Total outlays of the federal government for each fiscal year shall not exceed 17.5 percent of the Nation's gross domestic product for the previous calendar year.

SECTION 5: Total receipts shall include all receipts of the United States Government but shall not include those derived from borrowing. Total outlays shall include all outlays of the United States Government except those for the repayment of debt principal.

SECTION 6: Congress may provide for a one-year suspension of one or more of the preceding sections in this Article by a three-fifths vote of both Houses of Congress, provided the vote is conducted by roll call and sets forth the specific excess of outlays over receipts or outlays over 17.5 percent of the Nation's gross domestic product.

SECTION 7: The limit on the debt of the United States held by the public shall not be increased unless three-fifths of both Houses of Congress shall provide for such an increase by roll call vote.
SECTION 8: This Amendment shall take effect in the fourth fiscal year after its ratification.

_Taxing_

SECTION 1: Congress shall not collect more than 15 percent of a person's annual income, from whatever source derived. "Person" shall include natural and legal persons.

SECTION 2: The deadline for filing federal income tax returns shall be the day before the date set for elections to federal office.

SECTION 3: Congress shall not collect tax on a decedent's estate.

SECTION 4: Congress shall not institute a value-added tax or national sales tax or any other tax in kind or form.

SECTION 5: This Amendment shall take effect in the fourth fiscal year after its ratification.

_An Amendment to Limit the Federal Bureaucracy_

SECTION 1: All federal departments and agencies shall expire if said departments and agencies are not individually reauthorized in stand-alone reauthorization bills every three years by a majority vote of the House of Representatives and the Senate.

SECTION 2: All Executive Branch regulations exceeding an economic burden of $100 million, as determined jointly by the Government Accountability Office and the Congressional Budget Office, shall be submitted to a permanent Joint Committee of Congress, hereafter the Congressional Delegation Oversight Committee, for review and approval prior to their implementation.

SECTION 3: The Committee shall consist of seven members of the House of Representatives, four chosen by the Speaker
and three chosen by the Minority Leader; and seven mem-
bers of the Senate, four chosen by the Majority Leader and
three chosen by the Minority Leader. No member shall serve
on the Committee beyond a single three year term.

SECTION 4: The Committee shall vote no later than six months
from the date of the submission of the regulation to the Com-
mittee. The Committee shall make no change to the regulation,
either approving or disapproving the regulation by majority vote
as submitted.

SECTION 5: If the Committee does not act within six months
from the date of the submission of the regulation to the Com-
mittee, the regulation shall be considered disapproved and must
not be implemented by the Executive Branch.

An Amendment to Promote Free Enterprise

SECTION 1: Congress's power to regulate commerce is not
a plenary grant of power to the federal government to regu-
late and control economic activity but a specific grant of
power limited to preventing states from impeding commerce
and trade between and among the several States,

SECTION 2: Congress's power to regulate Commerce does
not extend to activity within a state, whether or not it affects
interstate commerce; nor does it extend to compelling an in-
dividual or entity to participate in commerce or trade.

An Amendment to Protect Private Property

SECTION 1: When any governmental entity acts not to secure
a private property right against actions that might injure prop-
erty owners, but to take property for a public use from a prop-
erty owner by actual seizure or through regulation, which
taking results in a market value reduction of the property, interference with the use of the property, or a financial loss to the property owner exceeding $10,000, the government shall compensate fully said property owner for such losses.

An Amendment to Grant the States Authority to Directly Amend the Constitution

SECTION 1: The State Legislatures, whenever two thirds shall deem it necessary, may adopt Amendments to the Constitution.

SECTION 2: Each State Legislature adopting said Amendments must adopt Amendments identical in subject and wording to the other State Legislatures.

SECTION 3: A six-year time limit is placed on the adoption of an Amendment, starting from the date said Amendment is adopted by the first State Legislature. Each State Legislature adopting said Amendment shall provide an exact copy of the adopted Amendment, along with an affidavit signed and dated by the Speaker of the State Legislature, to the Archivist of the United States within fifteen calendar days of its adoption.

SECTION 4: Upon adoption of an Amendment, a State Legislature may not rescind the Amendment or modify it during the six-year period in which the Amendment is under consideration by the several States' Legislatures.

An Amendment to Grant the States Authority to Check Congress

SECTION 1: There shall be a minimum of thirty days between the engrossing of a bill or resolution, including amendments, and its final passage by both Houses of Congress. During the engrossment period, the bill or resolution
shall be placed on the public record, and there shall be no changes to the final bill or resolution.

SECTION 2: SECTION 1 may be overridden by two-thirds vote of the members of each House of Congress.

SECTION 3: Upon three-fifths vote of the state legislatures, the States may override a federal statute.

SECTION 4: Upon three-fifths vote of the state legislatures, the States may override Executive Branch regulations exceeding an economic burden of $100 million after said regulations have been finally approved by the Congressional Delegation Oversight Committee [see An Amendment Establishing How the States May Amend the Constitution].

SECTION 5: The States' override shall not be the subject of litigation or review in any Federal or State court, or oversight or interference by Congress or the President.

SECTION 6: The States' override authority must be exercised no later than twenty-four months from the date the President has signed the statute into law, or the Congressional Delegation Oversight Committee has approved a final regulation, after which the States are prohibited from exercising the override.

An Amendment to Protect the Vote

SECTION 1: Citizens in every state, territory, and the District of Columbia shall produce valid photographic identification documents demonstrating evidence of their citizenship, issued by the state government for the state in which the voter resides, as a prerequisite for registering to vote and voting in any primary or general election for President, Vice President, and members of Congress.
SECTION 2: Provisions shall be made by the state legislatures to provide such citizenship-designated photographic identification documents at no cost to individuals unable to afford fees associated with acquiring such documents.

SECTION 3: Early voting in any general election for President, Vice President, and members of Congress shall not be held more than thirty calendar days prior to the national day of election except for active-duty military personnel, for whom early voting shall not commence more than forty-five calendar days prior to the national day of election.

SECTION 4: Where registration and/or voting is not in person but by mail, citizens must submit an approved citizen-designated photo identification and other reliable information to state election officials to register to vote and request ballots for voting, no later than forty-five calendar days before the primary or general elections for President, Vice President, or members of Congress. Registration forms and ballots must be returned and signed by the voter and must either be mailed or hand-delivered by the voter to state election officials. If delivered by third party, the voter must provide written authorization for the person making the delivery and the third party must sign a statement certifying that he did not unduly influence the voter's decisions.

SECTION 5: Electronic or other technology-based voting systems, for purposes of registering and voting in national elections, are proscribed unless a reliable identification and secure voting regimen is established by the state legislature.
Note:¹ This consolidation contains the text of the Constitution Act, 1867 (formerly the British North America Act, 1867), together with amendments made to it since its enactment, and the text of the Constitution Act, 1982, as amended since its enactment. The Constitution Act, 1982 contains the Canadian Charter of Rights and Freedoms and other new provisions, including the procedure for amending the Constitution of Canada.

The Constitution Act, 1982 also contains a Schedule of repeals of certain constitutional enactments and provides for the renaming of others. The British North America Act, 1949, for example, is renamed in the Schedule as the Newfoundland Act. The new names of these enactments are used in this consolidation, but their former names may be found in the Schedule.

The Constitution Act, 1982 was enacted by the Parliament of the United Kingdom as Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, and is set out in this consolidation as a separate enactment after the Constitution Act, 1867. The Canada Act 1982, other than Schedule B, is contained in the first footnote to the Constitution Act, 1982.

The law embodied in the Constitution Act, 1867 has been altered many times otherwise than by direct amendment, not only by the Parliament of the United Kingdom but also by the Parliament of Canada and the legislatures of the provinces, in those cases where provisions of that Act are expressed to be subject to alteration by Parliament or the legislatures. A consolidation of the Constitution Acts with only those subsequent enactments that directly alter the text of the Act would therefore not produce a true statement of the law. In preparing this consolidation, an attempt has been made to reflect accurately the substance of the law contained in enactments modifying the provisions of the Constitution Act, 1867.

THE CONSTITUTION ACT, 1867

30 & 31 Victoria, c. 3. (U.K.)
(Consolidated with amendments)

An Act for the Union of Canada, Nova Scotia, and New Brunswick, and the Government thereof; and for Purposes connected therewith
[29th March 1867.]

Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom:

And whereas such a Union would conduce to the Welfare of the Provinces and promote the Interests of the British Empire:

And whereas on the Establishment of the Union by Authority of Parliament it is expedient, not only that the Constitution of the Legislative Authority in the Dominion be provided for, but also that the Nature of the Executive Government therein be declared:

And whereas it is expedient that Provision be made for the eventual Admission into the Union of other Parts of British North America:

I. PRELIMINARY

1. Short title

This Act may be cited as the Constitution Act, 1867.

2. [Repealed]

Repealed.

¹ From the Department of Justice, Canada (http://laws.justice.gc.ca/eng/Const/index2.html)
II. UNION

3. Declaration of Union

It shall be lawful for the Queen, by and with the Advice of Her Majesty's Most Honourable Privy Council, to declare by Proclamation that, on and after a Day therein appointed, not being more than Six Months after the passing of this Act, the Provinces of Canada, Nova Scotia, and New Brunswick shall form and be One Dominion under the Name of Canada; and on and after that Day those Three Provinces shall form and be One Dominion under that Name accordingly.

4. Construction of subsequent Provisions of Act

Unless it is otherwise expressed or implied, the Name Canada shall be taken to mean Canada as constituted under this Act.

5. Four Provinces

Canada shall be divided into Four Provinces, named Ontario, Quebec, Nova Scotia, and New Brunswick.

6. Provinces of Ontario and Quebec

The Parts of the Province of Canada (as it exists at the passing of this Act) which formerly constituted respectively the Provinces of Upper Canada and Lower Canada shall be deemed to be severed, and shall form Two separate Provinces. The Part which formerly constituted the Province of Upper Canada shall constitute the Province of Ontario; and the Part which formerly constituted the Province of Lower Canada shall constitute the Province of Quebec.

7. Provinces of Nova Scotia and New Brunswick

The Provinces of Nova Scotia and New Brunswick shall have the same Limits as at the passing of this Act.

8. Decennial Census

In the general Census of the Population of Canada which is hereby required to be taken in the Year One thousand eight hundred and seventy-one, and in every Tenth Year thereafter, the respective Populations of the Four Provinces shall be distinguished.

III. EXECUTIVE POWER

9. Declaration of Executive Power in the Queen

The Executive Government and Authority of and over Canada is hereby declared to continue and be vested in the Queen.

10. Application of Provisions referring to Governor General

The Provisions of this Act referring to the Governor General extend and apply to the Governor General for the Time being of Canada, or other the Chief Executive Officer or Administrator for the Time being carrying on the Government of Canada on behalf and in the Name of the Queen, by whatever Title he is designated.

11. Constitution of Privy Council for Canada

There shall be a Council to aid and advise in the Government of Canada, to be styled the Queen’s Privy Council for Canada; and the Persons who are to be Members of that Council shall be from Time to Time chosen and summoned by the Governor General and sworn in as Privy Councillors, and Members thereof may be from Time to Time removed by the Governor General.

12. All Powers under Acts to be exercised by Governor General with Advice of Privy Council, or alone

All Powers, Authorities, and Functions which under any Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of Upper Canada, Lower Canada, Canada, Nova Scotia, or New Brunswick, are at the Union vested in or exercisable by the respective Governors or Lieutenant Governors of those Provinces, with the Advice, or with the Advice and Consent, of the respective Executive Councils thereof, or in conjunction with those Councils, or with any Number of Members thereof, or by those Governors or Lieutenant Governors individually, shall, as far as the same continue in existence and capable of being exercised after the Union in relation to the Government of Canada, be vested in and exercisable by the Governor General, with the Advice or with the Advice and Consent of or in conjunction with the Queen’s Privy Council for Canada, or any Members thereof, or by the Governor General individually, as the Case requires, subject nevertheless (except with respect to such as exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland) to be abolished or altered by the Parliament of Canada.
13. Application of Provisions referring to Governor General in Council
The Provisions of this Act referring to the Governor General in Council shall be construed as referring to
the Governor General acting by and with the Advice of the Queen's Privy Council for Canada.

14. Power to Her Majesty to authorize Governor General to appoint Deputies
It shall be lawful for the Queen, if Her Majesty thinks fit, to authorize the Governor General from Time to
Time to appoint any Person or any Persons jointly or severally to be his Deputy or Deputies within any Part
or Parts of Canada, and in that Capacity to exercise during the Pleasure of the Governor General such of
the Powers, Authorities, and Functions of the Governor General as the Governor General deems it neces-
sary or expedient to assign to him or them, subject to any Limitations or Directions expressed or given by
the Queen; but the Appointment of such a Deputy or Deputies shall not affect the Exercise by the Governor
General himself of any Power, Authority, or Function.

15. Command of Armed Forces to continue to be vested in the Queen
The Command-in-Chief of the Land and Naval Militia, and of all Naval and Military Forces, of and in Canada,
is hereby declared to continue and be vested in the Queen.

16. Seat of Government of Canada
Until the Queen otherwise directs, the Seat of Government of Canada shall be Ottawa.

IV. LEGISLATIVE POWER

17. Constitution of Parliament of Canada
There shall be One Parliament for Canada, consisting of the Queen, an Upper House styled the Senate,
and the House of Commons.

18. Privileges, etc., of Houses
The privileges, immunities, and powers to be held, enjoyed, and exercised by the Senate and by the House
of Commons, and by the members thereof respectively, shall be such as are from time to time defined by
Act of the Parliament of Canada, but so that any Act of the Parliament of Canada defining such privileges,
immunites, and powers shall not confer any privileges, immunities, or powers exceeding those at the pass-
ing of such Act held, enjoyed, and exercised by the Commons House of Parliament of the United Kingdom
of Great Britain and Ireland, and by the members thereof.

19. First Session of the Parliament of Canada
The Parliament of Canada shall be called together not later than Six Months after the Union.

20. [Repealed]

Repealed.

THE SENATE

21. Number of Senators
The Senate shall, subject to the Provisions of this Act, consist of One Hundred and five Members, who shall
be styled Senators.

22. Representation of Provinces in Senate
In relation to the Constitution of the Senate Canada shall be deemed to consist of Four Divisions:

1. Ontario;
2. Quebec;
3. The Maritime Provinces, Nova Scotia and New Brunswick, and Prince Edward Island;
4. The Western Provinces of Manitoba, British Columbia, Saskatchewan, and Alberta;

which Four Divisions shall (subject to the Provisions of this Act) be equally represented in the Senate as
follows: Ontario by twenty-four senators; Quebec by twenty-four senators; the Maritime Provinces and
Prince Edward Island by twenty-four senators, ten thereof representing Nova Scotia, ten thereof represent-
ing New Brunswick, and four thereof representing Prince Edward Island; the Western Provinces by twenty-
four senators, six thereof representing Manitoba, six thereof representing British Columbia, six thereof rep-
resenting Saskatchewan, and six thereof representing Alberta; Newfoundland shall be entitled to be repre-
sented in the Senate by six members; the Yukon Territory and the Northwest Territories shall be entitled to
be represented in the Senate by one member each.

In the Case of Quebec each of the Twenty-four Senators representing that Province shall be appointed for
One of the Twenty-four Electoral Divisions of Lower Canada specified in Schedule A. to Chapter One of
the Consolidated Statutes of Canada.
23. Qualifications of Senator

The Qualifications of a Senator shall be as follows:

(1) He shall be of the full age of Thirty Years:

(2) He shall be either a natural-born Subject of the Queen, or a Subject of the Queen naturalized by an Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of One of the Provinces of Upper Canada, Lower Canada, Canada, Nova Scotia, or New Brunswick, before the Union, or of the Parliament of Canada after the Union:

(3) He shall be legally or equitably seised as of Freehold for his own Use and Benefit of Lands or Tenements held in Free and Common Socage, or seised or possessed for his own Use and Benefit of Lands or Tenements held in Franc-alleu or in Roture, within the Province for which he is appointed, of the Value of Four thousand Dollars, over and above all Rents, Dues, Debts, Charges, Mortgages, and Incumbrances due or payable out of or charged on or affecting the same:

(4) His Real and Personal Property shall be together worth Four thousand Dollars over and above his Debts and Liabilities:

(5) He shall be resident in the Province for which he is appointed:

(6) In the Case of Quebec he shall have his Real Property Qualification in the Electoral Division for which he is appointed, or shall be resident in that Division.

24. Summons of Senator

The Governor General shall from Time to Time, in the Queen’s Name, by Instrument under the Great Seal of Canada, summon qualified Persons to the Senate; and, subject to the Provisions of this Act, every Person so summoned shall become and be a Member of the Senate and a Senator.

26. Addition of Senators in certain cases

If at any Time on the Recommendation of the Governor General the Queen thinks fit to direct that Four or Eight Members be added to the Senate, the Governor General may by Summons to Four or Eight qualified Persons (as the Case may be), representing equally the Four Divisions of Canada, add to the Senate accordingly.

27. Reduction of Senate to normal Number

In case of such Addition being at any Time made, the Governor General shall not summon any Person to the Senate, except on a further like Direction by the Queen on the like Recommendation, to represent one of the Four Divisions until such Division is represented by Twenty-four Senators and no more.

28. Maximum Number of Senators

The Number of Senators shall not at any Time exceed One Hundred and thirteen.

29. Tenure of Place in Senate

(1) Subject to subsection (2), a Senator shall, subject to the provisions of this Act, hold his place in the Senate for life.

(2) A Senator who is summoned to the Senate after the coming into force of this subsection shall, subject to this Act, hold his place in the Senate until he attains the age of seventy-five years.

30. Resignation of Place in Senate

A Senator may by Writing under his Hand addressed to the Governor General resign his Place in the Senate, and thereupon the same shall be vacant.

31. Disqualification of Senators

The Place of a Senator shall become vacant in any of the following Cases:

(1) If for Two consecutive Sessions of the Parliament he fails to give his Attendance in the Senate:

(2) If he takes an Oath or makes a Declaration or Acknowledgment of Allegiance, Obedience, or Adherence to a Foreign Power, or does an Act whereby he becomes a Subject or Citizen, or entitled to the Rights or Privileges of a Subject or Citizen, of a Foreign Power:

(3) If he is adjudged Bankrupt or Insolvent, or applies for the Benefit of any Law relating to Insolvent Debtors, or becomes a public Defaulter:

(4) If he is attainted of Treason or convicted of Felony or of any infamous Crime:
(5) If he ceases to be qualified in respect of Property or of Residence; provided, that a Senator shall not be deemed to have ceased to be qualified in respect of Residence by reason only of his residing at the Seat of the Government of Canada while holding an Office under that Government requiring his Presence there.

32. Summons on Vacancy in Senate
When a Vacancy happens in the Senate by Resignation, Death, or otherwise, the Governor General shall by Summons to a fit and qualified Person fill the Vacancy.

33. Questions as to Qualifications and Vacancies in Senate
If any Question arises respecting the Qualification of a Senator or a Vacancy in the Senate the same shall be heard and determined by the Senate.

34. Appointment of Speaker of Senate
The Governor General may from Time to Time, by Instrument under the Great Seal of Canada, appoint a Senator to be Speaker of the Senate, and may remove him and appoint another in his stead.

35. Quorum of Senate
Until the Parliament of Canada otherwise provides, the Presence of at least Fifteen Senators, including the Speaker, shall be necessary to constitute a Meeting of the Senate for the Exercise of its Powers.

36. Voting in Senate
Questions arising in the Senate shall be decided by a Majority of Voices, and the Speaker shall in all Cases have a Vote, and when the Voices are equal the Decision shall be deemed to be in the Negative.

THE HOUSE OF COMMONS

37. Constitution of House of Commons in Canada
The House of Commons shall, subject to the Provisions of this Act, consist of two hundred and ninety-five members of whom ninety-nine shall be elected for Ontario, seventy-five for Quebec, eleven for Nova Scotia, ten for New Brunswick, fourteen for Manitoba, thirty-two for British Columbia, four for Prince Edward Island, twenty-six for Alberta, fourteen for Saskatchewan, seven for Newfoundland, one for the Yukon Territory and two for the Northwest Territories.

38. Summoning of House of Commons
The Governor General shall from Time to Time, in the Queen’s Name, by Instrument under the Great Seal of Canada, summon and call together the House of Commons.

39. Senators not to sit in House of Commons
A Senator shall not be capable of being elected or of sitting or voting as a Member of the House of Commons.

40. Electoral districts of the four Provinces
Until the Parliament of Canada otherwise provides, Ontario, Quebec, Nova Scotia, and New Brunswick shall, for the Purposes of the Election of Members to serve in the House of Commons, be divided into Electoral Districts as follows:

1. Ontario
   Ontario shall be divided into the Counties, Ridings of Counties, Cities, Parts of Cities, and Towns enumerated in the First Schedule to this Act, each whereof shall be an Electoral District, each such District as numbered in that Schedule being entitled to return One Member.

2. Quebec
   Quebec shall be divided into Sixty-five Electoral Districts, composed of the Sixty-five Electoral Divisions into which Lower Canada is at the passing of this Act divided under Chapter Two of the Consolidated Statutes of Canada, Chapter Seventy-five of the Consolidated Statutes for Lower Canada, and the Act of the Province of Canada of the Twenty-third Year of the Queen, Chapter One, or any other Act amending the same in force at the Union, so that each such Electoral Division shall be for the Purposes of this Act an Electoral District entitled to return One Member.

3. Nova Scotia
   Each of the Eighteen Counties of Nova Scotia shall be an Electoral District. The County of Halifax shall be entitled to return Two Members, and each of the other Counties One Member.

4. New Brunswick
Each of the Fourteen Counties into which New Brunswick is divided, including the City and County of St. John, shall be an Electoral District. The City of St. John shall also be a separate Electoral District. Each of those Fifteen Electoral Districts shall be entitled to return One Member.

41. Continuance of existing Election Laws until Parliament of Canada otherwise provides

Until the Parliament of Canada otherwise provides, all Laws in force in the several Provinces at the Union relative to the following Matters or any of them, namely,—the Qualifications and Disqualifications of Persons to be elected or to sit or vote as Members of the House of Assembly or Legislative Assembly in the several Provinces, the Voters at Elections of such Members, the Oaths to be taken by Voters, the Returning Officers, their Powers and Duties, the Proceedings at Elections, the Periods during which Elections may be continued, the Trial of controverted Elections, and Proceedings incident thereto, the vacating of Seats of Members, and the Execution of new Writs in case of Seats vacated otherwise than by Dissolution,—shall respectively apply to Elections of Members to serve in the House of Commons for the same several Provinces.

Provided that, until the Parliament of Canada otherwise provides, at any Election for a Member of the House of Commons for the District of Algoma, in addition to Persons qualified by the Law of the Province of Canada to vote, every Male British Subject, aged Twenty-one Years or upwards, being a Householder, shall have a Vote.

42. [Repealed]

Repealed.

43. [Repealed]

Repealed.

44. As to Election of Speaker of House of Commons

The House of Commons on its first assembling after a General Election shall proceed with all practicable Speed to elect One of its Members to be Speaker.

45. As to filling up Vacancy in Office of Speaker

In case of a Vacancy happening in the Office of Speaker by Death, Resignation, or otherwise, the House of Commons shall with all practicable Speed proceed to elect another of its Members to be Speaker.

46. Speaker to preside

The Speaker shall preside at all Meetings of the House of Commons.

47. Provision in case of Absence of Speaker

Until the Parliament of Canada otherwise provides, in case of the Absence for any Reason of the Speaker from the Chair of the House of Commons for a Period of Forty-eight consecutive Hours, the House may elect another of its Members to act as Speaker, and the Member so elected shall during the Continuance of such Absence of the Speaker have and execute all the Powers, Privileges, and Duties of Speaker.

48. Quorum of House of Commons

The Presence of at least Twenty Members of the House of Commons shall be necessary to constitute a Meeting of the House for the Exercise of its Powers, and for that Purpose the Speaker shall be reckoned as a Member.

49. Voting in House of Commons

Questions arising in the House of Commons shall be decided by a Majority of Voices other than that of the Speaker, and when the Voices are equal, but not otherwise, the Speaker shall have a Vote.

50. Duration of House of Commons

Every House of Commons shall continue for Five Years from the Day of the Return of the Writs for choosing the House (subject to be sooner dissolved by the Governor General), and no longer.

51. Readjustment of representation in Commons

(1) The number of members of the House of Commons and the representation of the provinces therein shall, on the coming into force of this subsection and thereafter on the completion of each decennial census, be readjusted by such authority, in such manner, and from such time as the Parliament of Canada from time to time provides, subject and according to the following rules:

1. There shall be assigned to each of the provinces a number of members equal to the number obtained by dividing the total population of the provinces by two hundred and seventy-nine and by dividing the
population of each province by the quotient so obtained, counting any remainder in excess of 0.50 as one after the said process of division.

2. If the total number of members that would be assigned to a province by the application of rule 1 is less than the total number assigned to that province on the date of coming into force of this subsection, there shall be added to the number of members so assigned such number of members as will result in the province having the same number of members as were assigned on that date.

(2) The Yukon Territory as bounded and described in the schedule to chapter Y-2 of the Revised Statutes of Canada, 1985, shall be entitled to one member, the Northwest Territories as bounded and described in section 2 of chapter N-27 of the Revised Statutes of Canada, 1985, as amended by section 77 of chapter 28 of the Statutes of Canada, 1993, shall be entitled to one member, and Nunavut as bounded and described in section 3 of chapter 28 of the Statutes of Canada, 1993, shall be entitled to one member.

51A. Constitution of House of Commons

Notwithstanding anything in this Act a province shall always be entitled to a number of members in the House of Commons not less than the number of senators representing such province.

52. Increase of Number of House of Commons

The Number of Members of the House of Commons may be from Time to Time increased by the Parliament of Canada, provided the proportionate Representation of the Provinces prescribed by this Act is not thereby disturbed.

MONEY VOTES; ROYAL ASSENT

53. Appropriation and Tax Bills

Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons.

54. Recommendation of Money Votes

It shall not be lawful for the House of Commons to adopt or pass any Vote, Resolution, Address, or Bill for the Appropriation of any Part of the Public Revenue, or of any Tax or Impost, to any Purpose that has not been first recommended to that House by Message of the Governor General in the Session in which such Vote, Resolution, Address, or Bill is proposed.

55. Royal Assent to Bills, etc.

Where a Bill passed by the Houses of the Parliament is presented to the Governor General for the Queen’s Assent, he shall declare, according to his Discretion, but subject to the Provisions of this Act and to Her Majesty’s Instructions, either that he assents thereto in the Queen’s Name, or that he withholds the Queen’s Assent, or that he reserves the Bill for the Signification of the Queen’s Pleasure.

56. Disallowance by Order in Council of Act assented to by Governor General

Where the Governor General assents to a Bill in the Queen’s Name, he shall by the first convenient Opportunity send an authentic Copy of the Act to One of Her Majesty’s Principal Secretaries of State, and if the Queen in Council within Two Years after Receipt thereof by the Secretary of State thinks fit to disallow the Act, such Disallowance (with a Certificate of the Secretary of State of the Day on which the Act was received by him) being signified by the Governor General, by Speech or Message to each of the Houses of the Parliament or by Proclamation, shall annul the Act from and after the Day of such Signification.

57. Signification of Queen’s Pleasure on Bill reserved

A Bill reserved for the Signification of the Queen’s Pleasure shall not have any Force unless and until, within Two Years from the Day on which it was presented to the Governor General for the Queen’s Assent, the Governor General signifies, by Speech or Message to each of the Houses of the Parliament or by Proclamation, that it has received the Assent of the Queen in Council.

V. PROVINCIAL CONSTITUTIONS

EXECUTIVE POWER

58. Appointment of Lieutenant Governors of Provinces

For each Province there shall be an Officer, styled the Lieutenant Governor, appointed by the Governor General in Council by Instrument under the Great Seal of Canada.
59. Tenure of Office of Lieutenant Governor

A Lieutenant Governor shall hold Office during the Pleasure of the Governor General; but any Lieutenant Governor appointed after the Commencement of the First Session of the Parliament of Canada shall not be removable within Five Years from his Appointment, except for Cause assigned, which shall be communicated to him in Writing within One Month after the Order for his Removal is made, and shall be communicated by Message to the Senate and to the House of Commons within One Week thereafter if the Parliament is then sitting, and if not then within One Week after the Commencement of the next Session of the Parliament.

60. Salaries of Lieutenant Governors

The Salaries of the Lieutenant Governors shall be fixed and provided by the Parliament of Canada.

61. Oaths, etc., of Lieutenant Governor

Every Lieutenant Governor shall, before assuming the Duties of his Office, make and subscribe before the Governor General or some Person authorized by him Oaths of Allegiance and Office similar to those taken by the Governor General.

62. Application of Provisions referring to Lieutenant Governor

The Provisions of this Act referring to the Lieutenant Governor extend and apply to the Lieutenant Governor for the Time being of each Province, or other the Chief Executive Officer or Administrator for the Time being carrying on the Government of the Province, by whatever Title he is designated.

63. Appointment of Executive Officers for Ontario and Quebec

The Executive Council of Ontario and of Quebec shall be composed of such Persons as the Lieutenant Governor from Time to Time thinks fit, and in the first instance of the following Officers, namely,—the Attorney General, the Secretary and Registrar of the Province, the Treasurer of the Province, the Commissioner of Crown Lands, and the Commissioner of Agriculture and Public Works, with in Quebec the Speaker of the Legislative Council and the Solicitor General.

64. Executive Government of Nova Scotia and New Brunswick

The Constitution of the Executive Authority in each of the Provinces of Nova Scotia and New Brunswick shall, subject to the Provisions of this Act, continue as it exists at the Union until altered under the Authority of this Act.

65. Powers to be exercised by Lieutenant Governor of Ontario or Quebec with Advice, or alone

All Powers, Authorities, and Functions which under any Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of Upper Canada, Lower Canada, or Canada, were or are before or at the Union vested in or exerciseable by the respective Governors or Lieutenant Governors of those Provinces, with the Advice or with the Advice and Consent of the respective Executive Councils thereof, or in conjunction with those Councils, or with any Number of Members thereof, or by those Governors or Lieutenant Governors individually, shall, as far as the same are capable of being exercised after the Union in relation to the Government of Ontario and Quebec respectively, be vested in and shall or may be exercised by the Lieutenant Governor of Ontario and Quebec respectively, with the Advice or with the Advice and Consent of or in conjunction with the respective Executive Councils, or any Members thereof, or by the Lieutenant Governor individually, as the Case requires, subject nevertheless (except with respect to such as exist under Acts of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland,) to be abolished or altered by the respective Legislatures of Ontario and Quebec.

66. Application of Provisions referring to Lieutenant Governor in Council

The Provisions of this Act referring to the Lieutenant Governor in Council shall be construed as referring to the Lieutenant Governor of the Province acting by and with the Advice of the Executive Council thereof.

67. Administration in Absence, etc., of Lieutenant Governor

The Governor General in Council may from Time to Time appoint an Administrator to execute the Office and Functions of Lieutenant Governor during his Absence, Illness, or other Inability.

68. Seats of Provincial Governments

Unless and until the Executive Government of any Province otherwise directs with respect to that Province, the Seats of Government of the Provinces shall be as follows, namely,—of Ontario, the City of Toronto; of Quebec, the City of Quebec; of Nova Scotia, the City of Halifax; and of New Brunswick, the City of Fredericton.
LEGISLATIVE POWER

1. ONTARIO

69. Legislature for Ontario

There shall be a Legislature for Ontario consisting of the Lieutenant Governor and of One House, styled the Legislative Assembly of Ontario.

70. Electoral districts

The Legislative Assembly of Ontario shall be composed of Eighty-two Members, to be elected to represent the Eighty-two Electoral Districts set forth in the First Schedule to this Act.

2. QUEBEC

71. Legislature for Quebec

There shall be a Legislature for Quebec consisting of the Lieutenant Governor and of Two Houses, styled the Legislative Council of Quebec and the Legislative Assembly of Quebec.

72. Constitution of Legislative Council

The Legislative Council of Quebec shall be composed of Twenty-four Members, to be appointed by the Lieutenant Governor, in the Queen's Name, by Instrument under the Great Seal of Quebec, one being appointed to represent each of the Twenty-four Electoral Divisions of Lower Canada in this Act referred to, and each holding Office for the Term of his Life, unless the Legislature of Quebec otherwise provides under the Provisions of this Act.

73. Qualification of Legislative Councillors

The Qualifications of the Legislative Councillors of Quebec shall be the same as those of the Senators for Quebec.

74. Resignation, Disqualification, etc.

The Place of a Legislative Councillor of Quebec shall become vacant in the Cases, mutatis mutandis, in which the Place of Senator becomes vacant.

75. Vacancies

When a Vacancy happens in the Legislative Council of Quebec by Resignation, Death, or otherwise, the Lieutenant Governor, in the Queen’s Name, by Instrument under the Great Seal of Quebec, shall appoint a fit and qualified Person to fill the Vacancy.

76. Questions as to Vacancies, etc.

If any Question arises respecting the Qualification of a Legislative Councillor of Quebec, or a Vacancy in the Legislative Council of Quebec, the same shall be heard and determined by the Legislative Council.

77. Speaker of Legislative Council

The Lieutenant Governor may from Time to Time, by Instrument under the Great Seal of Quebec, appoint a Member of the Legislative Council of Quebec to be Speaker thereof, and may remove him and appoint another in his Stead.

78. Quorum of Legislative Council

Until the Legislature of Quebec otherwise provides, the Presence of at least Ten Members of the Legislative Council, including the Speaker, shall be necessary to constitute a Meeting for the Exercise of its Powers.

79. Voting in Legislative Council

Questions arising in the Legislative Council of Quebec shall be decided by a Majority of Voices, and the Speaker shall in all Cases have a Vote, and when the Voices are equal the Decision shall be deemed to be in the Negative.

80. Constitution of Legislative Assembly of Quebec

The Legislative Assembly of Quebec shall be composed of Sixty-five Members, to be elected to represent the Sixty-five Electoral Divisions or Districts of Lower Canada in this Act referred to, subject to Alteration thereof by the Legislature of Quebec: Provided that it shall not be lawful to present to the Lieutenant Governor of Quebec for Assent any Bill for altering the Limits of any of the Electoral Divisions or Districts mentioned in the Second Schedule to this Act, unless the Second and Third Readings of such Bill have been passed in the Legislative Assembly with the Concurrence of the Majority of the Members representing all those Electoral Divisions or Districts, and the Assent shall not be given to such Bill unless an Address has been presented by the Legislative Assembly to the Lieutenant Governor stating that it has been so passed.
3. ONTARIO AND QUEBEC

81. [Repealed]

82. Summoning of Legislative Assemblies
The Lieutenant Governor of Ontario and of Quebec shall from Time to Time, in the Queen’s Name, by Instrument under the Great Seal of the Province, summon and call together the Legislative Assembly of the Province.

83. Restriction on election of Holders of offices
Until the Legislature of Ontario or of Quebec otherwise provides, a Person accepting or holding in Ontario or in Quebec any Office, Commission, or Employment, permanent or temporary, at the Nomination of the Lieutenant Governor, to which an annual Salary, or any Fee, Allowance, Emolument, or Profit of any Kind or Amount whatever from the Province is attached, shall not be eligible as a Member of the Legislative Assembly of the respective Province, nor shall he sit or vote as such; but nothing in this Section shall make ineligible any Person being a Member of the Executive Council of the respective Province, or holding any of the following Offices, that is to say, the Offices of Attorney General, Secretary and Registrar of the Province, Treasurer of the Province, Commissioner of Crown Lands, and Commissioner of Agriculture and Public Works, and in Quebec Solicitor General, or shall disqualify him to sit or vote in the House for which he is elected, provided he is elected while holding such Office.

84. Continuance of existing Election Laws
Until the legislatures of Ontario and Quebec respectively otherwise provide, all Laws which at the Union are in force in those Provinces respectively, relative to the following Matters, or any of them, namely,—the Qualifications and Disqualifications of Persons to be elected or to sit or vote as Members of the Assembly of Canada, the Qualifications or Disqualifications of Voters, the Oaths to be taken by Voters, the Returning Officers, their Powers and Duties, the Proceedings at Elections, the Periods during which such Elections may be continued, and the Trial of controverted Elections and the Proceedings incident thereto, the vacating of the Seats of Members and the issuing and execution of new Writs in case of Seats vacated otherwise than by Dissolution,—shall respectively apply to Elections of Members to serve in the respective Legislative Assemblies of Ontario and Quebec.

Provided that, until the Legislature of Ontario otherwise provides, at any Election for a Member of the Legislative Assembly of Ontario for the District of Algoma, in addition to Persons qualified by the Law of the Province of Canada to vote, every Male British Subject, aged Twenty-one Years or upwards, being a Householder, shall have a Vote.

85. Duration of Legislative Assemblies
Every Legislative Assembly of Ontario and every Legislative Assembly of Quebec shall continue for Four Years from the Day of the Return of the Writs for choosing the same (subject nevertheless to either the Legislative Assembly of Ontario or the Legislative Assembly of Quebec being sooner dissolved by the Lieutenant Governor of the Province), and no longer.

86. Yearly Session of Legislature
There shall be a Session of the Legislature of Ontario and of that of Quebec once at least in every Year, so that Twelve Months shall not intervene between the last Sitting of the Legislature in each Province in one Session and its first Sitting in the next Session.

87. Speaker, Quorum, etc.
The following Provisions of this Act respecting the House of Commons of Canada shall extend and apply to the Legislative Assemblies of Ontario and Quebec, that is to say,—the Provisions relating to the Election of a Speaker originally and on Vacancies, the Duties of the Speaker, the Absence of the Speaker, the Quorum, and the Mode of voting, as if those Provisions were here re-enacted and made applicable in Terms to each such Legislative Assembly.

4. NOVA SCOTIA AND NEW BRUNSWICK

88. Constitutions of Legislatures of Nova Scotia and New Brunswick
The Constitution of the Legislature of each of the Provinces of Nova Scotia and New Brunswick shall, subject to the Provisions of this Act, continue as it exists at the Union until altered under the Authority of this Act.

5. ONTARIO, QUEBEC, AND NOVA SCOTIA

89. [Repealed]
6. THE FOUR PROVINCES

90. Application to Legislatures of Provisions respecting Money Votes, etc.

The following Provisions of this Act respecting the Parliament of Canada, namely,—the Provisions relating to Appropriation and Tax Bills, the Recommendation of Money Votes, the Assent to Bills, the Disallowance of Acts, and the Signification of Pleasure on Bills reserved,—shall extend and apply to the Legislatures of the several Provinces as if those Provisions were here re-enacted and made applicable in Terms to the respective Provinces and the Legislatures thereof, with the Substitution of the Lieutenant Governor of the Province for the Governor General, of the Governor General for the Queen and for a Secretary of State, of One Year for Two Years, and of the Province for Canada.

VI. DISTRIBUTION OF LEGISLATIVE POWERS

POWERS OF THE PARLIAMENT

91. Legislative Authority of Parliament of Canada

It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

1. Repealed.
2. The Public Debt and Property.
3. The Regulation of Trade and Commerce.
4. Unemployment insurance.
5. The raising of Money by any Mode or System of Taxation.
6. The borrowing of Money on the Public Credit.
7. Postal Service.
8. The Census and Statistics.
13. Quarantine and the Establishment and Maintenance of Marine Hospitals.
14. Sea Coast and Inland Fisheries.
15. Ferries between a Province and any British or Foreign Country or between Two Provinces.
21. Interest.
22. Legal Tender.
23. Bankruptcy and Insolvency.
24. Patents of Invention and Discovery.
25. Copyrights.
27. Naturalization and Aliens.
28. Marriage and Divorce.
27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.

28. The Establishment, Maintenance, and Management of Penitentiaries.

29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

EXCLUSIVE POWERS OF PROVINCIAL LEGISLATURES

92. Subjects of exclusive Provincial Legislation

In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

1. Repealed.

2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.

3. The borrowing of Money on the sole Credit of the Province

4. The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers.

5. The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.

6. The Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province.

7. The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.

8. Municipal Institutions in the Province.

9. Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.

10. Local Works and Undertakings other than such as are of the following Classes:
   
   (a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province:
   
   (b) Lines of Steam Ships between the Province and any British or Foreign Country:
   
   (c) Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.

11. The Incorporation of Companies with Provincial Objects.

12. The Solemnization of Marriage in the Province.

13. Property and Civil Rights in the Province.

14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

15. The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.

16. Generally all Matters of a merely local or private Nature in the Province.

NON-RENEWABLE NATURAL RESOURCES, FORESTRY RESOURCES AND ELECTRICAL ENERGY

92A. Laws respecting non-renewable natural resources, forestry resources and electrical energy

(1) In each province, the legislature may exclusively make laws in relation to

(a) exploration for non-renewable natural resources in the province;
(b) development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom; and

(c) development, conservation and management of sites and facilities in the province for the generation and production of electrical energy.

(2) In each province, the legislature may make laws in relation to the export from the province to another part of Canada of the primary production from non-renewable natural resources and forestry resources in the province and the production from facilities in the province for the generation of electrical energy, but such laws may not authorize or provide for discrimination in prices or in supplies exported to another part of Canada.

(3) Nothing in subsection (2) derogates from the authority of Parliament to enact laws in relation to the matters referred to in that subsection and, where such a law of Parliament and a law of a province conflict, the law of Parliament prevails to the extent of the conflict.

(4) In each province, the legislature may make laws in relation to the raising of money by any mode or system of taxation in respect of

(a) non-renewable natural resources and forestry resources in the province and the primary production therefrom, and

(b) sites and facilities in the province for the generation of electrical energy and the production therefrom,

(5) The expression “primary production” has the meaning assigned by the Sixth Schedule.

(6) Nothing in subsections (1) to (5) derogates from any powers or rights that a legislature or government of a province had immediately before the coming into force of this section.

EDUCATION

93. Legislation respecting Education

In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions:

(1) Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union:

(2) All the Powers, Privileges, and Duties at the Union by Law conferred and imposed in Upper Canada on the Separate Schools and School Trustees of the Queen’s Roman Catholic Subjects shall be and the same are hereby extended to the Dissenting Schools of the Queen’s Protestant and Roman Catholic Subjects in Quebec:

(3) Where in any Province a System of Separate or Dissenting Schools exists by Law at the Union or is thereafter established by the Legislature of the Province, an Appeal shall lie to the Governor General in Council from any Act or Decision of any Provincial Authority affecting any Right or Privilege of the Protestant or Roman Catholic Minority of the Queen’s Subjects in relation to Education:

(4) In case any such Provincial Law as from Time to Time seems to the Governor General in Council requisite for the due Execution of the Provisions of this Section is not made, or in case any Decision of the Governor General in Council on any Appeal under this Section is not duly executed by the proper Provincial Authority in that Behalf, then and in every such Case, and as far only as the Circumstances of each Case require, the Parliament of Canada may make remedial Laws for the due Execution of the Provisions of this Section and of any Decision of the Governor General in Council under this Section.

93A. Quebec

Paragraphs (1) to (4) of section 93 do not apply to Quebec.

UNIFORMITY OF LAWS IN ONTARIO, NOVA SCOTIA, AND NEW BRUNSWICK

94. Legislation for Uniformity of Laws in Three Provinces

Notwithstanding anything in this Act, the Parliament of Canada may make Provision for the Uniformity of all or any of the Laws relative to Property and Civil Rights in Ontario, Nova Scotia, and New Brunswick, and of the Procedure of all or any of the Courts in those Three Provinces, and from and after the passing of any Act in that Behalf the Power of the Parliament of Canada to make Laws in relation to any Matter comprised in any such Act shall, notwithstanding anything in this Act, be unrestricted; but any Act of the Parliament of Canada making Provision for such Uniformity shall not have effect in any Province unless and until it is adopted and enacted as Law by the Legislature thereof.
OLD AGE PENSIONS
94A. Legislation respecting old age pensions and supplementary benefits
The Parliament of Canada may make laws in relation to old age pensions and supplementary benefits, including survivors' and disability benefits irrespective of age, but no such law shall affect the operation of any law present or future of a provincial legislature in relation to any such matter.

AGRICULTURE AND IMMIGRATION
95. Concurrent Powers of Legislation respecting Agriculture, etc.
In each Province the Legislature may make Laws in relation to Agriculture in the Province, and to Immigration into the Province; and it is hereby declared that the Parliament of Canada may from Time to Time make Laws in relation to Agriculture in all or any of the Provinces, and to Immigration into all or any of the Provinces; and any Law of the Legislature of a Province relative to Agriculture or to Immigration shall have effect in and for the Province as long and as far only as it is not repugnant to any Act of the Parliament of Canada.

VII. JUDICATURE
96. Appointment of Judges
The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

97. Selection of Judges in Ontario, etc.
Until the Laws relative to Property and Civil Rights in Ontario, Nova Scotia, and New Brunswick, and the Procedure of the Courts in those Provinces, are made uniform, the Judges of the Courts of those Provinces appointed by the Governor General shall be selected from the respective Bars of those Provinces.

98. Selection of Judges in Quebec
The Judges of the Courts of Quebec shall be selected from the Bar of that Province.

99. Tenure of office of Judges
(1) Subject to subsection two of this section, the Judges of the Superior Courts shall hold office during good behaviour, but shall be removable by the Governor General on Address of the Senate and House of Commons.

(2) A Judge of a Superior Court, whether appointed before or after the coming into force of this section, shall cease to hold office upon attaining the age of seventy-five years, or upon the coming into force of this section if at that time he has already attained that age.

100. Salaries, etc., of Judges
The Salaries, Allowances, and Pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in Cases where the Judges thereof are for the Time being paid by Salary, shall be fixed and provided by the Parliament of Canada.

101. General Court of Appeal, etc.
The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada.

VIII. REVENUES; DEBTS; ASSETS; TAXATION
102. Creation of Consolidated Revenue Fund
All Duties and Revenues over which the respective Legislatures of Canada, Nova Scotia, and New Brunswick before and at the Union had and have Power of Appropriation, except such Portions thereof as are by this Act reserved to the respective Legislatures of the Provinces, or are raised by them in accordance with the special Powers conferred on them by this Act, shall form One Consolidated Revenue Fund, to be appropriated for the Public Service of Canada in the Manner and subject to the Charges in this Act provided.

103. Expenses of Collection, etc.
The Consolidated Revenue Fund of Canada shall be permanently charged with the Costs, Charges, and Expenses incident to the Collection, Management, and Receipt thereof, and the same shall form the First Charge thereon, subject to be reviewed and audited in such Manner as shall be ordered by the Governor General in Council until the Parliament otherwise provides.
104. Interest of Provincial Public Debts
The annual Interest of the Public Debts of the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union shall form the Second Charge on the Consolidated Revenue Fund of Canada.

105. Salary of Governor General
Unless altered by the Parliament of Canada, the Salary of the Governor General shall be Ten thousand Pounds Sterling Money of the United Kingdom of Great Britain and Ireland, payable out of the Consolidated Revenue Fund of Canada, and the same shall form the Third Charge thereon.

106. Appropriation from Time to Time
Subject to the several Payments by this Act charged on the Consolidated Revenue Fund of Canada, the same shall be appropriated by the Parliament of Canada for the Public Service.

107. Transfer of Stocks, etc.
All Stocks, Cash, Banker’s Balances, and Securities for Money belonging to each Province at the Time of the Union, except as in this Act mentioned, shall be the Property of Canada, and shall be taken in Reduction of the Amount of the respective Debts of the Provinces at the Union.

108. Transfer of Property in Schedule
The Public Works and Property of each Province, enumerated in the Third Schedule to this Act, shall be the Property of Canada.

109. Property in Lands, Mines, etc.
All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all Sums then due or payable for such Lands, Mines, Minerals, or Royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same.

110. Assets connected with Provincial Debts
All Assets connected with such Portions of the Public Debt of each Province as are assumed by that Province shall belong to that Province.

111. Canada to be liable for Provincial Debts
Canada shall be liable for the Debts and Liabilities of each Province existing at the Union.

112. Debts of Ontario and Quebec
Ontario and Quebec conjointly shall be liable to Canada for the Amount (if any) by which the Debt of the Province of Canada exceeds at the Union Sixty-two million five hundred thousand Dollars, and shall be charged with Interest at the Rate of Five per Centum per Annum thereon.

113. Assets of Ontario and Quebec
The Assets enumerated in the Fourth Schedule to this Act belonging at the Union to the Province of Canada shall be the Property of Ontario and Quebec conjointly.

114. Debt of Nova Scotia
Nova Scotia shall be liable to Canada for the Amount (if any) by which its Public Debt exceeds at the Union Eight million Dollars, and shall be charged with Interest at the Rate of Five per Centum per Annum thereon.

115. Debt of New Brunswick
New Brunswick shall be liable to Canada for the Amount (if any) by which its Public Debt exceeds at the Union Seven million Dollars, and shall be charged with Interest at the Rate of Five per Centum per Annum thereon.

116. Payment of interest to Nova Scotia and New Brunswick
In case the Public Debts of Nova Scotia and New Brunswick do not at the Union amount to Eight million and Seven million Dollars respectively, they shall respectively receive by half -yearly Payments in advance from the Government of Canada Interest at Five per Centum per Annum on the Difference between the actual Amounts of their respective Debts and such stipulated Amounts.

117. Provincial Public Property
The several Provinces shall retain all their respective Public Property not otherwise disposed of in this Act, subject to the Right of Canada to assume any Lands or Public Property required for Fortifications or for the Defence of the Country.
118. [Repealed]

Repealed.

119. Further Grant to New Brunswick

New Brunswick shall receive by half-yearly Payments in advance from Canada for the Period of Ten Years from the Union an additional Allowance of Sixty-three thousand Dollars per Annum; but as long as the Public Debt of that Province remains under Seven million Dollars, a Deduction equal to the Interest at Five per Centum per Annum on such Deficiency shall be made from that Allowance of Sixty-three thousand Dollars.

120. Form of Payments

All Payments to be made under this Act, or in discharge of Liabilities created under any Act of the Provinces of Canada, Nova Scotia, and New Brunswick respectively, and assumed by Canada, shall, until the Parliament of Canada otherwise directs, be made in such Form and Manner as may from Time to Time be ordered by the Governor General in Council.

121. Canadian Manufactures, etc.

All Articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces.

122. Continuance of Customs and Excise Laws

The Customs and Excise Laws of each Province shall, subject to the Provisions of this Act, continue in force until altered by the Parliament of Canada.

123. Exportation and Importation as between Two Provinces

Where Customs Duties are, at the Union, leviable on any Goods, Wares, or Merchandises in any Two Provinces, those Goods, Wares, and Merchandises may, from and after the Union, be imported from one of those Provinces into the other of them on Proof of Payment of the Customs Duty leviable thereon in the Province of Exportation, and on Payment of such further Amount (if any) of Customs Duty as is leviable thereon in the Province of Importation.

124. Lumber Dues in New Brunswick

Nothing in this Act shall affect the Right of New Brunswick to levy the Lumber Dues provided in Chapter Fifteen of Title Three of the Revised Statutes of New Brunswick, or in any Act amending that Act before or after the Union, and not increasing the Amount of such Dues; but the Lumber of any of the Provinces other than New Brunswick shall not be subject to such Dues.

125. Exemption of Public Lands, etc.

No Lands or Property belonging to Canada or any Province shall be liable to Taxation.

126. Provincial Consolidated Revenue Fund

Such Portions of the Duties and Revenues over which the respective Legislatures of Canada, Nova Scotia, and New Brunswick had before the Union Power of Appropriation as are by this Act reserved to the respective Governments or Legislatures of the Provinces, and all Duties and Revenues raised by them in accordance with the special Powers conferred upon them by this Act, shall in each Province form One Consolidated Revenue Fund to be appropriated for the Public Service of the Province.

IX. MISCELLANEOUS PROVISIONS

GENERAL

127. [Repealed]

Repealed.

128. Oath of Allegiance, etc.

Every Member of the Senate or House of Commons of Canada shall before taking his Seat therein take and subscribe before the Governor General or some Person authorized by him, and every Member of a Legislative Council or Legislative Assembly of any Province shall before taking his Seat therein take and subscribe before the Lieutenant Governor of the Province or some Person authorized by him, the Oath of Allegiance contained in the Fifth Schedule to this Act; and every Member of the Senate of Canada and every Member of the Legislative Council of Quebec shall also, before taking his Seat therein, take and subscribe before the Governor General, or some Person authorized by him, the Declaration of Qualification contained in the same Schedule.
129. Continuance of existing Laws, Courts, Officers, etc.

Except as otherwise provided by this Act, all Laws in force in Canada, Nova Scotia, or New Brunswick at the Union, and all Courts of Civil and Criminal Jurisdiction, and all legal Commissions, Powers, and Authorities, and all Officers, Judicial, Administrative, and Ministerial, existing therein at the Union, shall continue in Ontario, Quebec, Nova Scotia, and New Brunswick respectively, as if the Union had not been made; subject nevertheless (except with respect to such as are enacted by or exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland), to be repealed, abolished, or altered by the Parliament of Canada, or by the Legislature of the respective Province, according to the Authority of the Parliament or of that Legislature under this Act.

130. Transfer of Officers to Canada

Until the Parliament of Canada otherwise provides, all Officers of the several Provinces having Duties to discharge in relation to Matters other than those coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces shall be Officers of Canada, and shall continue to discharge the Duties of their respective Offices under the same Liabilities, Responsibilities, and Penalties as if the Union had not been made.

131. Appointment of new Officers

Until the Parliament of Canada otherwise provides, the Governor General in Council may from Time to Time appoint such Officers as the Governor General in Council deems necessary or proper for the effectual Execution of this Act.

132. Treaty Obligations

The Parliament and Government of Canada shall have all Powers necessary or proper for performing the Obligations of Canada or of any Province thereof, as Part of the British Empire, towards Foreign Countries, arising under Treaties between the Empire and such Foreign Countries.

133. Use of English and French Languages

Either the English or the French Language may be used by any Person in the Debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec; and both those Languages shall be used in the respective Records and Journals of those Houses; and either of those Languages may be used by any Person or in any Pleading or Process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec.

The Acts of the Parliament of Canada and of the Legislature of Quebec shall be printed and published in both those Languages.

ONTARIO AND QUEBEC

134. Appointment of Executive Officers for Ontario and Quebec

Until the Legislature of Ontario or of Quebec otherwise provides, the Lieutenant Governors of Ontario and Quebec may each appoint under the Great Seal of the Province the following Officers, to hold Office during Pleasure, that is to say,—the Attorney General, the Secretary and Registrar of the Province, the Treasurer of the Province, the Commissioner of Crown Lands, and the Commissioner of Agriculture and Public Works, and in the Case of Quebec the Solicitor General, and may, by Order of the Lieutenant Governor in Council, from Time to Time prescribe the Duties of those Officers, and of the several Departments over which they shall preside or to which they shall belong, and of the Officers and Clerks thereof, and may also appoint other and additional Officers to hold Office during Pleasure, and may from Time to Time prescribe the Duties of those Officers, and of the several Departments over which they shall preside or to which they shall belong, and of the Officers and Clerks thereof.

135. Powers, Duties, etc. of Executive Officers

Until the Legislature of Ontario or Quebec otherwise provides, all Rights, Powers, Duties, Functions, Responsibilities, or Authorities at the passing of this Act vested in or imposed on the Attorney General, Solicitor General, Secretary and Registrar of the Province of Canada, Minister of Finance, Commissioner of Crown Lands, Commissioner of Public Works, and Minister of Agriculture and Receiver General, by any Law, Statute, or Ordinance of Upper Canada, Lower Canada, or Canada, and not repugnant to this Act, shall be vested in or imposed on any Officer to be appointed by the Lieutenant Governor for the Discharge of the same or any of them; and the Commissioner of Agriculture and Public Works shall perform the Duties and Functions of the Office of Minister of Agriculture at the passing of this Act imposed by the Law of the Province of Canada, as well as those of the Commissioner of Public Works.
136. Great Seals

Until altered by the Lieutenant Governor in Council, the Great Seals of Ontario and Quebec respectively shall be the same, or of the same Design, as those used in the Provinces of Upper Canada and Lower Canada respectively before their Union as the Province of Canada.

137. Construction of temporary Acts

The words "and from thence to the End of the then next ensuing Session of the Legislature," or Words to the same Effect, used in any temporary Act of the Province of Canada not expired before the Union, shall be construed to extend and apply to the next Session of the Parliament of Canada if the Subject Matter of the Act is within the Powers of the same as defined by this Act, or to the next Sessions of the Legislatures of Ontario and Quebec respectively if the Subject Matter of the Act is within the Powers of the same as defined by this Act.

138. As to Errors in Names

From and after the Union the Use of the Words “Upper Canada” instead of “Ontario,” or “Lower Canada” instead of “Quebec,” in any Deed, Writ, Process, Pleading, Document, Matter, or Thing shall not invalidate the same.

139. As to issue of Proclamations before Union, to commence after Union

Any Proclamation under the Great Seal of the Province of Canada issued before the Union to take effect at a Time which is subsequent to the Union, whether relating to that Province, or to Upper Canada, or to Lower Canada, and the several Matters and Things therein proclaimed, shall be and continue of like Force and Effect as if the Union had not been made.

140. As to issue of Proclamations after Union

Any Proclamation which is authorized by any Act of the Legislature of the Province of Canada to be issued under the Great Seal of the Province of Canada, whether relating to that Province, or to Upper Canada, or to Lower Canada, and which is not issued before the Union, may be issued by the Lieutenant Governor of Ontario or of Quebec, as its Subject Matter requires, under the Great Seal thereof; and from and after the Issue of such Proclamation the same and the several Matters and Things therein proclaimed shall be and continue of the like Force and Effect in Ontario or Quebec as if the Union had not been made.

141. Penitentiary

The Penitentiary of the Province of Canada shall, until the Parliament of Canada otherwise provides, be and continue the Penitentiary of Ontario and of Quebec.

142. Arbitration respecting Debts, etc.

The Division and Adjustment of the Debts, Credits, Liabilities, Properties, and Assets of Upper Canada and Lower Canada shall be referred to the Arbitrament of Three Arbitrators, One chosen by the Government of Ontario, One by the Government of Quebec, and One by the Government of Canada; and the Selection of the Arbitrators shall not be made until the Parliament of Canada and the Legislatures of Ontario and Quebec have met; and the Arbitrator chosen by the Government of Canada shall not be a Resident either in Ontario or in Quebec.

143. Division of Records

The Governor General in Council may from Time to Time order that such and so many of the Records, Books, and Documents of the Province of Canada as he thinks fit shall be appropriated and delivered either to Ontario or to Quebec, and the same shall thenceforth be the Property of that Province; and any Copy thereof or Extract therefrom, duly certified by the Officer having charge of the Original thereof, shall be admitted as Evidence.

144. Constitution of Townships in Quebec

The Lieutenant Governor of Quebec may from Time to Time, by Proclamation under the Great Seal of the Province, to take effect from a Day to be appointed therein, constitute Townships in those Parts of the Province of Quebec in which Townships are not then already constituted, and fix the Metes and Bounds thereof.

X. INTERCOLONIAL RAILWAY

145. [Repealed]
XI. ADMISSION OF OTHER COLONIES

146. Power to admit Newfoundland, etc., into the Union

It shall be lawful for the Queen, by and with the Advice of Her Majesty's Most Honourable Privy Council, on Addresses from the Houses of the Parliament of Canada, and from the Houses of the respective Legislatures of the Colonies or Provinces of Newfoundland, Prince Edward Island, and British Columbia, to admit those Colonies or Provinces, or any of them, into the Union, and on Address from the Houses of the Parliament of Canada to admit Rupert’s Land and the North-western Territory, or either of them, into the Union, on such Terms and Conditions in each Case as are in the Addresses expressed and as the Queen thinks fit to approve, subject to the Provisions of this Act; and the Provisions of any Order in Council in that Behalf shall have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland.

147. As to Representation of Newfoundland and Prince Edward Island in Senate

In case of the Admission of Newfoundland and Prince Edward Island, or either of them, each shall be entitled to a Representation in the Senate of Canada of Four Members, and (notwithstanding anything in this Act) in case of the Admission of Newfoundland the normal Number of Senators shall be Seventy-six and their maximum Number shall be Eighty-two; but Prince Edward Island when admitted shall be deemed to be comprised in the third of the Three Divisions into which Canada is, in relation to the Constitution of the Senate, divided by this Act, and accordingly, after the Admission of Prince Edward Island, whether Newfoundland is admitted or not, the Representation of Nova Scotia and New Brunswick in the Senate shall, as Vacancies occur, be reduced from Twelve to Ten Members respectively, and the Representation of each of those Provinces shall not be increased at any Time beyond Ten, except under the Provisions of this Act for the Appointment of Three or Six additional Senators under the Direction of the Queen.

SCHEDULES

THE FIRST SCHEDULE

Electoral Districts of Ontario

A.

Existing Electoral Divisions

Counties

1. Prescott.
2. Glengarry.
3. Stormont.
4. Dundas.
5. Russell.
6. Carleton.
7. Prince Edward.

Ridings of Counties

11. South Riding of Lanark.
15. East Riding of Northumberland.
16. West Riding of Northumberland (excepting therefrom the Township of South Monaghan).
17. East Riding of Durham.
27. West Riding of Elgin.
29. South Riding of Waterloo.
30. North Riding of Brant.
31. South Riding of Brant.
34. East Riding of Middlesex.

**Cities, Parts of Cities, and Towns**

35. West Toronto.
36. East Toronto.
37. Hamilton.
38. Ottawa.
40. London.
41. Town of Brockville, with the Township of Elizabethtown thereto attached.
42. Town of Niagara, with the Township of Niagara thereto attached.
43. Town of Cornwall, with the Township of Cornwall thereto attached.

**B. New Electoral Divisions**

44. The Provisional Judicial District of Algoma.
The County of Bruce, divided into Two Ridings, to be called respectively the North and South Ridings:
45. The North Riding of Bruce to consist of the Townships of Bury, Lindsay, Eastnor, Albermarle, Amable, Arran, Bruce, Elderslie, and Saugeen, and the Village of Southampton.
46. The South Riding of Bruce to consist of the Townships of Kincardine (including the Village of Kincardine), Greenock, Brant, Huron, Kinloss, Culross, and Carrick.
The County of Huron, divided into Two Ridings, to be called respectively the North and South Ridings:
47. The North Riding to consist of the Townships of Ashfield, Wawanosh, Turnberry, Howick, Morris, Grey, Colborne, Hullett, including the Village of Clinton, and McKillop.
The County of Middlesex, divided into three Ridings, to be called respectively the North, West, and East Ridings:
49. The North Riding to consist of the Townships of McGillivray and Biddulph (taken from the County of Huron), and Williams East, Williams West, Adelaide, and Lobo.
50. The West Riding to consist of the Townships of Delaware, Carradoc, Metcalfe, Mosa and Ekfrid, and the Village of Strathroy.
51. The East Riding to consist of the Townships now embraced therein, and be bounded as it is at present.
52. The County of Lambton to consist of the Townships of Bosanquet, Warwick, Plympton, Sarnia, Moore, Enniskillen, and Brooke, and the Town of Sarnia.
53. The County of Kent to consist of the Townships of Chatham, Dover, East Tilbury, Romney, Raleigh, and Harwich, and the Town of Chatham.
54. The County of Bothwell to consist of the Townships of Sombra, Dawn, and Euphemia (taken from the County of Lambton), and the Townships of Zone, Camden with the Gore thereof, Orford, and Howard (taken from the County of Kent).
The County of Grey divided into Two Ridings to be called respectively the South and North Ridings:
55. The South Riding to consist of the Townships of Bentinck, Glenelg, Artesemia, Osprey, Normanby, Egremont, Proton, and Melanchton.
The County of Perth divided into Two Ridings, to be called respectively the South and North Ridings:
57. The South Riding to consist of the Townships of Wallace, Elma, Logan, Ellice, Mornington, and North Easthope, and the Town of Stratford.
58. The South Riding to consist of the Townships of Blanchard, Downie, South Easthope, Fullarton, Hibbert, and the Villages of Mitchell and Ste. Marys.
The County of Wellington divided into Three Ridings to be called respectively North, South and Centre Ridings:
59. The North Riding to consist of the Townships of Amaranth, Arthur, Luther, Minto, Maryborough, Peel, and the Village of Mount Forest.
60. The Centre Riding to consist of the Townships of Garafraxa, Erin, Eramosa, Nichol, and Pilkington, and the Villages of Fergus and Elora.
61. The South Riding to consist of the Town of Guelph, and the Townships of Guelph and Puslinch.
The County of Norfolk, divided into Two Ridings, to be called respectively the South and North Ridings:
61. The South Riding to consist of the Townships of Charlottesville, Houghton, Walsingham, and Woodhouse, and with the Gore thereof.
62. The North Riding to consist of the Townships of Middleton, Townsend, and Windham, and the Town of Simcoe.
63. The County of Haldimand to consist of the Townships of Oneida, Seneca, Cayuga North, Cayuga South, Raynham, Walpole, and Dunn.
64. The County of Monck to consist of the Townships of Canborough and Moulton, and Sherbrooke, and the Village of Dunnville (taken from the County of Haldimand), the Townships of Caister and Gainsborough (taken from the County of Lincoln), and the Townships of Pelham and Wainfleet (taken from the County of Welland).
65. The County of Lincoln to consist of the Townships of Clinton, Grantham, Grimsby, and Louth, and the Town of St. Catherines.
66. The County of Welland to consist of the Townships of Bertie, Crowland, Humberstone, Stamford, Thorold, and Willoughby, and the Villages of Chippewa, Clifton, Fort Erie, Thorold, and Welland.
67. The County of Peel to consist of the Townships of Chinguacousy, Toronto, and the Gore of Toronto, and the Villages of Brampton and Streetsville.
68. The County of Cardwell to consist of the Townships of Albion and Caledon (taken from the County of Peel), and the Townships of Adjala and Mono (taken from the County of Simcoe).

The County of Simcoe, divided into Two Ridings, to be called respectively the South and North Ridings:
69. The South Riding to consist of the Townships of West Gwillimbury, Tecumseth, Innisfil, Essa, Tosorontio, Mulmur, and the Village of Bradford.
70. The North Riding to consist of the Townships of Nottawasaga, Sunnida, Vespra, Flos, Oro, Medonte, Orillia and Matchedash, Tiny and Tay, Balaklava and Robinson, and the Towns of Barrie and Collingwood.

The County of Victoria, divided into Two Ridings, to be called respectively the South and North Ridings:
71. The South Riding to consist of the Townships of Ops, Mariposa, Emily, Verulam, and the Town of Lindsay.
72. The North Riding to consist of the Townships of Anson, Bexley, Carden, Dalton, Digby, Eldon, Fenelon, Hindon, Laxton, Lutterworth, Macaulay and Draper, Sommerville, and Morrison, Muskoka, Monck and Watt (taken from the County of Simcoe), and any other surveyed Townships lying to the North of the said North Riding.

The County of Peterborough, divided into Two Ridings, to be called respectively the West and East Ridings:
73. The West Riding to consist of the Townships of South Monaghan (taken from the County of Northumberland), North Monaghan, Smith, and Ennismore, and the Town of Peterborough.
74. The East Riding to consist of the Townships of Asphodel, Belmont and Methuen, Douro, Dummer, Galway, Harvey, Minden, Stanhope and Dysart, Otonabee, and Snowden, and the Village of Ashburnham, and any other surveyed Townships lying to the North of the said East Riding.

The County of Hastings, divided into Three Ridings, to be called respectively the West, East, and North Ridings:
75. The West Riding to consist of the Town of Belleville, the Township of Sydney, and the Village of Trenton.
76. The East Riding to consist of the Townships of Thurlow, Tyendinaga, and Hungerford.
77. The North Riding to consist of the Townships of Rawdon, Huntingdon, Madoc, Elzevir, Tudor, Marmora, and Lake, and the Village of Stirling, and any other surveyed Townships lying to the North of the said North Riding.

The County of Lennox to consist of the Townships of Richmond, Adolphustown, North Fredericksburg, South Fredericksburg, Ernest Town, and Amherst Island, and the Village of Napanee.
79. The County of Addington to consist of the Townships of Camden, Portland, Sheffield, Hinchinbrooke, Kaladar, Kennebec, Olden, Oso, Anglesea, Barrie, Clarendon, Palmerston, Effingham, Abinger, Miller, Canonto, Denbigh, Loughborough, and Bedford.
80. The County of Frontenac to consist of the Townships of Kingston, Wolfe Island, Pittsburg and Howe Island, and Storrington.

The County of Renfrew, divided into Two Ridings, to be called respectively the South and North Ridings:
81. The South Riding to consist of the Townships of McNab, Bagot, Bithfield, Brougham, Horton, Admaston, Grattan, Matawatchan, Griffith, Lyndoch, Raglan, Radcliffe, Brudenell, Sebastopol, and the Villages of Amprimri and Renfrew.
82. The North Riding to consist of the Townships of Ross, Bromley, Westmeath, Stafford, Pembroke, Wilberforce, Alice, Petawawa, Buchanan, South Algona, North Algona, Fraser, McKay, Wylie, Rolph, Head, Maria, Clara, Haggerty, Sherwood, Burns, and Richards, and any other surveyed Townships lying Northwesterly of the said North Riding.

Every Town and incorporated Village existing at the Union, not especially mentioned in this Schedule, is to be taken as Part of the County or Riding within which it is locally situate.
THE SECOND SCHEDULE

Electoral Districts of Quebec specially fixed

Counties of

<table>
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<tr>
<td>Huntingdon.</td>
<td>Stanstead.</td>
<td>Town of Sherbrooke.</td>
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THE THIRD SCHEDULE

Provincial Public Works and Property to be the Property of Canada

1. Canals, with Lands and Water Power connected therewith.
2. Public Harbours.
3. Lighthouses and Piers, and Sable Island.
4. Steamboats, Dredges, and public Vessels.
5. Rivers and Lake Improvements.
6. Railways and Railway Stocks, Mortgages, and other Debts due by Railway Companies.
8. Custom Houses, Post Offices, and all other Public Buildings, except such as the Government of Canada appropriate for the Use of the Provincial Legislatures and Governments.
9. Property transferred by the Imperial Government, and known as Ordnance Property.
10. Armouries, Drill Sheds, Military Clothing, and Munitions of War, and Lands set apart for general Public Purposes.

THE FOURTH SCHEDULE

Assets to be the Property of Ontario and Quebec conjointly

Upper Canada Building Fund.
Lunatic Asylums.
Normal School.
Court Houses in Aylmer. Montreal. Kamouraska. (Lower Canada.)
Law Society, Upper Canada.
Montreal Turnpike Trust.
University Permanent Fund.
Royal Institution.
Consolidated Municipal Loan Fund, Upper Canada.
Consolidated Municipal Loan Fund, Lower Canada.
Agricultural Society, Upper Canada.
Lower Canada Legislative Grant.
Quebec Fire Loan.
Temiscouata Advance Account.
Quebec Turnpike Trust.
Education - East.
Building and Jury Fund, Lower Canada.
Municipalities Fund.
Lower Canada Superior Education Income Fund.

THE FIFTH SCHEDULE

Oath of Allegiance

I A.B. do swear, That I will be faithful and bear true Allegiance to Her Majesty Queen Victoria.

Note. The Name of the King or Queen of the United Kingdom of Great Britain and Ireland for the Time being is to be substituted from Time to Time, with proper Terms of Reference thereto.

Declaration of Qualification

I A.B. do declare and testify, That I am by Law duly qualified to be appointed a Member of the Senate of Canada [or as the Case may be], and that I am legally or equitably seised as of Freehold for my own Use and Benefit of Lands or Tenements held in Free and Common Socage [or seised or possessed for my own
Use and Benefit of Lands or Tenements held in Franc-allée or in Roture (as the Case may be),] in the Province of Nova Scotia [or as the Case may be] of the Value of Four thousand Dollars over and above all Rents, Dues, Debts, Mortgages, Charges, and Incumbrances due or payable out of or charged on or affecting the same, and that I have not collusively or colourably obtained a Title to or become possessed of the said Lands and Tenements or any Part thereof for the Purpose of enabling me to become a Member of the Senate of Canada [or as the Case may be], and that my Real and Personal Property are together worth Four thousand Dollars over and above my Debts and Liabilities.

THE SIXTH SCHEDULE

Primary Production from Non-Renewable Natural Resources and Forestry Resources

1. For the purposes of section 92A of this Act,

(a) production from a non-renewable natural resource is primary production therefrom if

(i) it is in the form in which it exists upon its recovery or severance from its natural state, or

(ii) it is a product resulting from processing or refining the resource, and is not a manufactured product or a product resulting from refining crude oil, refining upgraded heavy crude oil, refining gases or liquids derived from coal or refining a synthetic equivalent of crude oil; and

(b) production from a forestry resource is primary production therefrom if it consists of sawlogs, poles, lumber, wood chips, sawdust or any other primary wood product, or wood pulp, and is not a product manufactured from wood.

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THE CONSTITUTION ACT, 1982

[Schedule B to the Canada Act 1982 (U.K.), 1982 c. 11]

Part

I Canadian Charter of Rights and Freedoms

Guarantee of Rights and Freedoms
Fundamental Freedoms
Democratic Rights
Mobility Rights
Legal Rights
Equality Rights
Official Languages of Canada
Minority Language Educational Rights
Enforcement
General
Application of Charter
Citation

II Rights of the Aboriginal Peoples of Canada

III Equalization and Regional Disparities

IV Constitutional Conference

IV.I Constitutional Conferences

V Procedure for Amending Constitution of Canada

VI Amendment to the Constitution Act, 1867

VII General

...
Fundamental Freedoms

2. Fundamental freedoms

Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;
(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
(c) freedom of peaceful assembly; and
(d) freedom of association.

Democratic Rights

3. Democratic rights of citizens

Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

4. Maximum duration of legislative bodies

(1) No House of Commons and no legislative assembly shall continue for longer than five years from the date fixed for the return of the writs of a general election of its members.

(2) In time of real or apprehended war, invasion or insurrection, a House of Commons may be continued by Parliament and a legislative assembly may be continued by the legislature beyond five years if such continuation is not opposed by the votes of more than one-third of the members of the House of Commons or the legislative assembly, as the case may be.

5. Annual sitting of legislative bodies

There shall be a sitting of Parliament and of each legislature at least once every twelve months.

Mobility Rights

6. Mobility of citizens

(1) Every citizen of Canada has the right to enter, remain in and leave Canada.

(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right

(a) to move to and take up residence in any province; and
(b) to pursue the gaining of a livelihood in any province.

(3) The rights specified in subsection (2) are subject to

(a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and
(b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

(4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

Legal Rights

7. Life, liberty and security of person

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

8. Search or seizure

Everyone has the right to be secure against unreasonable search or seizure.

9. Detention or imprisonment

Everyone has the right not to be arbitrarily detained or imprisoned.

10. Arrest or detention

Everyone has the right on arrest or detention

(a) to be informed promptly of the reasons therefor;
(b) to retain and instruct counsel without delay and to be informed of that right; and
(c) to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful.

11. Proceedings in criminal and penal matters
Any person charged with an offence has the right
(a) to be informed without unreasonable delay of the specific offence;
(b) to be tried within a reasonable time;
(c) not to be compelled to be a witness in proceedings against that person in respect of the offence;
(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;
(e) not to be denied reasonable bail without just cause;
(f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;
(g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;
(h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and
(i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

12. Treatment or punishment
Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

13. Self-crimination
A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

14. Interpreter
A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

Equality Rights

15. Equality before and under law and equal protection and benefit of law
(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Official Languages of Canada

16. Official languages of Canada
(1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.

(2) English and French are the official languages of New Brunswick and have equality of status and equal rights and privileges as to their use in all institutions of the legislature and government of New Brunswick.

(3) Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.

16.1. English and French linguistic communities in New Brunswick
(1) The English linguistic community and the French linguistic community in New Brunswick have equality of status and equal rights and privileges, including the right to distinct educational institutions and such distinct cultural institutions as are necessary for the preservation and promotion of those communities.

(2) The role of the legislature and government of New Brunswick to preserve and promote the status, rights and privileges referred to in subsection (1) is affirmed.
17. Proceedings of Parliament
(1) Everyone has the right to use English or French in any debates and other proceedings of Parliament.
(2) Everyone has the right to use English or French in any debates and other proceedings of the legislature of New Brunswick.

18. Parliamentary statutes and records
(1) The statutes, records and journals of Parliament shall be printed and published in English and French and both language versions are equally authoritative.
(2) The statutes, records and journals of the legislature of New Brunswick shall be printed and published in English and French and both language versions are equally authoritative.

19. Proceedings in courts established by Parliament
(1) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by Parliament.
(2) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court of New Brunswick.

20. Communications by public with federal institutions
(1) Any member of the public in Canada has the right to communicate with, and to receive available services from, any head or central office of an institution of the Parliament or government of Canada in English or French, and has the same right with respect to any other office of any such institution where
   (a) there is a significant demand for communications with and services from that office in such language; or
   (b) due to the nature of the office, it is reasonable that communications with and services from that office be available in both English and French.
(2) Any member of the public in New Brunswick has the right to communicate with, and to receive available services from, any office of an institution of the legislature or government of New Brunswick in English or French.

21. Continuation of existing constitutional provisions
Nothing in sections 16 to 20 abrogates or derogates from any right, privilege or obligation with respect to the English and French languages, or either of them, that exists or is continued by virtue of any other provision of the Constitution of Canada.

22. Rights and privileges preserved
Nothing in sections 16 to 20 abrogates or derogates from any legal or customary right or privilege acquired or enjoyed either before or after the coming into force of this Charter with respect to any language that is not English or French.

Minority Language Educational Rights

23. Language of instruction
(1) Citizens of Canada
   (a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or
   (b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province,

have the right to have their children receive primary and secondary school instruction in that language in that province.

(2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.

(3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province
   (a) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and

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(b) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

**Enforcement**

24. Enforcement of guaranteed rights and freedoms

(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

**General**

25. Aboriginal rights and freedoms not affected by Charter

The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

(a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

(b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

26. Other rights and freedoms not affected by Charter

The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.

27. Multicultural heritage

This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

28. Rights guaranteed equally to both sexes

Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

29. Rights respecting certain schools preserved

Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools.

30. Application to territories and territorial authorities

A reference in this Charter to a Province or to the legislative assembly or legislature of a province shall be deemed to include a reference to the Yukon Territory and the Northwest Territories, or to the appropriate legislative authority thereof, as the case may be.

31. Legislative powers not extended

Nothing in this Charter extends the legislative powers of any body or authority.

**Application of Charter**

32. Application of Charter

(1) This Charter applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

(2) Notwithstanding subsection (1), section 15 shall not have effect until three years after this section comes into force.

33. Exception where express declaration

(1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.
An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

Parliament or the legislature of a province may re-enact a declaration made under subsection (1).

Subsection (3) applies in respect of a re-enactment made under subsection (4).

Citation

This Part may be cited as the Canadian Charter of Rights and Freedoms.

PART II

RIGHTS OF THE ABORIGINAL PEOPLES OF CANADA

35. Recognition of existing aboriginal and treaty rights

(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada.

(3) For greater certainty, in subsection (1) “treaty rights” includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

35.1. Commitment to participation in constitutional conference

The government of Canada and the provincial governments are committed to the principle that, before any amendment is made to Class 24 of section 91 of the “Constitution Act, 1867”, to section 25 of this Act or to this Part,

(a) a constitutional conference that includes in its agenda an item relating to the proposed amendment, composed of the Prime Minister of Canada and the first ministers of the provinces, will be convened by the Prime Minister of Canada; and

(b) the Prime Minister of Canada will invite representatives of the aboriginal peoples of Canada to participate in the discussions on that item.

PART III

EQUALIZATION AND REGIONAL DISPARITIES

36. Commitment to promote equal opportunities

(1) Without altering the legislative authority of Parliament or of the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority, Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to

(a) promoting equal opportunities for the well-being of Canadians;

(b) furthering economic development to reduce disparity in opportunities; and

(c) providing essential public services of reasonable quality to all Canadians.

(2) Parliament and the government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation.
PART IV
CONSTITUTIONAL CONFERENCE

37.

PART IV.1
CONSTITUTIONAL CONFERENCES

37.1.

PART V
PROCEDURE FOR AMENDING CONSTITUTION OF CANADA

38. General procedure for amending Constitution of Canada

(1) An amendment to the Constitution of Canada may be made by proclamation issued by the Governor General under the Great Seal of Canada where so authorized by

(a) resolutions of the Senate and House of Commons; and

(b) resolutions of the legislative assemblies of at least two-thirds of the provinces that have, in the aggregate, according to the then latest general census, at least fifty per cent of the population of all the provinces.

(2) An amendment made under subsection (1) that derogates from the legislative powers, the proprietary rights or any other rights or privileges of the legislature or government of a province shall require a resolution supported by a majority of the members of each of the Senate, the House of Commons and the legislative assemblies required under subsection (1).

(3) An amendment referred to in subsection (2) shall not have effect in a province the legislative assembly of which has expressed its dissent thereto by resolution supported by a majority of its members prior to the issue of the proclamation to which the amendment relates unless that legislative assembly, subsequently, by resolution supported by a majority of its members, revokes its dissent and authorizes the amendment.

(4) A resolution of dissent made for the purposes of subsection (3) may be revoked at any time before or after the issue of the proclamation to which it relates.

39. Restriction on proclamation

(1) A proclamation shall not be issued under subsection 38(1) before the expiration of one year from the adoption of the resolution initiating the amendment procedure thereunder, unless the legislative assembly of each province has previously adopted a resolution of assent or dissent.

(2) A proclamation shall not be issued under subsection 38(1) after the expiration of three years from the adoption of the resolution initiating the amendment procedure thereunder.

40. Compensation

Where an amendment is made under subsection 38(1) that transfers provincial legislative powers relating to education or other cultural matters from provincial legislatures to Parliament, Canada shall provide reasonable compensation to any province to which the amendment does not apply.

41. Amendment by unanimous consent

An amendment to the Constitution of Canada in relation to the following matters may be made by proclamation issued by the Governor General under the Great Seal of Canada only where authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province:

(a) the office of the Queen, the Governor General and the Lieutenant Governor of a province;

(b) the right of a province to a number of members in the House of Commons not less than the number of Senators by which the province is entitled to be represented at the time this Part comes into force;

(c) subject to section 43, the use of the English or the French language;

(d) the composition of the Supreme Court of Canada; and

(e) an amendment to this Part.

42. Amendment by general procedure

(1) An amendment to the Constitution of Canada in relation to the following matters may be made only in accordance with subsection 38(1):

(a) the principle of proportionate representation of the provinces in the House of Commons prescribed by the Constitution of Canada;

(b) the powers of the Senate and the method of selecting Senators;
(c) the number of members by which a province is entitled to be represented in the Senate and the residence qualifications of Senators;

(d) subject to paragraph 41(d), the Supreme Court of Canada;

(e) the extension of existing provinces into the territories; and

(f) notwithstanding any other law or practice, the establishment of new provinces.

(2) Subsections 38(2) to (4) do not apply in respect of amendments in relation to matters referred to in subsection (1).

43. Amendment of provisions relating to some but not all provinces

An amendment to the Constitution of Canada in relation to any provision that applies to one or more, but not all, provinces, including

(a) any alteration to boundaries between provinces, and

(b) any amendment to any provision that relates to the use of the English or the French language within a province,

may be made by proclamation issued by the Governor General under the Great Seal of Canada only where so authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province to which the amendment applies.

44. Amendments by Parliament

Subject to sections 41 and 42, Parliament may exclusively make laws amending the Constitution of Canada in relation to the executive government of Canada or the Senate and House of Commons.

45. Amendments by provincial legislatures

Subject to section 41, the legislature of each province may exclusively make laws amending the constitution of the province.

46. Initiation of amendment procedures

(1) The procedures for amendment under sections 38, 41, 42 and 43 may be initiated either by the Senate or the House of Commons or by the legislative assembly of a province.

(2) A resolution of assent made for the purposes of this Part may be revoked at any time before the issue of a proclamation authorized by it.

47. Amendments without Senate resolution

(1) An amendment to the Constitution of Canada made by proclamation under section 38, 41, 42 or 43 may be made without a resolution of the Senate authorizing the issue of the proclamation if, within one hundred and eighty days after the adoption by the House of Commons of a resolution authorizing its issue, the Senate has not adopted such a resolution and if, at any time after the expiration of that period, the House of Commons again adopts the resolution.

(2) Any period when Parliament is prorogued or dissolved shall not be counted in computing the one hundred and eighty day period referred to in subsection (1).

48. Advice to issue proclamation

The Queen’s Privy Council for Canada shall advise the Governor General to issue a proclamation under this Part forthwith on the adoption of the resolutions required for an amendment made by proclamation under this Part.

49. Constitutional conference

A constitutional conference composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada within fifteen years after this Part comes into force to review the provisions of this Part.
PART VI
AMENDMENT TO THE CONSTITUTION ACT, 1867

50.

51.

PART VII
GENERAL

52. Primacy of Constitution of Canada

(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

(2) The Constitution of Canada includes
   
   (a) the Canada Act 1982, including this Act;
   
   (b) the Acts and orders referred to in the schedule; and
   
   (c) any amendment to any Act or order referred to in paragraph (a) or (b).

(3) Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada.

53. Repeals and new names

(1) The enactments referred to in Column I of the schedule are hereby repealed or amended to the extent indicated in Column II thereof and, unless repealed, shall continue as law in Canada under the names set out in Column III thereof.

(2) Every enactment, except the Canada Act 1982, that refers to an enactment referred to in the schedule by the name in Column I thereof is hereby amended by substituting for that name the corresponding name in Column III thereof, and any British North America Act not referred to in the schedule may be cited as the Constitution Act followed by the year and number, if any, of its enactment.

54. Repeal and consequential amendments

Part IV is repealed on the day that is one year after this Part comes into force and this section may be repealed and this Act renumbered, consequentially upon the repeal of Part IV and this section, by proclamation issued by the Governor General under the Great Seal of Canada.

54.1. [Repealed]

55. French version of Constitution of Canada

A French version of the portions of the Constitution of Canada referred to in the schedule shall be prepared by the Minister of Justice of Canada as expeditiously as possible and, when any portion thereof sufficient to warrant action being taken has been so prepared, it shall be put forward for enactment by proclamation issued by the Governor General under the Great Seal of Canada pursuant to the procedure then applicable to an amendment of the same provisions of the Constitution of Canada.

56. English and French versions of certain constitutional texts

Where any portion of the Constitution of Canada has been or is enacted in English and French or where a French version of any portion of the Constitution is enacted pursuant to section 55, the English and French versions of that portion of the Constitution are equally authoritative.

57. English and French versions of this Act

The English and French versions of this Act are equally authoritative.

58. Commencement

Subject to section 59, this Act shall come into force on a day to be fixed by proclamation issued by the Queen or the Governor General under the Great Seal of Canada.

59. Commencement of paragraph 23(1)(a) in respect of Quebec

(1) Paragraph 23(1)(a) shall come into force in respect of Quebec on a day to be fixed by proclamation issued by the Queen or the Governor General under the Great Seal of Canada.

(2) A proclamation under subsection (1) shall be issued only where authorized by the legislative assembly or government of Quebec.

(3) This section may be repealed on the day paragraph 23(1)(a) comes into force in respect of Quebec and this Act amended and renumbered, consequentially upon the repeal of this section, by proclamation issued by the Queen or the Governor General under the Great Seal of Canada.
60. Short title and citations
This Act may be cited as the Constitution Act, 1982, and the Constitution Acts 1867 to 1975 (No. 2) and this Act may be cited together as the Constitution Acts, 1867 to 1982.

61. References
A reference to the “Constitution Acts, 1867 to 1982” shall be deemed to include a reference to the “Constitution Amendment Proclamation, 1983”.

SCHEDULE TO THE
CONSTITUTION ACT, 1982

MODERNIZATION OF THE CONSTITUTION

<table>
<thead>
<tr>
<th>Item</th>
<th>Column I Act Affected</th>
<th>Column II Amendment</th>
<th>Column III New Name</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>British North America Act, 1867, 30-31 Vict., c. 3 (U.K.)</td>
<td>(1) Section 1 is repealed and the following substituted therefor: &quot;1. This Act may be cited as the Constitution Act, 1867.&quot; (2) Section 20 is repealed. (3) Class 1 of section 91 is repealed. (4) Class 1 of section 92 is repealed.</td>
<td>Constitution Act, 1867</td>
</tr>
<tr>
<td>2.</td>
<td>An Act to amend and continue the Act 32-33 Victoria chapter 3; and to establish and provide for the Government of the Province of Manitoba, 1870, 33 Vict., c. 3 (Can.)</td>
<td>(1) The long title is repealed and the following substituted therefor: &quot;Manitoba Act, 1870.&quot; (2) Section 20 is repealed.</td>
<td>Manitoba Act, 1870</td>
</tr>
<tr>
<td>3.</td>
<td>Order of Her Majesty in Council admitting Rupert’s Land and the North-Western Territory into the union, dated the 23rd day of June, 1870</td>
<td></td>
<td>Rupert’s Land and North-Western Territory Order</td>
</tr>
<tr>
<td>4.</td>
<td>Order of Her Majesty in Council admitting British Columbia into the Union, dated the 16th day of May, 1871</td>
<td></td>
<td>British Columbia Terms of Union</td>
</tr>
<tr>
<td>5.</td>
<td>British North America Act, 1871, 34-35 Vict., c. 28 (U.K.)</td>
<td>Section 1 is repealed and the following substituted therefor: &quot;1. This Act may be cited as the Constitution Act, 1871.&quot;</td>
<td>Constitution Act, 1871</td>
</tr>
<tr>
<td>6.</td>
<td>Order of Her Majesty in Council admitting Prince Edward Island into the union, dated the 26th day of June, 1873.</td>
<td></td>
<td>Prince Edward Island Terms of Union</td>
</tr>
<tr>
<td>8.</td>
<td>Order of Her Majesty in Council admitting all British possessions and Territories in North America and islands adjacent thereto into the Union, dated the 31st day of July, 1880.</td>
<td></td>
<td>Adjacent Territories Order</td>
</tr>
<tr>
<td>9.</td>
<td>British North America Act, 1886, 49-50 Vict., c. 35 (U.K.)</td>
<td>Section 3 is repealed and the following substituted therefor: &quot;3. This Act may be cited as the Constitution Act, 1886.&quot;</td>
<td>Constitution Act, 1886</td>
</tr>
<tr>
<td>12.</td>
<td>The Alberta Act, 1905, 4-5 Edw. VII, c. 3 (Can.)</td>
<td></td>
<td>Alberta Act</td>
</tr>
<tr>
<td>13.</td>
<td>The Saskatchewan Act, 1905, 4-5 Edw. VII, c. 42 (Can.)</td>
<td></td>
<td>Saskatchewan Act</td>
</tr>
<tr>
<td>14.</td>
<td>British North America Act, 1907, 7 Edw. VII, c. 11 (U.K.)</td>
<td>Section 2 is repealed and the following substituted therefor: &quot;2. This Act may be cited as the Constitution Act, 1907.&quot;</td>
<td>Constitution Act, 1907</td>
</tr>
<tr>
<td>15.</td>
<td>British North America Act, 1915, 5-6 Geo. V, c. 45 (U.K.)</td>
<td>Section 3 is repealed and the following substituted therefor: &quot;3. This Act may be cited as the Constitution Act, 1915.&quot;</td>
<td>Constitution Act, 1915</td>
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<tr>
<td>16.</td>
<td>British North America Act, 1930, 20-21, Geo. V, c. 26 (U.K.)</td>
<td>Section 3 is repealed and the following substituted therefor:</td>
<td>Constitution Act, 1930</td>
</tr>
<tr>
<td>17.</td>
<td>Statute of Westminster, 1931, 22 Geo. V, c. 4 (U.K.)</td>
<td>In so far as they apply to Canada, (a) section 4 is repealed; and (b) subsection 7(1) is repealed.</td>
<td>Statute of Westminster, 1931</td>
</tr>
<tr>
<td>18.</td>
<td>British North America Act, 1940, 3-4 Geo. VI, c. 36 (U.K.)</td>
<td>Section 2 is repealed and the following substituted therefor:</td>
<td>Constitution Act, 1940</td>
</tr>
<tr>
<td>21.</td>
<td>British North America Act, 1949, 12-13 Geo. VI, c. 22 (U.K.)</td>
<td>Section 3 is repealed and the following substituted therefor:</td>
<td>Newfoundland Act</td>
</tr>
<tr>
<td>25.</td>
<td>British North America Act, 1960, 9 Eliz. II, c. 2 (U.K.)</td>
<td>Section 2 is repealed and the following substituted therefor:</td>
<td>Constitution Act, 1960</td>
</tr>
<tr>
<td>27.</td>
<td>British North America Act, 1965, 14 Eliz. II, c. 4, Part I (Can.)</td>
<td>Section 2 is repealed and the following substituted therefor:</td>
<td>Constitution Act, 1965</td>
</tr>
<tr>
<td>29.</td>
<td>British North America Act, 1975, 23-24 Eliz. II, c. 28, Part I (Can.)</td>
<td>Section 3, as amended by 25-26 Eliz. II, c. 28, s. 31 (Can.), is repealed and the following substituted therefor:</td>
<td>Constitution Act (No. 1), 1975</td>
</tr>
<tr>
<td>30.</td>
<td>British North America Act (No. 2), 1975, 23-24 Eliz. II, c. 53 (Can.)</td>
<td>Section 3 is repealed and the following substituted therefor:</td>
<td>Constitution Act (No. 2), 1975</td>
</tr>
</tbody>
</table>
The Constitution of the Republic of South Africa, 1996 (as Amended to 2009)

Assent: December 16, 1996;
Commencement: February 4, 1997

as amended by:

ACT

To introduce a new Constitution for the Republic of South Africa and to provide for matters incidental thereto.

Preamble

We, the people of South Africa,
Recognise the injustices of our past;
Honour those who suffered for justice and freedom in our land;
Respect those who have worked to build and develop our country; and
Believe that South Africa belongs to all who live in it, united in our diversity.

We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to

Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;
Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;
Improve the quality of life of all citizens and free the potential of each person; and
Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.

May God protect our people.
Nkosi Sikelel’iAfrika. Morena boloka setjhaba sa heso.
God seën Suid-Afrika. God bless South Africa.
Mudzimu fhatutshedza Afurika. Hosi katekisa Afrika.

CHAPTER 1
FOUNDING PROVISIONS (ss 1–6)

1 Republic of South Africa

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.

2 Supremacy of Constitution

This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

3 Citizenship

(1) There is a common South African citizenship.
(2) All citizens are—
(a) equally entitled to the rights, privileges and benefits of citizenship; and
(b) equally subject to the duties and responsibilities of citizenship.

(3) National legislation must provide for the acquisition, loss and restoration of citizenship.

4 National anthem

The national anthem of the Republic is determined by the President by proclamation.

5 National flag

The national flag of the Republic is black, gold, green, white, red and blue, as described and sketched in Schedule 1.

6 Languages

(1) The official languages of the Republic are Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu.

(2) Recognising the historically diminished use and status of the indigenous languages of our people, the state must take practical and positive measures to elevate the status and advance the use of these languages.

(3) (a) The national government and provincial governments may use any particular official languages for the purposes of government, taking into account usage, practicality, expense, regional circumstances and the balance of the needs and preferences of the population as a whole or in the province concerned; but the national government and each provincial government must use at least two official languages.

(b) Municipalities must take into account the language usage and preferences of their residents.

(4) The national government and provincial governments, by legislative and other measures, must regulate and monitor their use of official languages. Without detracting from the provisions of subsection (2), all official languages must enjoy parity of esteem and must be treated equitably.

(5) A Pan South African Language Board established by national legislation must—

(a) promote, and create conditions for, the development and use of—
   (i) all official languages;
   (ii) the Khoi, Nama and San languages; and
   (iii) sign language; and

(b) promote and ensure respect for—
   (i) all languages commonly used by communities in South Africa, including German, Greek, Gujarati, Hindi, Portuguese, Tamil, Telegu and Urdu; and
   (ii) Arabic, Hebrew, Sanskrit and other languages used for religious purposes in South Africa.

CHAPTER 2
BILL OF RIGHTS (ss 7–39)

7 Rights

(1) 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.

(2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.

(3) The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.

8 Application

(1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.

(2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

(3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court—

(a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and

(b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36 (1).
(4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.

9 Equality

(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

10 Human dignity

Everyone has inherent dignity and the right to have their dignity respected and protected.

11 Life

Everyone has the right to life.

12 Freedom and security of the person

(1) Everyone has the right to freedom and security of the person, which includes the right—
   (a) not to be deprived of freedom arbitrarily or without just cause;
   (b) not to be detained without trial;
   (c) to be free from all forms of violence from either public or private sources;
   (d) not to be tortured in any way; and
   (e) not to be treated or punished in a cruel, inhuman or degrading way.

(2) Everyone has the right to bodily and psychological integrity, which includes the right—
   (a) to make decisions concerning reproduction;
   (b) to security in and control over their body; and
   (c) not to be subjected to medical or scientific experiments without their informed consent.

13 Slavery, servitude and forced labour

No one may be subjected to slavery, servitude or forced labour.

14 Privacy

Everyone has the right to privacy, which includes the right not to have—
   (a) their person or home searched;
   (b) their property searched;
   (c) their possessions seized; or
   (d) the privacy of their communications infringed.

15 Freedom of religion, belief and opinion

(1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion.

(2) Religious observances may be conducted at state or state-aided institutions, provided that—
   (a) those observances follow rules made by the appropriate public authorities;
   (b) they are conducted on an equitable basis; and
   (c) attendance at them is free and voluntary.

(3) (a) This section does not prevent legislation recognising—
   (i) marriages concluded under any tradition, or a system of religious, personal or family law; or
   (ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.
(b) Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution.

16 Freedom of expression

(1) Everyone has the right to freedom of expression, which includes—
   (a) freedom of the press and other media;
   (b) freedom to receive or impart information or ideas;
   (c) freedom of artistic creativity; and
   (d) academic freedom and freedom of scientific research.

(2) The right in subsection (1) does not extend to—
   (a) propaganda for war;
   (b) incitement of imminent violence; or
   (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

17 Assembly, demonstration picket and petition

Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions.

18 Freedom of association

Everyone has the right to freedom of association.

19 Political rights

(1) Every citizen is free to make political choices, which includes the right—
   (a) to form a political party;
   (b) to participate in the activities of, or recruit members for, a political party; and
   (c) to campaign for a political party or cause.

(2) Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.

(3) Every adult citizen has the right—
   (a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and
   (b) to stand for public office and, if elected, to hold office.

20 Citizenship

No citizen may be deprived of citizenship.

21 Freedom of movement and residence

(1) Everyone has the right to freedom of movement.

(2) Everyone has the right to leave the Republic.

(3) Every citizen has the right to enter, to remain in and to reside anywhere in, the Republic.

(4) Every citizen has the right to a passport.

22 Freedom of trade, occupation and profession

Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.

23 Labour relations

(1) Everyone has the right to fair labour practices.

(2) Every worker has the right—
   (a) to form and join a trade union;
   (b) to participate in the activities and programmes of a trade union; and
   (c) to strike.

(3) Every employer has the right—
   (a) to form and join an employers’ organisation; and
(b) to participate in the activities and programmes of an employers’ organisation.

(4) Every trade union and every employers’ organisation has the right—

(a) to determine its own administration, programmes and activities;

(b) to organise; and

(c) to form and join a federation.

(5) Every trade union, employers’ organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36 (1).

(6) National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter the limitation must comply with section 36 (1).

24 Environment

Everyone has the right—

(a) to an environment that is not harmful to their health or well-being; and

(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that—

(i) prevent pollution and ecological degradation;

(ii) promote conservation; and

(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

25 Property

(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

(2) Property may be expropriated only in terms of law of general application—

(a) for a public purpose or in the public interest; and

(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

(3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including—

(a) the current use of the property;

(b) the history of the acquisition and use of the property;

(c) the market value of the property;

(d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and

(e) the purpose of the expropriation.

(4) For the purposes of this section—

(a) the public interest includes the nation’s commitment to land reform, and to reforms to bring about equitable access to all South Africa’s natural resources; and

(b) property is not limited to land.

(5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

(6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

(7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

(8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36 (1).
(9) Parliament must enact the legislation referred to in subsection (6).

26 Housing

(1) Everyone has the right to have access to adequate housing.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

27 Health care, food, water and social security

(1) Everyone has the right to have access to—
   (a) health care services, including reproductive health care;
   (b) sufficient food and water; and
   (c) social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

(3) No one may be refused emergency medical treatment.

28 Children

(1) Every child has the right—
   (a) to a name and a nationality from birth;
   (b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
   (c) to basic nutrition, shelter, basic health care services and social services;
   (d) to be protected from maltreatment, neglect, abuse or degradation;
   (e) to be protected from exploitative labour practices;
   (f) not to be required or permitted to perform work or provide services that—
      (i) are inappropriate for a person of that child’s age; or
      (ii) place at risk the child’s well-being, education, physical or mental health or spiritual, moral or social development;
   (g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be—
      (i) kept separately from detained persons over the age of 18 years; and
      (ii) treated in a manner, and kept in conditions, that take account of the child’s age;
   (h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and
   (i) not to be used directly in armed conflict, and to be protected in times of armed conflict.

(2) A child’s best interests are of paramount importance in every matter concerning the child.

(3) In this section ‘child’ means a person under the age of 18 years.

29 Education

(1) Everyone has the right—
   (a) to a basic education, including adult basic education; and
   (b) to further education, which the state, through reasonable measures, must make progressively available and accessible.

(2) Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account—
   (a) equity;
   (b) practicability; and
(c) the need to redress the results of past racially discriminatory laws and practices.

(3) Everyone has the right to establish and maintain, at their own expense, independent educational institutions that—

(a) do not discriminate on the basis of race;

(b) are registered with the state; and

(c) maintain standards that are not inferior to standards at comparable public educational institutions.

(4) Subsection (3) does not preclude state subsidies for independent educational institutions.

30 Language and culture

Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.

31 Cultural, religious and linguistic communities

(1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community—

(a) to enjoy their culture, practise their religion and use their language; and

(b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

(2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

32 Access to information

(1) Everyone has the right of access to—

(a) any information held by the state; and

(b) any information that is held by another person and that is required for the exercise or protection of any rights.

(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.

33 Just administrative action

(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

(3) National legislation must be enacted to give effect to these rights, and must—

(a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;

(b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and

(c) promote an efficient administration.

34 Access to courts

Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

35 Arrested, detained and accused persons

(1) Everyone who is arrested for allegedly committing an offence has the right—

(a) to remain silent;

(b) to be informed promptly—

(i) of the right to remain silent; and

(ii) of the consequences of not remaining silent;

(c) not to be compelled to make any confession or admission that could be used in evidence against that person;

(d) to be brought before a court as soon as reasonably possible, but not later than—

(i) 48 hours after the arrest; or
(ii) the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day;

(e) at the first court appearance after being arrested, to be charged or to be informed of the reason for the detention to continue, or to be released; and

(f) to be released from detention if the interests of justice permit, subject to reasonable conditions.

(2) Everyone who is detained, including every sentenced prisoner, has the right—

(a) to be informed promptly of the reason for being detained;

(b) to choose, and to consult with, a legal practitioner, and to be informed of this right promptly;

(c) to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

(d) to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released;

(e) to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment; and

(f) to communicate with, and be visited by, that person’s—

(i) spouse or partner;

(ii) next of kin;

(iii) chosen religious counsellor; and

(iv) chosen medical practitioner.

(3) Every accused person has a right to a fair trial, which includes the right—

(a) to be informed of the charge with sufficient detail to answer it;

(b) to have adequate time and facilities to prepare a defence;

(c) to a public trial before an ordinary court;

(d) to have their trial begin and conclude without unreasonable delay;

(e) to be present when being tried;

(f) to choose, and be represented by, a legal practitioner, and to be informed of this right promptly;

(g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

(h) to be presumed innocent, to remain silent, and not to testify during the proceedings;

(i) to adduce and challenge evidence;

(j) not to be compelled to give self-incriminating evidence;

(k) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;

(l) not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted;

(m) not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted;

(n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and

(o) of appeal to, or review by, a higher court.

(4) Whenever this section requires information to be given to a person, that information must be given in a language that the person understands.

(5) Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.
36 Limitation of rights

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

37 States of emergency

(1) A state of emergency may be declared only in terms of an Act of Parliament, and only when—

(a) the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency; and

(b) the declaration is necessary to restore peace and order.

(2) A declaration of a state of emergency, and any legislation enacted or other action taken in consequence of that declaration, may be effective only—

(a) prospectively; and

(b) for no more than 21 days from the date of the declaration, unless the National Assembly resolves to extend the declaration. The Assembly may extend a declaration of a state of emergency for no more than three months at a time. The first extension of the state of emergency must be by a resolution adopted with a supporting vote of a majority of the members of the Assembly. Any subsequent extension must be by a resolution adopted with a supporting vote of at least 60 per cent of the members of the Assembly. A resolution in terms of this paragraph may be adopted only following a public debate in the Assembly.

(3) 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.

(4) Any legislation enacted in consequence of a declaration of a state of emergency may derogate from the Bill of Rights only to the extent that—

(a) the derogation is strictly required by the emergency; and

(b) the legislation—

(i) is consistent with the Republic’s obligations under international law applicable to states of emergency;

(ii) conforms to subsection (5); and

(iii) is published in the national Government Gazette as soon as reasonably possible after being enacted.

(5) No Act of Parliament that authorises a declaration of a state of emergency, and no legislation enacted or other action taken in consequence of a declaration, may permit or authorise—

(a) indemnifying the state, or any person, in respect of any unlawful act;

(b) any derogation from this section; or

(c) any derogation from a section mentioned in column 1 of the Table of Non-Derogable Rights, to the extent indicated opposite that section in column 3 of the Table.
### Table of Non-Derogable Rights

<table>
<thead>
<tr>
<th>Section number</th>
<th>Section title</th>
<th>Extent to which the right is non-derogable</th>
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<td>Human dignity</td>
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<td>- the rights in paragraphs (a) to (o) of subsection (3), excluding paragraph (d);</td>
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<td>- subsection (4); and</td>
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<td>- subsection (5) with respect to the exclusion of evidence if the admission of that evidence would render the trial unfair</td>
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</table>

(6) Whenever anyone is detained without trial in consequence of a derogation of rights resulting from a declaration of a state of emergency, the following conditions must be observed—

(a) An adult family member or friend of the detainee must be contacted as soon as reasonably possible, and informed that the person has been detained.

(b) A notice must be published in the national *Government Gazette* within five days of the person being detained, stating the detainee’s name and place of detention and referring to the emergency measure in terms of which that person has been detained.

(c) The detainee must be allowed to choose, and be visited at any reasonable time by, a medical practitioner.

(d) The detainee must be allowed to choose, and be visited at any reasonable time by, a legal representative.

(e) A court must review the detention as soon as reasonably possible, but no later than 10 days after the date the person was detained, and the court must release the detainee unless it is necessary to continue the detention to restore peace and order.

(f) A detainee who is not released in terms of a review under paragraph (e), or who is not released in terms of a review under this paragraph, may apply to a court for a further review of the detention at any time after 10 days have passed since the previous review, and the court must release the detainee unless it is still necessary to continue the detention to restore peace and order.

(g) The detainee must be allowed to appear in person before any court considering the detention, to be represented by a legal practitioner at those hearings, and to make representations against continued detention.

(h) The state must present written reasons to the court to justify the continued detention of the detainee, and must give a copy of those reasons to the detainee at least two days before the court reviews the detention.

(7) If a court releases a detainee, that person may not be detained again on the same grounds unless the state first shows a court good cause for re-detaining that person.
Subsections (6) and (7) do not apply to persons who are not South African citizens and who are detained in consequence of an international armed conflict. Instead, the state must comply with the standards binding on the Republic under international humanitarian law in respect of the detention of such persons.

38 Enforcement of rights

Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are—

(a) anyone acting in their own interest;
(b) anyone acting on behalf of another person who cannot act in their own name;
(c) anyone acting as a member of, or in the interest of, a group or class of persons;
(d) anyone acting in the public interest; and
(e) an association acting in the interest of its members.

39 Interpretation of Bill of Rights

(1) When interpreting the Bill of Rights, a court, tribunal or forum—

(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
(b) must consider international law; and
(c) may consider foreign law.

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

CHAPTER 3

CO-OPERATIVE GOVERNMENT (ss 40–41)

40 Government of the Republic

(1) In the Republic, government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated.

(2) All spheres of government must observe and adhere to the principles in this Chapter and must conduct their activities within the parameters that the Chapter provides.

41 Principles of co-operative government and intergovernmental relations

(1) All spheres of government and all organs of state within each sphere must—

(a) preserve the peace, national unity and the indivisibility of the Republic;
(b) secure the well-being of the people of the Republic;
(c) provide effective, transparent, accountable and coherent government for the Republic as a whole;
(d) be loyal to the Constitution, the Republic and its people;
(e) respect the constitutional status, institutions, powers and functions of government in the other spheres;
(f) not assume any power or function except those conferred on them in terms of the Constitution;
(g) exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and
(h) co-operate with one another in mutual trust and good faith by—

(i) fostering friendly relations;
(ii) assisting and supporting one another;
(iii) informing one another of, and consulting one another on, matters of common interest;
(iv) co-ordinating their actions and legislation with one another;
(v) adhering to agreed procedures; and
(vi) avoiding legal proceedings against one another.
(2) An Act of Parliament must—
   (a) establish or provide for structures and institutions to promote and facilitate intergovernmental relations; and
   (b) provide for appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes.

(3) An organ of state involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute.

(4) If a court is not satisfied that the requirements of subsection (3) have been met, it may refer a dispute back to the organs of state involved.

CHAPTER 4
PARLIAMENT (ss 42–82)

42 Composition of Parliament

(1) Parliament consists of—
   (a) the National Assembly; and
   (b) the National Council of Provinces.

(2) The National Assembly and the National Council of Provinces participate in the legislative process in the manner set out in the Constitution.

(3) The National Assembly is elected to represent the people and to ensure government by the people under the Constitution. It does this by choosing the President, by providing a national forum for public consideration of issues, by passing legislation and by scrutinizing and overseeing executive action.

(4) The National Council of Provinces represents the provinces to ensure that provincial interests are taken into account in the national sphere of government. It does this mainly by participating in the national legislative process and by providing a national forum for public consideration of issues affecting the provinces.

(5) The President may summon Parliament to an extraordinary sitting at any time conduct special business.

(6) The seat of Parliament is Cape Town, but an Act of Parliament enacted in accordance with section 76 (1) and (5) may determine that the seat of Parliament is elsewhere.

43 Legislative authority of the Republic

In the Republic, the legislative authority—
   (a) of the national sphere of government is vested in Parliament, as set out in section 44;
   (b) of the provincial sphere of government is vested in the provincial legislatures, as set out in section 104; and
   (c) of the local sphere of government is vested in the Municipal Councils, as set out in section 156.

44 National legislative authority

(1) The national legislative authority as vested in Parliament—
   (a) confers on the National Assembly the power—
      (i) to amend the Constitution;
      (ii) to pass legislation with regard to any matter, including a matter within a functional area listed in Schedule 4, but excluding, subject to subsection (2), a matter within a functional area listed in Schedule 5; and
      (iii) to assign any of its legislative powers, except the power to amend the Constitution, to any legislative body in another sphere of government; and
   (b) confers on the National Council of Provinces the power—
      (i) to participate in amending the Constitution in accordance with section 74;
      (ii) to pass, in accordance with section 76, legislation with regard to any matter within a functional area listed in Schedule 4 and any other matter required by the Constitution to be passed in accordance with section 76; and
      (iii) to consider, in accordance with section 75, any other legislation passed by the National Assembly.
(2) Parliament may intervene, by passing legislation in accordance with section 76 (1), with regard to a matter falling within a functional area listed in Schedule 5, when it is necessary—

(a) to maintain national security;
(b) to maintain economic unity;
(c) to maintain essential national standards;
(d) to establish minimum standards required for the rendering of services; or
(e) to prevent unreasonable action taken by a province which is prejudicial to the interests of another province or to the country as a whole.

(3) Legislation with regard to a matter that is reasonably necessary for, or incidental to, the effective exercise of a power concerning any matter listed in Schedule 4 is, for all purposes, legislation with regard to a matter listed in Schedule 4.

(4) When exercising its legislative authority; Parliament is bound only by the Constitution, and must act in accordance with, and within the limits of, the Constitution.

45 Joint rules and orders and joint committees

(1) The National Assembly and the National Council of Provinces must establish a joint rules committee to make rules and orders concerning the joint business of the Assembly and Council, including rules and orders—

(a) to determine procedures to facilitate the legislative process, including setting a time limit for completing any step in the process;
(b) to establish joint committees composed of representatives from both the Assembly and the Council to consider and report on Bills envisaged in sections 74 and 75 that are referred to such a committee;
(c) to establish a joint committee to review the Constitution at least annually; and
(d) to regulate the business of—
(i) the joint rules committee;
(ii) the Mediation Committee;
(iii) the constitutional review committee; and
(iv) any joint committees established in terms of paragraph (b).

(2) Cabinet members, members of the National Assembly and delegates to the National Council of Provinces have the same privileges and immunities before a joint committee of the Assembly and the Council as they have before the Assembly or the Council.

The National Assembly (ss 46–59)

46 Composition and election

(1) The National Assembly consists of no fewer than 350 and no more than 400 women and men elected as members in terms of an electoral system that—

(a) is prescribed by national legislation;
(b) is based on the national common voters roll;
(c) provides for a minimum voting age of 18 years; and
(d) results, in general, in proportional representation.

(2) An Act of Parliament must provide a formula for determining the number of members of the National Assembly.

47 Membership

(1) Every citizen who is qualified to vote for the National Assembly is eligible to be a member of the Assembly, except—

(a) anyone who is appointed by, or is in the service of, the state and receives remuneration for that appointment or service, other than—
(i) the President, Deputy President, Ministers and Deputy Ministers; and
(ii) other office-bearers whose functions are compatible with the functions of a member of the Assembly, and have been declared compatible with those functions by national legislation;
(b) permanent delegates to the National Council of Provinces or members of a provincial legislature or a Municipal Council;
(c) unrehabilitated insolvents;
(d) anyone declared to be of unsound mind by a court of the Republic; or
(e) anyone who, after this section took effect, is convicted of an offence and sentenced to more than 12 months’ imprisonment without the option of a fine, either in the Republic, or outside the Republic if the conduct constituting the offence would have been an offence in the Republic, but no one may be regarded as having been sentenced until an appeal against the conviction or sentence has been determined, or until the time for an appeal has expired. A disqualification under this paragraph ends five years after the sentence has been completed.

(2) A person who is not eligible to be a member of the National Assembly in terms of subsection (1) (a) or (b) may be a candidate for the Assembly, subject to any limits or conditions established by national legislation.

(3) A person loses membership of the National Assembly if that person—
(a) ceases to be eligible;
(b) is absent from the Assembly without permission in circumstances for which the rules and orders of the Assembly prescribe loss of membership; or
(c) ceases to be a member of the party that nominated that person as a member of the Assembly.

(4) Vacancies in the National Assembly must be filled in terms of national legislation.

48 Oath or affirmation

Before members of the National Assembly begin to perform their functions in the Assembly, they must swear or affirm faithfulness to the Republic and obedience to the Constitution, in accordance with Schedule 2.

49 Duration of National Assembly

(1) The National Assembly is elected for a term of five years.

(2) If the National Assembly is dissolved in terms of section 50, or when its term expires, the President, by proclamation, must call and set dates for an election, which must be held within 90 days of the date the Assembly was dissolved or its term expired. A proclamation calling and setting dates for an election may be issued before or after the expiry of the term of the National Assembly.

(3) If the result of an election of the National Assembly is not declared within the period established in terms of section 190, or if an election is set aside by a court, the President, by proclamation, must call and set dates for another election, which must be held within 90 days of the expiry of that period or of the date on which the election was set aside.

(4) The National Assembly remains competent to function from the time it is dissolved or its term expires, until the day before the first day of polling for the next Assembly.

50 Dissolution of National Assembly before expiry of its term

(1) The President must dissolve the National Assembly if—
(a) the Assembly has adopted a resolution to dissolve with a supporting vote of a majority of its members; and
(b) three years have passed since the Assembly was elected.

(2) The Acting President must dissolve the National Assembly if—
(a) there is a vacancy in the office of President; and
(b) the Assembly fails to elect a new President within 30 days after the vacancy occurred.

51 Sittings and recess periods

(1) After an election, the first sitting of the National Assembly must take place at a time and on a date determined by the Chief Justice, but not more than 14 days after the election result has been declared. The Assembly may determine the time and duration of its other sittings and its recess periods.

(2) The President may summon the National Assembly to an extraordinary sitting at any time to conduct special business.

(3) Sittings of the National Assembly are permitted at places other than the seat of Parliament only on the grounds of public interest, security or convenience, and if provided for in the rules and orders of the Assembly.
52 Speaker and Deputy Speaker

(1) At the first sitting after its election, or when necessary to fill a vacancy, the National Assembly must elect a Speaker and a Deputy Speaker from among its members.

(2) The Chief Justice must preside over the election of a Speaker, or designate another judge to do so. The Speaker presides over the election of a Deputy Speaker.

(3) The procedure set out in Part A of Schedule 3 applies to the election of the Speaker and the Deputy Speaker.

(4) The National Assembly may remove the Speaker or Deputy Speaker from office by resolution. A majority of the members of the Assembly must be present when the resolution is adopted.

(5) In terms of its rules and orders, the National Assembly may elect from among its members other presiding officers to assist the Speaker and the Deputy Speaker.

53 Decisions

(1) Except where the Constitution provides otherwise—
   (a) a majority of the members of the National Assembly must be present before a vote may be taken on a Bill or an amendment to a Bill;
   (b) at least one third of the members must be present before a vote may be taken on any other question before the Assembly; and
   (c) all questions before the Assembly are decided by a majority of the votes cast.

(2) The member of the National Assembly presiding at a meeting of the Assembly has no deliberative vote, but—
   (a) must cast a deciding vote when there is an equal number of votes on each side of a question; and
   (b) may cast a deliberative vote when a question must be decided with a supporting vote of at least two thirds of the members of the Assembly.

54 Rights of certain Cabinet members and Deputy Ministers in the National Assembly

The President and any member of the Cabinet or any Deputy Minister who is not a member of the National Assembly may, subject to the rules and orders of the Assembly, attend and speak in the Assembly, but may not vote.

55 Powers of National Assembly

(1) In exercising its legislative power, the National Assembly may—
   (a) consider, pass, amend or reject any legislation before the Assembly; and
   (b) initiate or prepare legislation, except money Bills.

(2) The National Assembly must provide for mechanisms—
   (a) to ensure that all executive organs of state in the national sphere of government are accountable to it; and
   (b) to maintain oversight of—
      (i) the exercise of national executive authority, including the implementation of legislation; and
      (ii) any organ of state.

56 Evidence or information before National Assembly

The National Assembly or any of its committees may—
   (a) summon any person to appear before it to give evidence on oath or affirmation, or to produce documents;
   (b) require any person or institution to report to it;
   (c) compel, in terms of national legislation or the rules and orders, any person or institution to comply with a summons or requirement in terms of paragraph (a) or (b); and
   (d) receive petitions, representations or submissions from any interested persons or institutions.

57 Internal arrangements, proceedings and procedures of National Assembly

(1) The National Assembly may—
   (a) determine and control its internal arrangements, proceedings and procedures; and
(b) make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement.

(2) The rules and orders of the National Assembly must provide for—

(a) the establishment, composition, powers, functions, procedures and duration of its committees;
(b) the participation in the proceedings of the Assembly and its committees of minority parties represented in the Assembly, in a manner consistent with democracy;
(c) financial and administrative assistance to each party represented in the Assembly in proportion to its representation, to enable the party and its leader to perform their functions in the Assembly effectively; and
(d) the recognition of the leader of the largest opposition party in the Assembly as the Leader of the Opposition.

58 Privilege

(1) Cabinet members, Deputy Ministers and members of the National Assembly—

(a) have freedom of speech in the Assembly and in its committees, subject to its rules and orders; and
(b) are not liable to civil or criminal proceedings, arrest, imprisonment or damages for—

(i) anything that they have said in, produced before or submitted to the Assembly or any of its committees; or
(ii) anything revealed as a result of anything that they have said in, produced before or submitted to the Assembly or any of its committees.

(2) Other privileges and immunities of the National Assembly, Cabinet members and members of the Assembly may be prescribed by national legislation.

(3) Salaries, allowances and benefits payable to members of the National Assembly are a direct charge against the National Revenue Fund.

59 Public access to and involvement in National Assembly

(1) The National Assembly must—

(a) facilitate public involvement in the legislative and other processes of the Assembly and its committees; and
(b) conduct its business in an open manner, and hold its sittings, and those of its committees, in public, but reasonable measures may be taken—

(i) to regulate public access, including access of the media, to the Assembly and its committees; and
(ii) to provide for the searching of any person and, where appropriate, the refusal of entry to, or the removal of, any person.

(2) The National Assembly may not exclude the public, including the media, from a sitting of a committee unless it is reasonable and justifiable to do so in an open and democratic society.

National Council of Provinces (ss 60–72)

60 Composition of National Council

(1) The National Council of Provinces is composed of a single delegation from each province consisting of ten delegates.

(2) The ten delegates are—

(a) four special delegates consisting of—

(i) the Premier of the province or, if the Premier is not available, any member of the provincial legislature designated by the Premier either generally or for any specific business before the National Council of Provinces; and
(ii) three other special delegates; and
(b) six permanent delegates appointed in terms of section 61 (2).

(3) The Premier of a province, or if the Premier is not available, a member of the province’s delegation designated by the Premier, heads the delegation.

61 Allocation of delegates

(1) Parties represented in a provincial legislature are entitled to delegates in the province’s delegation in accordance with the formula set out in Part B of Schedule 3.
A provincial legislature must, within 30 days after the result of an election of that legislature is declared—

(i) determine, in accordance with national legislation, how many of each party’s delegates are to be permanent delegates and how many are to be special delegates; and

(ii) appoint the permanent delegates in accordance with the nominations of the parties.

(b) . . .,

The national legislation envisaged in subsection (2) (a) must ensure the participation of minority parties in both the permanent and special delegates’ components of the delegation in a manner consistent with democracy.

The legislature, with the concurrence of the Premier and the leaders of the parties entitled to special delegates in the province’s delegation, must designate special delegates, as required from time to time, from among the members of the legislature.

62 Permanent delegates

(1) A person nominated as a permanent delegate must be eligible to be a member of the provincial legislature.

(2) If a person who is a member of a provincial legislature is appointed as a permanent delegate, that person ceases to be a member of the legislature.

(3) Permanent delegates are appointed for a term that expires—

(a) immediately before the first sitting of a provincial legislature after its next election; or

(b) . . .,

(4) A person ceases to be a permanent delegate if that person—

(a) ceases to be eligible to be a member of the provincial legislature for any reason other than being appointed as a permanent delegate;

(b) becomes a member of the Cabinet;

(c) has lost the confidence of the provincial legislature and is recalled by the party that nominated that person;

(d) ceases to be a member of the party that nominated that person and is recalled by that party; or

(e) is absent from the National Council of Provinces without permission in circumstances for which the rules and orders of the Council prescribe loss of office as a permanent delegate.

(5) Vacancies among the permanent delegates must be filled in terms of national legislation.

(6) Before permanent delegates begin to perform their functions in the National Council of Provinces, they must swear or affirm faithfulness to the Republic and obedience to the Constitution, in accordance with Schedule 2.

63 Sittings of National Council

(1) The National Council of Provinces may determine the time and duration of its sittings and its recess periods.

(2) The President may summon the National Council of Provinces to an extraordinary sitting at any time to conduct special business.

(3) Sittings of the National Council of Provinces are permitted at places other than the seat of Parliament only on the grounds of public interest, security or convenience, and if provided for in the rules and orders of the Council.

64 Chairperson and Deputy Chairpersons

(1) The National Council of Provinces must elect a Chairperson and two Deputy Chairpersons from among the delegates.

(2) The Chairperson and one of the Deputy Chairpersons are elected from among the permanent delegates for five years unless their terms as delegates expire earlier.

(3) The other Deputy Chairperson is elected for a term of one year, and must be succeeded by a delegate from another province, so that every province is represented in turn.

(4) The Chief Justice must preside over the election of the Chairperson, or designate another judge to do so. The Chairperson presides over the election of the Deputy Chairpersons.
(5) The procedure set out in Part A of Schedule 3 applies to the election of the Chairperson and the Deputy Chairpersons.

(6) The National Council of Provinces may remove the Chairperson or a Deputy Chairperson from office.

(7) In terms of its rules and orders, the National Council of Provinces may elect from among the delegates other presiding officers to assist the Chairperson and Deputy Chairpersons.

65 Decisions

(1) Except where the Constitution provides otherwise—
   (a) each province has one vote, which is cast on behalf of the province by the head of its delegation; and
   (b) all questions before the National Council of Provinces are agreed when at least five provinces vote in favour of the question.

(2) An Act of Parliament, enacted in accordance with the procedure established by either subsection (1) or subsection (2) of section 76, must provide for a uniform procedure in terms of which provincial legislatures confer authority on their delegations to cast votes on their behalf.

66 Participation by members of National executive

(1) Cabinet members and Deputy Ministers may attend, and may speak in, the National Council of Provinces, but may not vote.

(2) The National Council of Provinces may require a Cabinet member, a Deputy Minister or an official in the national executive or a provincial executive to attend a meeting of the Council or a committee of the Council.

67 Participation by local government representatives

Not more than ten part-time representatives designated by organised local government in terms of section 163, to represent the different categories of municipalities, may participate when necessary in the proceedings of the National Council of Provinces, but may not vote.

68 Powers of National Council

In exercising its legislative power, the National Council of Provinces may—
   (a) consider, pass, amend, propose amendments to or reject any legislation before the Council, in accordance with this Chapter; and
   (b) initiate or prepare legislation falling within a functional area listed in Schedule 4 or other legislation referred to in section 76 (3), but may not initiate or prepare money Bills.

69 Evidence or information before National Council

The National Council of Provinces or any of its committees may—
   (a) summon any person to appear before it to give evidence on oath or affirmation or to produce documents;
   (b) require any institution or person to report to it;
   (c) compel, in terms of national legislation or the rules and orders, any person or institution to comply with a summons or requirement in terms of paragraph (a) or (b); and
   (d) receive petitions, representations or submissions from any interested persons or institutions.

70 Internal arrangements, proceedings and procedures of National Council

(1) The National Council of Provinces may—
   (a) determine and control its internal arrangements, proceedings and procedures; and
   (b) make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement.

(2) The rules and orders of the National Council of Provinces must provide for—
   (a) the establishment, composition, powers, functions, procedures and duration of its committees;
   (b) the participation of all the provinces in its proceedings in a manner consistent with democracy; and
   (c) the participation in the proceedings of the Council and its committees of minority parties represented in the Council, in a manner consistent with democracy, whenever a matter is to be decided in accordance with section 75.

71 Privilege

(1) Delegates to the National Council of Provinces and the persons referred to in sections 66 and 67
(a) have freedom of speech in the Council and in its committees, subject to its rules and orders; and
(b) are not liable to civil or criminal proceedings, arrest, imprisonment or damages for—
   (i) anything that they have said in, produced before or submitted to the Council or any of its commit-
   tees; or
   (ii) anything revealed as a result of anything that they have said in, produced before or submitted to
   the Council or any of its committees.

(2) Other privileges and immunities of the National Council of Provinces, delegates to the Council and
persons referred to in sections 66 and 67 may be prescribed by national legislation.

(3) Salaries, allowances and benefits payable to permanent members of the National Council of Provinces
are a direct charge against the National Revenue Fund.

**72 Public access to and involvement in National Council**

(1) The National Council of Provinces must—
   (a) facilitate public involvement in the legislative and other processes of the Council and its committees;
   and
   (b) conduct its business in an open manner, and hold its sittings, and those of its committees, in public,
      but reasonable measures may be taken—
      (i) to regulate public access, including access of the media, to the Council and its committees; and
      (ii) to provide for the searching of any person and, where appropriate, the refusal of entry to, or the
      removal of, any person.

(2) The National Council of Provinces may not exclude the public, including the media, from a sitting of a
committee unless it is reasonable and justifiable to do so in an open and democratic society.

**National Legislative Process (ss 73–82)**

**73 All Bills**

(1) Any Bill may be introduced in the National Assembly.

(2) Only a Cabinet member or a Deputy Minister, or a member or committee of the National Assembly, may
introduce a Bill in the Assembly, but only the Cabinet member responsible for national financial matters
may introduce the following Bills in the Assembly—
   (a) a money Bill; or
   (b) a Bill which provides for legislation envisaged in section 214.

(3) A Bill referred to in section 76 (3), except a Bill referred to in subsection (2) (a) or (b) of this section, may
be introduced in the National Council of Provinces.

(4) Only a member or committee of the National Council of Provinces may introduce a Bill in the Council.

(5) A Bill passed by the National Assembly must be referred to the National Council of Provinces if it must
be considered by the Council. A Bill passed by the Council must be referred to the Assembly.

**74 Bills amending the Constitution**

(1) Section 1 and this subsection may be amended by a Bill passed by—
   (a) the National Assembly, with a supporting vote of at least 75 per cent of its members; and
   (b) the National Council of Provinces, with a supporting vote of at least six provinces.

(2) Chapter 2 may be amended by a Bill passed by—
   (a) the National Assembly, with a supporting vote of at least two thirds of its members; and (b) the Na-
   tional Council of Provinces, with a supporting vote of at least six provinces.

(3) Any other provision of the Constitution may be amended by a Bill passed—
   (a) by the National Assembly, with a supporting vote of at least two thirds of its members; and
   (b) also by the National Council of Provinces, with a supporting vote of at least six provinces, if the
   amendment—
      (i) relates to a matter that affects the Council;
      (ii) alters provincial boundaries, powers, functions or institutions; or
      (iii) amends a provision that deals specifically with a provincial matter.
(4) A Bill amending the Constitution may not include provisions other than constitutional amendments and matters connected with the amendments.

(5) At least 30 days before a Bill amending the Constitution is introduced in terms of section 73 (2), the person or committee intending to introduce the Bill must—

(a) publish in the national Government Gazette, and in accordance with the rules and orders of the National Assembly, particulars of the proposed amendment for public comment;

(b) submit, in accordance with the rules and orders of the Assembly, those particulars to the provincial legislatures for their views; and

(c) submit, in accordance with the rules and orders of the National Council of Provinces, those particulars to the Council for a public debate, if the proposed amendment is not an amendment that is required to be passed by the Council.

(6) When a Bill amending the Constitution is introduced, the person or committee introducing the Bill must submit any written comments received from the public and the provincial legislatures—

(a) to the Speaker for tabling in the National Assembly; and

(b) in respect of amendments referred to in subsection (1), (2) or (3), to the Chairperson of the National Council of Provinces for tabling in the Council.

(7) A Bill amending the Constitution may not be put to the vote in the National Assembly within 30 days of—

(a) its introduction, if the Assembly is sitting when the Bill is introduced; or

(b) its tabling in the Assembly, if the Assembly is in recess when the Bill is introduced.

(8) If a Bill referred to in subsection (3), or any part of the Bill, concerns only a specific province or provinces, the National Council of Provinces may not pass the Bill or the relevant part unless it has been approved by the legislature or legislatures of the province or provinces concerned.

(9) A Bill amending the Constitution that has been passed by the National Assembly and, where applicable, by the National Council of Provinces, must be referred to the President for assent.

75 Ordinary Bills not affecting provinces

(1) When the National Assembly passes a Bill other than a Bill to which the procedure set out in section 74 or 76 applies, the Bill must be referred to the National Council of Provinces and dealt with in accordance with the following procedure—

(a) The Council must—

(i) pass the Bill;

(ii) pass the Bill subject to amendments proposed by it; or

(iii) reject the Bill.

(b) If the Council passes the Bill without proposing amendments, the Bill must be submitted to the President for assent.

(c) If the Council rejects the Bill or passes it subject to amendments, the Assembly must reconsider the Bill, taking into account any amendment proposed by the Council, and may—

(i) pass the Bill again, either with or without amendments; or

(ii) decide not to proceed with the Bill.

(d) A Bill passed by the Assembly in terms of paragraph (c) must be submitted to the President for assent.

(2) When the National Council of Provinces votes on a question in terms of this section, section 65 does not apply; instead—

(a) each delegate in a provincial delegation has one vote;

(b) at least one third of the delegates must be present before a vote may be taken on the question; and

(c) the question is decided by a majority of the votes cast, but if there is an equal number of votes on each side of the question, the delegate presiding must cast a deciding vote.

76 Ordinary Bills affecting provinces

(1) When the National Assembly passes a Bill referred to in subsection (3), (4) or (5), the Bill must be referred to the National Council of Provinces and dealt with in accordance with the following procedure—

(a) The Council must—
(i) pass the Bill;
(ii) pass an amended Bill; or
(iii) reject the Bill.

(b) If the Council passes the Bill without amendment, the Bill must be submitted to the President for assent.

(c) If the Council passes an amended Bill, the amended Bill must be referred to the Assembly, and if the Assembly passes the amended Bill, it must be submitted to the President for assent.

(d) If the Council rejects the Bill, or if the Assembly refuses to pass an amended Bill referred to it in terms of paragraph (c), the Bill and, where applicable, also the amended Bill, must be referred to the Mediation Committee, which may agree on—
   (i) the Bill as passed by the Assembly;
   (ii) the amended Bill as passed by the Council; or
   (iii) another version of the Bill.

(e) If the Mediation Committee is unable to agree within 30 days of the Bill’s referral to it, the Bill lapses unless the Assembly again passes the Bill, but with a supporting vote of at least two thirds of its members.

(f) If the Mediation Committee agrees on the Bill as passed by the Assembly, the Bill must be referred to the Council, and if the Council passes the Bill, the Bill must be submitted to the President for assent.

(g) If the Mediation Committee agrees on the amended Bill as passed by the Council, the Bill must be referred to the Assembly, and if it is passed by the Assembly, it must be submitted to the President for assent.

(h) If the Mediation Committee agrees on another version of the Bill, that version of the Bill must be referred to both the Assembly and the Council, and if it is passed by the Assembly and the Council, it must be submitted to the President for assent.

(i) If a Bill referred to the Council in terms of paragraph (f) or (h) is not passed by the Council, the Bill lapses unless the Assembly passes the Bill with a supporting vote of at least two thirds of its members.

(j) If a Bill referred to the Assembly in terms of paragraph (g) or (h) is not passed by the Assembly, that Bill lapses, but the Bill as originally passed by the Assembly may again be passed by the Assembly, but with a supporting vote of at least two thirds of its members.

(k) A Bill passed by the Assembly in terms of paragraph (e), (i) or (j) must be submitted to the President for assent.

(2) When the National Council of Provinces passes a Bill referred to in subsection (3), the Bill must be referred to the National Assembly and dealt with in accordance with the following procedure—

(a) The Assembly must—
   (i) pass the Bill;
   (ii) pass an amended Bill; or
   (iii) reject the Bill.

(b) A Bill passed by the Assembly in terms of paragraph (a) (i) must be submitted to the President for assent.

(c) If the Assembly passes an amended Bill, the amended Bill must be referred to the Council, and if the Council passes the amended Bill, it must be submitted to the President for assent.

(d) If the Assembly rejects the Bill, or if the Council refuses to pass an amended Bill referred to it in terms of paragraph (c), the Bill and, where applicable, also the amended Bill must be referred to the Mediation Committee, which may agree on—
   (i) the Bill as passed by the Council;
   (ii) the amended Bill as passed by the Assembly; or
   (iii) another version of the Bill.

(e) If the Mediation Committee is unable to agree within 30 days of the Bill’s referral to it, the Bill lapses.

(f) If the Mediation Committee agrees on the Bill as passed by the Council, the Bill must be referred to the Assembly, and if the Assembly passes the Bill, the Bill must be submitted to the President for assent.
(g) If the Mediation Committee agrees on the amended Bill as passed by the Assembly, the Bill must be referred to the Council, and if it is passed by the Council, it must be submitted to the President for assent.

(h) If the Mediation Committee agrees on another version of the Bill, that version of the Bill must be referred to both the Council and the Assembly, and if it is passed by the Council and the Assembly, it must be submitted to the President for assent.

(i) If a Bill referred to the Assembly in terms of paragraph (f) or (h) is not passed by the Assembly, the Bill lapses.

(3) A Bill must be dealt with in accordance with the procedure established by either subsection (1) or subsection (2) if it falls within a functional area listed in Schedule 4 or provides for legislation envisaged in any of the following sections—

(a) Section 65 (2);
(b) section 163;
(c) section 182;
(d) section 195 (3) and (4);
(e) section 196; and
(f) section 197.

(4) A Bill must be dealt with in accordance with the procedure established by subsection (1) if it provides for legislation—

(a) envisaged in section 44 (2) or 220 (3); or
(b) envisaged in Chapter 13, and which includes any provision affecting the financial interests of the provincial sphere of government.

(5) A Bill envisaged in section 42 (6) must be dealt with in accordance with the procedure established by subsection (1), except that—

(a) when the National Assembly votes on the Bill, the provisions of section 53 (1) do not apply; instead, the Bill may be passed only if a majority of the members of the Assembly vote in favour of it; and

(b) if the Bill is referred to the Mediation Committee, the following rules apply—

(i) If the National Assembly considers a Bill envisaged in subsection (1) (g) or (h), that Bill may be passed only if a majority of the members of the Assembly vote in favour of it.

(ii) If the National Assembly considers or reconsiders a Bill envisaged in subsection (1) (e), (i) or (j), that Bill may be passed only if at least two thirds of the members of the Assembly vote in favour of it.

(6) This section does not apply to money Bills.

77 Money Bills

(1) A Bill is a money Bill if it—

(a) appropriates money;
(b) imposes national taxes, levies, duties or surcharges;
(c) abolishes or reduces, or grants exemptions from, any national taxes, levies, duties or surcharges; or
(d) authorises direct charges against the National Revenue Fund, except a Bill envisaged in section 214 authorising direct charges.

(2) A money Bill may not deal with any other matter except—

(a) a subordinate matter incidental to the appropriation of money;
(b) the imposition, abolition or reduction of national taxes, levies, duties or surcharges;
(c) the granting of exemption from national taxes, levies, duties or surcharges; or
(d) the authorisation of direct charges against the National Revenue Fund.

(3) All money Bills must be considered in accordance with the procedure established by section 75. An Act of Parliament must provide for a procedure to amend money Bills before Parliament.

78 Mediation Committee

(1) The Mediation Committee consists of—
九名成员由全国代表大会选举产生，依据规则和程序，确保各政党在代表大会中所占比例与他们在代表大会中所占比例基本一致；且

（b）一位代表，来自各省代表团的代表，由代表团指定。

（2）调停委员会已同意一个版本的法案，或决定问题时，该版本或问题的一方支持——

（a）至少五名代表，出席全国代表大会；且

（b）至少五名代表，出席全国省会。

79 反对法案

（1）总统必须签署已通过本章规定的法案，或者如果总统对法案的合宪性有保留意见，则将其退回给全国代表大会重新审议。

（2）共同规则和程序应规定全国代表大会重新审议法案的程序和全国省会的参与。

（3）全国省会必须参与总统已退回的重新审议法案，如果——

（a）总统对法案的合宪性保留意见涉及理事会的事务；或

（b）第74条（1）、（2）或（3）（b）或76条适用在通过该法案。

（4）如果在重新审议后，完全满足了总统的保留意见，总统必须签署法案；如果未满足，总统则必须——

（a）签署并签署法案；或

（b）将其提交至宪法法院，决定其合宪性。

（5）如果宪法法院决定该法案合宪，总统必须签署。

80 申请全国代表大会向宪法法院申请

（1）全国代表大会的议员，可以向宪法法院申请，宣告所有或部分法案违宪。

（2）该申请应——

（a）至少由全国代表大会三分之一的议员支持；

（b）自总统签署法案之日起30天内提出。

（3）宪法法院可以命令所有或部分法案，如果是依据第1条的申请，该法案在法院作出决定前没有效力，如果——

（a）出于司法公正的考虑；

（b）该申请有合理的成功希望。

（4）如果申请未成功，且未有合理的成功希望，宪法法院可命令申请人支付费用。

81 发布法案

经过签署的一部法案，成为一部法案，必须立即公布，且在公布时或在公布日期后生效。

82 安全保管法案

签署的法案是法案条款的最终证据，其后，必须交给宪法法院安全保管。

第5章

总统和国家执行（ss 83-102）

83 总统

总统——

（a）是国家元首和国家执行的首脑；

（b）必须维护、捍卫和尊重宪法作为共和国的最高法律；
promotes the unity of the nation and that which will advance the Republic.

84 Powers and functions of President

(1) The President has the powers entrusted by the Constitution and legislation, including those necessary to perform the functions of Head of State and head of the national executive.

(2) The President is responsible for—
   (a) assenting to and signing Bills;
   (b) referring a Bill back to the National Assembly for reconsideration of the Bill’s constitutionality;
   (c) referring a Bill to the Constitutional Court for a decision on the Bill’s constitutionality;
   (d) summoning the National Assembly, the National Council of Provinces or Parliament to an extraordinary sitting to conduct special business;
   (e) making any appointments that the Constitution or legislation requires the President to make, other than as head of the national executive;
   (f) appointing commissions of inquiry;
   (g) calling a national referendum in terms of an Act of Parliament;
   (h) receiving and recognising foreign diplomatic and consular representatives;
   (i) appointing ambassadors, plenipotentiaries, and diplomatic and consular representatives;
   (j) pardoning or reprieving offenders and remitting any fines, penalties or forfeitures; and
   (k) conferring honours.

85 Executive authority of the Republic

(1) The executive authority of the Republic is vested in the President.

(2) The President exercises the executive authority, together with the other members of the Cabinet, by—
   (a) implementing national legislation except where the Constitution or an Act of Parliament provides otherwise;
   (b) developing and implementing national policy;
   (c) co-ordinating the functions of state departments and administrations;
   (d) preparing and initiating legislation; and
   (e) performing any other executive function provided for in the Constitution or in national legislation.

86 Election of President

(1) At its first sitting after its election, and whenever necessary to fill a vacancy, the National Assembly must elect a woman or a man from among its members to be the President.

(2) The Chief Justice must preside over the election of the President, or designate another judge to do so. The procedure set out in Part A of Schedule 3 applies to the election of the President.

(3) An election to fill a vacancy in the office of President must be held at a time and on a date determined by the Chief Justice, but not more than 30 days after the vacancy occurs.

87 Assumption of office by President

When elected President, a person ceases to be a member of the National Assembly and, within five days, must assume office by swearing or affirming faithfulness to the Republic and obedience to the Constitution, in accordance with Schedule 2.

88 Term of office of President

(1) The President’s term of office begins on assuming office and ends upon a vacancy occurring or when the person next elected President assumes office.

(2) No person may hold office as President for more than two terms, but when a person is elected to fill a vacancy in the office of President, the period between that election and the next election of a President is not regarded as a term.

89 Removal of President

(1) The National Assembly, by a resolution adopted with a supporting vote of at least two thirds of its members, may remove the President from office only on the—
   (a) a serious violation of the Constitution or the law;
   (b) serious misconduct; or
(c) inability to perform the functions of office.

(2) Anyone who has been removed from the office of President in terms of subsection (1) (a) or (b) may not receive any benefits of that office, and may not serve in any public office.

90 Acting President

(1) When the President is absent from the Republic or otherwise unable to fulfil the duties of President, or during a vacancy in the office of President, an office-bearer in the order below acts as President—
   (a) The Deputy President.
   (b) A Minister designated by the President.
   (c) A Minister designated by the other members of the Cabinet.
   (d) The Speaker, until the National Assembly designates one of its other members.

(2) An Acting President has the responsibilities, powers and functions of the President.

(3) Before assuming the responsibilities, powers and functions of the President, the Acting President must swear or affirm faithfulness to the Republic and obedience to the Constitution, in accordance with Schedule 2.

(4) A person who as Acting President has sworn or affirmed faithfulness to the Republic need not repeat the swearing or affirming procedure for any subsequent term as acting President during the period ending when the person next elected President assumes office.

91 Cabinet

(1) The Cabinet consists of the President, as head of the Cabinet, a Deputy President and Ministers.

(2) The President appoints the Deputy President and Ministers, assigns their powers and functions, and may dismiss them.

(3) The President—
   (a) must select the Deputy President from among the members of the National Assembly;
   (b) may select any number of Ministers from among the members of the National Assembly; and
   (c) may select no more than two Ministers from outside the Assembly.

(4) The President must appoint a member of the Cabinet to be the leader of government business in the National Assembly.

(5) The Deputy President must assist the President in the execution of the functions of government.

92 Accountability and responsibilities

(1) The Deputy President and Ministers are responsible for the powers and functions of the executive assigned to them by the President.

(2) Members of the Cabinet are accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions.

(3) Members of the Cabinet must—
   (a) act in accordance with the Constitution; and
   (b) provide Parliament with full and regular reports concerning matters under their control.

93 Deputy Ministers

(1) The President may appoint—
   (a) any number of Deputy Ministers from among the members of the National Assembly; and
   (b) no more than two Deputy Ministers from outside the Assembly, to assist the members of the Cabinet, and may dismiss them.

(2) Deputy Ministers appointed in terms of subsection (1) (b) are accountable to Parliament for the exercise of their powers and the performance of their functions.

94 Continuation of Cabinet offer elections

When an election of the National Assembly is held, the Cabinet, the Deputy President, Ministers and any Deputy Ministers remain competent to function until the person elected President by the next Assembly assumes office.
95 Oath or affirmation
Before the Deputy President, Ministers and any Deputy Ministers begin to perform their functions, they must swear or affirm faithfulness to the Republic and obedience to the Constitution, in accordance with Schedule 2.

96 Conduct of Cabinet members and Deputy Ministers
(1) Members of the Cabinet and Deputy Ministers must act in accordance with a code of ethics prescribed by national legislation.

(2) Members of the Cabinet and Deputy Ministers may not—
(a) undertake any other paid work;
(b) act in any way that is inconsistent with their office, or expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests; or
(c) use their position or any information entrusted to them, to enrich themselves or improperly benefit any other person.

97 Transfer of functions
The President by proclamation may transfer to a member of the Cabinet—
(a) the administration of any legislation entrusted to another member; or
(b) any power or function entrusted by legislation to another member.

98 Temporary assignment of functions
The President may assign to a Cabinet member any power or function of another member who is absent from office or is unable to exercise that power or perform that function.

99 Assignment of functions
A Cabinet member may assign any power or function that is to be exercised or performed in terms of an Act of Parliament to a member of a provincial Executive Council or to a Municipal Council. An assignment—
(a) must be in terms of an agreement between the relevant Cabinet member and the Executive Council member or Municipal Council;
(b) must be consistent with the Act of Parliament in terms of which the relevant power or function is exercised or performed; and
(c) takes effect upon proclamation by the President.

100 National intervention in provincial administration
(1) When a province cannot or does not fulfil an executive obligation in terms of the Constitution or legislation, the national executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation, including—
(a) issuing a directive to the provincial executive, describing the extent of the failure to fulfil its obligations and stating any steps required to meet its obligations; and
(b) assuming responsibility for the relevant obligation in that province to the extent necessary to—
(i) maintain essential national standards or meet established minimum standards for the rendering of a service;
(ii) maintain economic unity;
(iii) maintain national security; or
(iv) prevent that province from taking unreasonable action that is prejudicial to the interests of another province or to the country as a whole.

(2) If the national executive intervenes in a province in terms of subsection (1) (b)
(a) it must submit a written notice of the intervention to the National Council of Provinces within 14 days after the intervention began;
(b) the intervention must end if the Council disapproves the intervention within 180 days after the intervention began or by the end of that period has not approved the intervention; and
(c) the Council must, while the intervention continues, review the intervention regularly and may make any appropriate recommendations to the national executive.

(3) National legislation may regulate the process established by this section.
101 Executive decisions

(1) A decision by the President must be in writing if it—
   (a) is taken in terms of legislation; or
   (b) has legal consequences.

(2) A written decision by the President must be countersigned by another Cabinet member if that decision concerns a function assigned to that other Cabinet member.

(3) Proclamations, regulations and other instruments of subordinate legislation must be accessible to the public.

(4) National legislation may specify the manner in which, and the extent to which, instruments mentioned in subsection (3) must be—
   (a) tabled in Parliament; and
   (b) approved by Parliament.

102 Motions of no confidence

(1) If the National Assembly, by a vote supported by a majority of its members, passes a motion of no confidence in the Cabinet excluding the President, the President must reconstitute the Cabinet.

(2) If the National Assembly, by a vote supported by a majority of its members, passes a motion of no confidence in the President, the President and the other members of the Cabinet and any Deputy Ministers must resign.

CHAPTER 6

PROVINCES (ss 103–150)

103 Provinces

(1) The Republic has the following provinces—
   (a) Eastern Cape;
   (b) Free State;
   (c) Gauteng;
   (d) KwaZulu-Natal;
   (e) Limpopo;
   (f) Mpumalanga;
   (g) Northern Cape;
   (h) North West;
   (i) Western Cape.

(2) The geographical areas of the respective provinces comprise the sum of the indicated geographical areas reflected in the various maps referred to in the Notice listed in Schedule 1A.

(3) (a) Whenever the geographical area of a province is re-determined by an amendment to the Constitution, an Act of Parliament may provide for measures to regulate, within a reasonable time, the legal, practical and any other consequences of the re-determination.

   (b) An Act of Parliament envisaged in paragraph (a) may be enacted and implemented before such amendment to the Constitution takes effect, but any provincial functions, assets, rights, obligations, duties or liabilities may only be transferred in terms of that Act after that amendment to the Constitution takes effect.

Provincial Legislatures (ss 104–124)

104 Legislative authority of provinces

(1) The legislative authority of a province is vested in its provincial legislature, and confers on the provincial legislature the power—
   (a) to pass a constitution for its province or to amend any constitution passed by it in terms of sections 142 and 143;
   (b) to pass legislation for its province with regard to—
      (i) any matter within a functional area listed in Schedule 4;
      (ii) any matter within a functional area listed in Schedule 5;
(iii) any matter outside those functional areas, and that is expressly assigned to the province by national legislation; and
(iv) any matter for which a provision of the Constitution envisages the enactment of provincial legislation; and

(c) to assign any of its legislative powers to a Municipal Council in that province.

(2) The legislature of a province, by a resolution adopted with a supporting vote of at least two thirds of its members, may request Parliament to change the name of that province.

(3) A provincial legislature is bound only by the Constitution and, if it has passed a constitution for its province, also by that constitution, and must act in accordance with, and within the limits of, the Constitution and that provincial constitution.

(4) Provincial legislation with regard to a matter that is reasonably necessary for, or incidental to, the effective exercise of a power concerning any matter listed in Schedule 4, is for all purposes legislation with regard to a matter listed in Schedule 4.

(5) A provincial legislature may recommend to the National Assembly legislation concerning any matter outside the authority of that legislature, or in respect of which an Act of Parliament prevails over a provincial law.

105 Composition and election of provincial legislatures

(1) A provincial legislature consists of women and men elected as members in terms of an electoral system that—
(a) is prescribed by national legislation;
(b) is based on that province’s segment of the national common voters roll;
(c) provides for a minimum voting age of 18 years; and
(d) results, in general, in proportional representation.

(2) A provincial legislature consists of between 30 and 80 members. The number of members, which may differ among the provinces, must be determined in terms of a formula prescribed by national legislation.

106 Membership

(1) Every citizen who is qualified to vote for the National Assembly is eligible to be a member of a provincial legislature, except—
(a) anyone who is appointed by, or is in the service of, the state and receives remuneration for that appointment or service, other than—
(i) the Premier and other members of the Executive Council of a province; and
(ii) other office-bearers whose functions are compatible with the functions of a member of a provincial legislature, and have been declared compatible with those functions by national legislation;
(b) members of the National Assembly, permanent delegates to the National Council of Provinces or members of a Municipal Council;
(c) unrehabilitated insolvents;
(d) anyone declared to be of unsound mind by a court of the Republic; or
(e) anyone who, after this section took effect, is convicted of an offence and sentenced to more than 12 months’ imprisonment without the option of a fine, either in the Republic, or outside the Republic if the conduct constituting the offence would have been an offence in the Republic, but no one may be regarded as having been sentenced until an appeal against the conviction or sentence has been determined, or until the time for an appeal has expired. A disqualification under this paragraph ends five years after the sentence has been completed.

(2) A person who is not eligible to be a member of a provincial legislature in terms of subsection (1) (a) or (b) may be a candidate for the legislature, subject to any limits or conditions established by national legislation.

(3) A person loses membership of a provincial legislature if that person—
(a) ceases to be eligible;
(b) is absent from the legislature without permission in circumstances for which the rules and orders of the legislature prescribe loss of membership; or.
(c) ceases to be a member of the party that nominated that person as a member of the legislature.
(4) Vacancies in a provincial legislature must be filled in terms of national legislation.

107 Oath or affirmation
Before members of a provincial legislature begin to perform their functions in the legislature, they must swear or affirm faithfulness to the Republic and obedience to the Constitution, in accordance with Schedule 2.

108 Duration of provincial legislatures
(1) A provincial legislature is elected for a term of five years.
(2) If a provincial legislature is dissolved in terms of section 109, or when its term expires, the Premier of the province, by proclamation, must call and set dates for an election, which must be held within 90 days of the date the legislature was dissolved or its term expired. A proclamation calling and setting dates for an election may be issued before or after the expiry of the term of a provincial legislature.
(3) If the result of an election of a provincial legislature is not declared within the period referred to in section 190, or if an election is set aside by a court, the President, by proclamation, must call and set dates for another election, which must be held within 90 days of the expiry of that period or of the date on which the election was set aside.
(4) A provincial legislature remains competent to function from the time it is dissolved or its term expires, until the day before the first day of polling for the next legislature.

109 Dissolution of provincial legislatures before expiry of term
(1) The Premier of a province must dissolve the provincial legislature if—
   (a) the legislature has adopted a resolution to dissolve with a supporting vote of a majority of its members; and
   (b) three years have passed since the legislature was elected.
(2) An Acting Premier must dissolve the provincial legislature if—
   (a) there is a vacancy in the office of Premier; and
   (b) the legislature fails to elect a new Premier within 30 days after the vacancy occurred.

110 Sittings and recess periods
(1) After an election, the first sitting of a provincial legislature must take place at a time and on a date determined by a judge designated by the Chief Justice, but not more than 14 days after the election result has been declared. A provincial legislature may determine the time and duration of its other sittings and its recess periods.
(2) The Premier of a province may summon the provincial legislature to an extraordinary sitting at any time to conduct special business.
(3) A provincial legislature may determine where it ordinarily will sit.

111 Speakers and Deputy Speakers
(1) At the first sitting after its election, or when necessary to fill a vacancy, a provincial legislature must elect a Speaker and a Deputy Speaker from among its members.
(2) A judge designated by the Chief Justice must preside over the election of a Speaker. The Speaker presides over the election of a Deputy Speaker.
(3) The procedure set out in Part A of Schedule 3 applies to the election of Speakers and Deputy Speakers.
(4) A provincial legislature may remove its Speaker or Deputy Speaker from office by resolution. A majority of the members of the legislature must be present when the resolution is adopted.
(5) In terms of its rules and orders, a provincial legislature may elect from among its members other presiding officers to assist the Speaker and the Deputy Speaker.

112 Decisions
(1) Except where the Constitution provides otherwise—
   (a) a majority of the members of a provincial legislature must be present before a vote may be taken on a Bill or an amendment to a Bill;
   (b) at least one third of the members must be present before a vote may be taken on any other question before the legislature; and
   (c) all questions before a provincial legislature are decided by a majority of the votes cast.
(2) The member presiding at a meeting of a provincial legislature has no deliberative vote, but—
   (a) must cast a deciding vote when there is an equal number of votes on each side of a question; and
   (b) may cast a deliberative vote when a question must be decided with a supporting vote of at least two
   thirds of the members of the legislature.

113 Permanent delegates’ rights in provincial legislatures

A province’s permanent delegates to the National Council of Provinces may attend, and may speak in, their
provincial legislature and its committees, but may not vote. The legislature may require a permanent dele-
gate to attend the legislature or its committees.

114 Powers of provincial legislatures

(1) In exercising its legislative power, a provincial legislature may—
   (a) consider, pass, amend or reject any Bill before the legislature; and
   (b) initiate or prepare legislation, except money Bills.

(2) A provincial legislature must provide for mechanisms—
   (a) to ensure that all provincial executive organs of state in the province are accountable to it; and
   (b) to maintain oversight of—
      (i) the exercise of provincial executive authority in the province, including the implementation of leg-
          islation; and
      (ii) any provincial organ of state.

115 Evidence or information before provincial legislatures

A provincial legislature or any of its committees may—
   (a) summon any person to appear before it to give evidence on oath or affirmation, or to produce docu-
       ments;
   (b) require any person or provincial institution to report to it;
   (c) compel, in terms of provincial legislation or the rules and orders, any person or institution to comply
       with a summons or requirement in terms of paragraph (a)or (b); and
   (d) receive petitions, representations or submissions from any interested persons or institutions.

116 Internal arrangements, proceedings and procedures of provincial legislatures

(1) A provincial legislature may—
   (a) determine and control its internal arrangements, proceedings and procedures; and
   (b) make rules and orders concerning its business, with due regard to representative and participatory
democracy, accountability, transparency and public involvement.

(2) The rules and orders of a provincial legislature must provide for—
   (a) the establishment, composition, powers, functions, procedures and duration of its committees;
   (b) the participation in the proceedings of the legislature and its committees of minority parties repre-
       sented in the legislature, in a manner consistent with democracy;
   (c) financial and administrative assistance to each party represented in the legislature, in proportion to
       its representation, to enable the party and its leader to perform their functions in the legislature effect-
       tively; and
   (d) the recognition of the leader of the largest opposition party in the legislature, as the Leader of the
       Opposition.

117 Privilege

(1) Members of a provincial legislature and the province’s permanent delegates to the National Council of
Provinces—
   (a) have freedom of speech in the legislature and in its committees, subject to its rules and orders; and
   (b) are not liable to civil or criminal proceedings, arrest, imprisonment or damages for—
      (i) anything that they have said in, produced before or submitted to the legislature or any of its com-
          mittees; or
      (ii) anything revealed as a result of anything that they have said in, produced before or submitted to
          the legislature or any of its committees.
(2) Other privileges and immunities of a provincial legislature and its members may be prescribed by national legislation.

(3) Salaries, allowances and benefits payable to members of a provincial legislature are a direct charge against the Provincial Revenue Fund.

118 Public access to and involvement in provincial legislatures

(1) A provincial legislature must—

(a) facilitate public involvement in the legislative and other processes of the legislature and its committees; and

(b) conduct its business in an open manner, and hold its sittings, and those of its committees, in public, but reasonable measures may be taken—

(i) to regulate public access, including access of the media, to the legislature and its committees; and

(ii) to provide for the searching of any person and, where appropriate, the refusal of entry to, or the removal of, any person.

(2) A provincial legislature may not exclude the public, including the media, from a sitting of a committee unless it is reasonable and justifiable to do so in an open and democratic society.

119 Introduction of Bills

Only members of the Executive Council of a province or a committee or member of a provincial legislature may introduce a Bill in the legislature; but only the member of the Executive Council who is responsible for financial matters in the province may introduce a money Bill in the legislature.

120 Money Bills

(1) A Bill is a money Bill if it—

(a) appropriates money;

(b) imposes provincial taxes, levies, duties or surcharges;

(c) abolishes or reduces, or grants exemptions from, any provincial taxes, levies, duties or surcharges; or

(d) authorises direct charges against a Provincial Revenue Fund.

(2) A money Bill may not deal with any other matter except—

(a) a subordinate matter incidental to the appropriation of money;

(b) the imposition, abolition or reduction of provincial taxes, levies, duties or surcharges;

(c) the granting of exemption from provincial taxes, levies, duties or surcharges; or

(d) the authorisation of direct charges against a Provincial Revenue Fund.

(3) A provincial Act must provide for a procedure by which the province’s legislature may amend a money Bill.

121 Assent to Bills

(1) The Premier of a province must either assent to and sign a Bill passed by the provincial legislature in terms of this Chapter or, if the Premier has reservations about the constitutionality of the Bill, refer it back to the legislature for reconsideration.

(2) If, after reconsideration, a Bill fully accommodates the Premier’s reservations, the Premier must assent to and sign the Bill; if not, the Premier must either—

(a) assent to and sign the Bill; or

(b) refer it to the Constitutional Court for a decision on its constitutionality.

(3) If the Constitutional Court decides that the Bill is constitutional, the Premier must assent to and sign it.

122 Application by members to Constitutional Court

(1) Members of a provincial legislature may apply to the Constitutional Court for an order declaring that all or part of a provincial Act is unconstitutional.

(2) An application—

(a) must be supported by at least 20 per cent of the members of the legislature; and

(b) must be made within 30 days of the date on which the Premier assented to and signed the Act.
(3) The Constitutional Court may order that all or part of an Act that is the subject of an application in terms of subsection (1) has no force until the Court has decided the application if—

(a) the interests of justice require this; and

(b) the application has a reasonable prospect of success.

(4) If an application is unsuccessful, and did not have a reasonable prospect of success, the Constitutional Court may order the applicants to pay costs.

123 Publication of provincial Acts
A Bill assented to and signed by the Premier of a province becomes a provincial Act, must be published promptly and takes effect when published or on a date determined in terms of the Act.

124 Safekeeping of provincial Acts
The signed copy of a provincial Act is conclusive evidence of the provisions of that Act and, after publication, must be entrusted to the Constitutional Court for safekeeping.

Provincial Executives (ss 125–141)

125 Executive authority of provinces
(1) The executive authority of a province is vested in the Premier of that province.

(2) The Premier exercises the executive authority, together with the other members of the Executive Council, by—

(a) implementing provincial legislation in the province;

(b) implementing all national legislation within the functional areas listed in Schedule 4 or 5 except where the Constitution or an Act of Parliament provides otherwise;

(c) administering in the province, national legislation outside the functional areas listed in Schedules 4 and 5, the administration of which has been assigned to the provincial executive in terms of an Act of Parliament;

(d) developing and implementing provincial policy;

(e) co-ordinating the functions of the provincial administration and its departments;

(f) preparing and initiating provincial legislation; and

(g) performing any other function assigned to the provincial executive in terms of the Constitution or an Act of Parliament.

(3) A province has executive authority in terms of subsection (2) (b) only to the extent that the province has the administrative capacity to assume effective responsibility. The national government, by legislative and other measures, must assist provinces to develop the administrative capacity required for the effective exercise of their powers and performance of their functions referred to in subsection (2).

(4) Any dispute concerning the administrative capacity of a province in regard to any function must be referred to the National Council of Provinces for resolution within 30 days of the date of the referral to the Council.

(5) Subject to section 100, the implementation of provincial legislation in a province is an exclusive provincial executive power.

(6) The provincial executive must act in accordance with—

(a) the Constitution; and

(b) the provincial constitution, if a constitution has been passed for the province.

126 Assignment of functions
A member of the Executive Council of a province may assign any power or function that is to be exercised or performed in terms of an Act of Parliament or a provincial Act, to a Municipal Council. An assignment—

(a) must be in terms of an agreement between the relevant Executive Council member and the Municipal Council;

(b) must be consistent with the Act in terms of which the relevant power or function is exercised or performed; and

(c) takes effect upon proclamation by the Premier.
127 Powers and functions of Premiers

(1) The Premier of a province has the powers and functions entrusted to that office by the Constitution and any legislation.

(2) The Premier of a province is responsible for—
   (a) assenting to and signing Bills;
   (b) referring a Bill back to the provincial legislature for reconsideration of the Bill’s constitutionality;
   (c) referring a Bill to the Constitutional Court for a decision on the Bill’s constitutionality;
   (d) summoning the legislature to an extraordinary sitting to conduct special business;
   (e) appointing commissions of inquiry; and
   (f) calling a referendum in the province in accordance with national legislation.

128 Election of Premiers

(1) At its first sitting after its election, and whenever necessary to fill a vacancy, a provincial legislature must elect a woman or a man from among its members to be the Premier of the province.

(2) A judge designated by the Chief Justice must preside over the election of the Premier. The procedure set out in Part A of Schedule 3 applies to the election of the Premier.

(3) An election to fill a vacancy in the office of Premier must be held at a time and on a date determined by the Chief Justice, but not later than 30 days after the vacancy occurs.

129 Assumption of office by Premiers

A Premier-elect must assume office within five days of being elected, by swearing or affirming faithfulness to the Republic and obedience to the Constitution, in accordance with Schedule 2.

130 Term of office and removal of Premiers

(1) A Premier’s term of office begins when the Premier assumes office and ends upon a vacancy occurring or when the person next elected Premier assumes office.

(2) No person may hold office as Premier for more than two terms, but when a person is elected to fill a vacancy in the office of Premier, the period between that election and the next election of a Premier is not regarded as a term.

(3) The legislature of a province, by a resolution adopted with a supporting vote of at least two thirds of its members, may remove the Premier from office only on the grounds of—
   (a) a serious violation of the Constitution or the law;
   (b) serious misconduct; or
   (c) inability to perform the functions of office.

(4) Anyone who has been removed from the office of Premier in terms of subsection (3) (a) or (b) may not receive any benefits of that office, and may not serve in any public office.

131 Acting Premiers

(1) When the Premier is absent or otherwise unable to fulfil the duties of the office of Premier, or during a vacancy in the office of Premier, an office-bearer in the order below acts as the Premier—
   (a) A member of the Executive Council designated by the Premier.
   (b) A member of the Executive Council designated by the other members of the Council.
   (c) The Speaker, until the legislature designates one of its other members.

(2) An Acting Premier has the responsibilities, powers and functions of the Premier.

(3) Before assuming the responsibilities, powers and functions of the Premier, the Acting Premier must swear or affirm faithfulness to the Republic and obedience to the Constitution, in accordance with Schedule 2.

132 Executive Councils

(1) The Executive Council of a province consists of the Premier, as head of the Council, and no fewer than five and no more than ten members appointed by the Premier from among the members of the provincial legislature.

(2) The Premier of a province appoints the members of the Executive Council, assigns their powers and functions, and may dismiss them.
133 Accountability and responsibilities

(1) The members of the Executive Council of a province are responsible for the functions of the executive assigned to them by the Premier.

(2) Members of the Executive Council of a province are accountable collectively and individually to the legislature for the exercise of their powers and the performance of their functions.

(3) Members of the Executive Council of a province must—

(a) act in accordance with the Constitution and, if a provincial constitution has been passed for the province, also that constitution; and

(b) provide the legislature with full and regular reports concerning matters under their control.

134 Continuation of Executive Councils after elections

When an election of a provincial legislature is held, the Executive Council and its members remain competent to function until the person elected Premier by the next legislature assumes office.

135 Oath or affirmation

Before members of the Executive Council of a province begin to perform their functions, they must swear or affirm faithfulness to the Republic and obedience to the Constitution, in accordance with Schedule 2.

136 Conduct of members of Executive Councils

(1) Members of the Executive Council of a province must act in accordance with a code of ethics prescribed by national legislation.

(2) Members of the Executive Council of a province may not—

(a) undertake any other paid work;

(b) act in any way that is inconsistent with their office, or expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests; or

(c) use their position or any information entrusted to them, to enrich themselves or improperly benefit any other person.

137 Transfer of functions

The Premier by proclamation may transfer to a member of the Executive Council—

(a) the administration of any legislation entrusted to another member; or

(b) any power or function entrusted by legislation to another member.

138 Temporary assignment of functions

The Premier of a province may assign to a member of the Executive Council any power or function of another member who is absent from office or is unable to exercise that power or perform that function.

139 Provincial intervention in local government

(1) When a municipality cannot or does not fulfill an executive obligation in terms of the Constitution or legislation, the relevant provincial executive may intervene by taking any appropriate steps to ensure fulfillment of that obligation, including—

(a) issuing a directive to the Municipal Council, describing the extent of the failure to fulfill its obligations and stating any steps required to meet its obligations;

(b) assuming responsibility for the relevant obligation in that municipality to the extent necessary to—

(i) maintain essential national standards or meet established minimum standards for the rendering of a service;

(ii) prevent that Municipal Council from taking unreasonable action that is prejudicial to the interests of another municipality or to the province as a whole; or

(iii) maintain economic unity; or

(c) dissolving the Municipal Council and appointing an administrator until a newly elected Municipal Council has been declared elected, if exceptional circumstances warrant such a step.

(2) If a provincial executive intervenes in a municipality in terms of subsection (1) (b)—

(a) it must submit a written notice of the intervention to—

(i) the Cabinet member responsible for local government affairs; and

(ii) the relevant provincial legislature and the National Council of Provinces,
within 14 days after the intervention began;

(b) the intervention must end if—

(i) the Cabinet member responsible for local government affairs disapproves the intervention within 28 days after the intervention began or by the end of that period has not approved the intervention; or

(ii) the Council disapproves the intervention within 180 days after the intervention began or by the end of that period has not approved the intervention; and

(c) the Council must, while the intervention continues, review the intervention regularly and may make any appropriate recommendations to the provincial executive.

(3) If a Municipal Council is dissolved in terms of subsection (1) (c)

(a) the provincial executive must immediately submit a written notice of the dissolution to—

(i) the Cabinet member responsible for local government affairs; and

(ii) the relevant provincial legislature and the National Council of Provinces; and

(b) the dissolution takes effect 14 days from the date of receipt of the notice by the Council unless set aside by that Cabinet member or the Council before the expiry of those 14 days.

(4) If a municipality cannot or does not fulfil an obligation in terms of the Constitution or legislation to approve a budget or any revenue-raising measures necessary to give effect to the budget, the relevant provincial executive must intervene by taking any appropriate steps to ensure that the budget or those revenue-raising measures are approved, including dissolving the Municipal Council and—

(a) appointing an administrator until a newly elected Municipal Council has been declared elected; and

(b) approving a temporary budget or revenue-raising measures to provide for the continued functioning of the municipality.

(5) If a municipality, as a result of a crisis in its financial affairs, is in serious or persistent material breach of its obligations to provide basic services or to meet its financial commitments, or admits that it is unable to meet its obligations or financial commitments, the relevant provincial executive must

(a) impose a recovery plan aimed at securing the municipality’s ability to meet its obligations to provide basic services or its financial commitments, which—

(i) is to be prepared in accordance with national legislation; and

(ii) binds the municipality in the exercise of its legislative and executive authority, but only to the extent necessary to solve the crisis in its financial affairs; and

(b) dissolve the Municipal Council, if the municipality cannot or does not approve legislative measures, including a budget or any revenue-raising measures, necessary to give effect to the recovery plan, and—

(i) appoint an administrator until a newly elected Municipal Council has been declared elected; and

(ii) approve a temporary budget or revenue-raising measures or any other measures giving effect to the recovery plan to provide for the continued functioning of the municipality; or

(c) if the Municipal Council is not dissolved in terms of paragraph (b), assume responsibility for the implementation of the recovery plan to the extent that the municipality cannot or does not otherwise implement the recovery plan.

(6) If a provincial executive intervenes in a municipality in terms of subsection (4) or (5), it must submit a written notice of the intervention to—

(a) the Cabinet member responsible for local government affairs; and

(b) the relevant provincial legislature and the National Council of Provinces, within seven days after the intervention began.

(7) If a provincial executive cannot or does not or does not adequately exercise the powers or perform the functions referred to in subsection (4) or (5), the national executive must intervene in terms of subsection (4) or (5) in the stead of the relevant provincial executive.

(8) National legislation may regulate the implementation of this section, including the processes established by this section.

140 Executive decisions

(1) A decision by the Premier of a province must be in writing if it—

(a) is taken in terms of legislation; or
(b) has legal consequences.

(2) A written decision by the Premier must be countersigned by another Executive Council member if that
decision concerns a function assigned to that other member.

(3) Proclamations, regulations and other instruments of subordinate legislation of a province must be ac-
cessible to the public.

(4) Provincial legislation may specify the manner in which, and the extent to which, instruments mentioned
in subsection (3) must be—
   (a) tabled in the provincial legislature; and
   (b) approved by the provincial legislature.

**141 Motions of no confidence**

(1) If a provincial legislature, by a vote supported by a majority of its members, passes a motion of no
confidence in the province’s Executive Council excluding the Premier, the Premier must reconstitute the
Council.

(2) If a provincial legislature, by a vote supported by a majority of its members, passes a motion of no
confidence in the Premier, the Premier and the other members of the Executive Council must resign.

_Provincial Constitutions (ss 142–145)_

**142 Adoption of provincial constitutions**

A provincial legislature may pass a constitution for the province or, where applicable, amend its constitution,
if at least two thirds of its members vote in favour of the Bill.

**143 Contents of provincial constitutions**

(1) A provincial constitution, or constitutional amendment, must not be inconsistent with this Constitution,
but may provide for—
   (a) provincial legislative or executive structures and procedures that differ from those provided for in this
   Chapter; or
   (b) the institution, role, authority and status of a traditional monarch, where applicable.

(2) Provisions included in a provincial constitution or constitutional amendment in terms of para-
graph (a) or (b) of subsection (1)—
   (a) must comply with the values in section 1 and with Chapter 3; and
   (b) may not confer on the province any power or function that falls—
      (i) outside the area of provincial competence in terms of Schedules 4 and 5; or
      (ii) outside the powers and functions conferred on the province by other sections of the Constitution.

**144 Certification of provincial constitutions**

(1) If a provincial legislature has passed or amended a constitution, the Speaker of the legislature must
submit the text of the constitution or constitutional amendment to the Constitutional Court for certification.

(2) No text of a provincial constitution or constitutional amendment becomes law until the Constitutional
Court has certified—
   (a) that the text has been passed in accordance with section 142; and
   (b) that the whole text complies with section 143.

**145 Signing, publication and safekeeping of provincial constitutions**

(1) The Premier of a province must assent to and sign the text of a provincial constitution or constitutional
amendment that has been certified by the Constitutional Court.

(2) The text assented to and signed by the Premier must be published in the national _Government Ga-
zette_ and takes effect on publication or on a later date determined in terms of that constitution or amend-
ment.

(3) The signed text of a provincial constitution or constitutional amendment is conclusive evidence of its
provisions and, after publication, must be entrusted to the Constitutional Court for safekeeping.

_Conflicting Laws (ss 146–150)_

**146 Conflicts between national and provincial legislation**

(1) This section applies to a conflict between national legislation and provincial legislation falling within a
functional area listed in Schedule 4.
National legislation that applies uniformly with regard to the country as a whole prevails over provincial legislation if any of the following conditions is met—

(a) The national legislation deals with a matter that cannot be regulated effectively by legislation enacted by the respective provinces individually.

(b) The national legislation deals with a matter that, to be dealt with effectively, requires uniformity across the nation, and the national legislation provides that uniformity by establishing—

(i) norms and standards;
(ii) frameworks; or
(iii) national policies.

(c) The national legislation is necessary for—

(i) the maintenance of national security;
(ii) the maintenance of economic unity;
(iii) the protection of the common market in respect of the mobility of goods, services, capital and labour;
(iv) the promotion of economic activities across provincial boundaries;
(v) the promotion of equal opportunity or equal access to government services; or
(vi) the protection of the environment.

National legislation prevails over provincial legislation if the national legislation is aimed at preventing unreasonable action by a province that—

(a) is prejudicial to the economic, health or security interests of another province or the country as a whole; or

(b) impedes the implementation of national economic policy.

(4) When there is a dispute concerning whether national legislation is necessary for a purpose set out in subsection (2) (c) and that dispute comes before a court for resolution, the court must have due regard to the approval or the rejection of the legislation by the National Council of Provinces.

(5) Provincial legislation prevails over national legislation if subsection (2) or (3) does not apply.

(6) A law made in terms of an Act of Parliament or a provincial Act can prevail only if that law has been approved by the National Council of Provinces.

(7) If the National Council of Provinces does not reach a decision within 30 days of its first sitting after a law was referred to it, that law must be considered for all purposes to have been approved by the Council.

(8) If the National Council of Provinces does not approve a law referred to in subsection (6), it must, within 30 days of its decision, forward reasons for not approving the law to the authority that referred the law to it.

### 147 Other conflicts

(1) If there is a conflict between national legislation and a provision of a provincial constitution with regard to—

(a) a matter concerning which this Constitution specifically requires or envisages the enactment of national legislation, the national legislation prevails over the affected provision of the provincial constitution;

(b) national legislative intervention in terms of section 44 (2), the national legislation prevails over the provision of the provincial constitution; or

(c) a matter within a functional area listed in Schedule 4, section 146 applies as if the affected provision of the provincial constitution were provincial legislation referred to in that section.

(2) National legislation referred to in section 44 (2) prevails over provincial legislation in respect of matters within the functional areas listed in Schedule 5.

### 148 Conflicts that cannot be resolved

If a dispute concerning a conflict cannot be resolved by a court, the national legislation prevails over the provincial legislation or provincial constitution.

### 149 Status of legislation that does not prevail

A decision by a court that legislation prevails over other legislation does not invalidate that other legislation, but that other legislation becomes inoperative for as long as the conflict remains.
150 Interpretation of conflicts
When considering an apparent conflict between national and provincial legislation, or between national legislation and a provincial constitution, every court must prefer any reasonable interpretation of the legislation or constitution that avoids a conflict, over any alternative interpretation that results in a conflict.

CHAPTER 7
LOCAL GOVERNMENT (ss 151–164)

151 Status of municipalities
(1) The local sphere of government consists of municipalities, which must be established for the whole of the territory of the Republic.
(2) The executive and legislative authority of a municipality is vested in its Municipal Council.
(3) A municipality has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution.
(4) The national or a provincial government may not compromise or impede a municipality’s ability or right to exercise its powers or perform its functions.

152 Objects of local government
(1) The objects of local government are—
   (a) to provide democratic and accountable government for local communities;
   (b) to ensure the provision of services to communities in a sustainable manner;
   (c) to promote social and economic development;
   (d) to promote a safe and healthy environment; and
   (e) to encourage the involvement of communities and community organisations in the matters of local government.
(2) A municipality must strive, within its financial and administrative capacity, to achieve the objects set out in subsection (1).

153 Developmental duties of municipalities
A municipality must—
   (a) structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community; and
   (b) participate in national and provincial development programmes.

154 Municipalities in co-operative government
(1) The national government and provincial governments, by legislative and other measures, must support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions.
(2) Draft national or provincial legislation that affects the status, institutions, powers or functions of local government must be published for public comment before it is introduced in Parliament or a provincial legislature, in a manner that allows organised local government, municipalities and other interested persons an opportunity to make representations with regard to the draft legislation.

155 Establishment of municipalities
(1) There are the following categories of municipality—
   (a) Category A: A municipality that has exclusive municipal executive and legislative authority in its area.
   (b) Category B: A municipality that shares municipal executive and legislative authority in its area with a category C municipality within whose area it falls.
   (c) Category C: A municipality that has municipal executive and legislative authority in an area that includes more than one municipality.
(2) National legislation must define the different types of municipality that may be established within each category.
(3) National legislation must—
   (a) establish the criteria for determining when an area should have a single category A municipality or when it should have municipalities of both category B and category C;
(b) establish criteria and procedures for the determination of municipal boundaries by an independent authority; and

(c) subject to section 229, make provision for an appropriate division of powers and functions between municipalities when an area has municipalities of both category B and category C. A division of powers and functions between a category B municipality and a category C municipality may differ from the division of powers and functions between another category B municipality and that category C municipality.

(4) The legislation referred to in subsection (3) must take into account the need to provide municipal services in an equitable and sustainable manner.

(5) Provincial legislation must determine the different types of municipality to be established in the province.

(6) Each provincial government must establish municipalities in its province in a manner consistent with the legislation enacted in terms of subsections (2) and (3) and, by legislative or other measures, must—

(a) provide for the monitoring and support of local government in the province; and

(b) promote the development of local government capacity to enable municipalities to perform their functions and manage their own affairs.

(6A) . . . . . .

(7) The national government, subject to section 44, and the provincial governments have the legislative and executive authority to see to the effective performance by municipalities of their functions in respect of matters listed in Schedules 4 and 5, by regulating the exercise by municipalities of their executive authority referred to in section 156 (1).

156 Powers and functions of municipalities

(1) A municipality has executive authority in respect of, and has the right to administer—

(a) the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5; and

(b) any other matter assigned to it by national or provincial legislation.

(2) A municipality may make and administer by-laws for the effective administration of the matters which it has the right to administer.

(3) Subject to section 151 (4), a by-law that conflicts with national or provincial legislation is invalid. If there is a conflict between a by-law and national or provincial legislation that is inoperative because of a conflict referred to in section 149, the by-law must be regarded as valid for as long as that legislation is inoperative.

(4) The national government and provincial governments must assign to a municipality, by agreement and subject to any conditions, the administration of a matter listed in Part A of Schedule 4 or Part A of Schedule 5 which necessarily relates to local government, if—

(a) that matter would most effectively be administered locally; and

(b) the municipality has the capacity to administer it.

(5) A municipality has the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions.

157 Composition and election of Municipal Councils

(1) A Municipal Council consists of—

(a) members elected in accordance with subsections (2) and (3); or

(b) if provided for by national legislation—

(i) members appointed by other Municipal Councils to represent those other Councils; or

(ii) both members elected in accordance with paragraph (a) and members appointed in accordance with subparagraph (i) of this paragraph.

(2) The election of members to a Municipal Council as anticipated in subsection (1) (a) must be in accordance with national legislation, which must prescribe a system—

(a) of proportional representation based on that municipality’s segment of the national common voters roll, and which provides for the election of members from lists of party candidates drawn up in a party’s order of preference; or

(b) of proportional representation as described in paragraph (a) combined with a system of ward representation based on that municipality’s segment of the national common voters roll.

(3) An electoral system in terms of subsection (2) must result, in general, in proportional representation.
If the electoral system includes ward representation, the delimitation of wards must be done by an independent authority appointed in terms of, and operating according to, procedures and criteria prescribed by national legislation.

A person may vote in a municipality only if that person is registered on that municipality’s segment of the national common voters roll.

The national legislation referred to in subsection (1) (b) must establish a system that allows for parties and interests reflected within the Municipal Council making the appointment, to be fairly represented in the Municipal Council to which the appointment is made.

**158 Membership of Municipal Councils**

Every citizen who is qualified to vote for a Municipal Council is eligible to be a member of that Council, except—

(a) anyone who is appointed by, or is in the service of, the municipality and receives remuneration for that appointment or service, and who has not been exempted from this disqualification in terms of national legislation;

(b) anyone who is appointed by, or is in the service of, the state in another sphere, and receives remuneration for that appointment or service, and who has been disqualified from membership of a Municipal Council in terms of national legislation;

(c) anyone who is disqualified from voting for the National Assembly or is disqualified in terms of section 47(1) (c), (d) or (e) from being a member of the Assembly;

(d) a member of the National Assembly, a delegate to the National Council of Provinces or a member of a provincial legislature; but this disqualification does not apply to a member of a Municipal Council representing local government in the National Council; or

(e) a member of another Municipal Council; but this disqualification does not apply to a member of a Municipal Council representing that Council in another Municipal Council of a different category.

A person who is not eligible to be a member of a Municipal Council in terms of subsection (1) (a), (b), (d) or (e) may be a candidate for the Council, subject to any limits or conditions established by national legislation.

Vacancies in a Municipal Council must be filled in terms of national legislation.

**159 Terms of Municipal Councils**

The term of a Municipal Council may be no more than five years, as determined by national legislation.

If a Municipal Council is dissolved in terms of national legislation, or when its term expires, an election must be held within 90 days of the date that Council was dissolved or its term expired.

A Municipal Council, other than a Council that has been dissolved following an intervention in terms of section 139, remains competent to function from the time it is dissolved or its term expires, until the newly elected Council has been declared elected.

**160 Internal procedures**

A Municipal Council—

(a) makes decisions concerning the exercise of all the powers and the performance of all the functions of the municipality;

(b) must elect its chairperson;

(c) may elect an executive committee and other committees, subject to national legislation; and

(d) may employ personnel that are necessary for the effective performance of its functions.

The following functions may not be delegated by a Municipal Council—

(a) The passing of by-laws;

(b) the approval of budgets;

(c) the imposition of rates and other taxes, levies and duties; and

(d) the raising of loans.

A majority of the members of a Municipal Council must be present before a vote may be taken on any matter.
(b) All questions concerning matters mentioned in subsection (2) are determined by a decision taken by a Municipal Council with a supporting vote of a majority of its members.

(c) All other questions before a Municipal Council are decided by a majority of the votes cast.

(4) No by-law may be passed by a Municipal Council unless—

(a) all the members of the Council have been given reasonable notice; and

(b) the proposed by-law has been published for public comment.

(5) National legislation may provide criteria for determining—

(a) the size of a Municipal Council;

(b) whether Municipal Councils may elect an executive committee or any other committee; or

(c) the size of the executive committee or any other committee of a Municipal Council.

(6) A Municipal Council may make by-laws which prescribe rules and orders for—

(a) its internal arrangements;

(b) its business and proceedings; and

(c) the establishment, composition, procedures, powers and functions of its committees.

(7) A Municipal Council must conduct its business in an open manner, and may close its sittings, or those of its committees, only when it is reasonable to do so having regard to the nature of the business being transacted.

(8) Members of a Municipal Council are entitled to participate in its proceedings and those of its committees in a manner that—

(a) allows parties and interests reflected within the Council to be fairly represented;

(b) is consistent with democracy; and

(c) may be regulated by national legislation.

161 Privilege

Provincial legislation within the framework of national legislation may provide for privileges and immunities of Municipal Councils and their members.

162 Publication of municipal by-laws

(1) A municipal by-law may be enforced only after it has been published in the official gazette of the relevant province.

(2) A provincial official gazette must publish a municipal by-law upon request by the municipality.

(3) Municipal by-laws must be accessible to the public.

163 Organised local government

An Act of Parliament enacted in accordance with the procedure established by section 76 must—

(a) provide for the recognition of national and provincial organisations representing municipalities; and

(b) determine procedures by which local government may—

(i) consult with the national or a provincial government;

(ii) designate representatives to participate in the National Council of Provinces; and

(iii) participate in the process prescribed in the national legislation envisaged in section 221 (1) (c).

164 Other matters

Any matter concerning local government not dealt with in the Constitution may be prescribed by national legislation or by provincial legislation within the framework of national legislation.

CHAPTER 8

COURTS AND ADMINISTRATION OF JUSTICE (ss 165–180)

165 Judicial authority

(1) The judicial authority of the Republic is vested in the courts.

(2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.

(3) No person or organ of state may interfere with the functioning of the courts.
(4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.

(5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies.

166 Judicial system

The courts are—
(a) the Constitutional Court;
(b) the Supreme Court of Appeal;
(c) the High Courts, including any high court of appeal that may be established by an Act of Parliament to hear appeals from High Courts;
(d) the Magistrates’ Courts; and
(e) any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Courts or the Magistrates’ Courts.

167 Constitutional Court

(1) The Constitutional Court consists of the Chief Justice of South Africa, the Deputy Chief Justice and nine other judges.

(2) A matter before the Constitutional Court must be heard by at least eight judges.

(3) The Constitutional Court—
(a) is the highest court in all constitutional matters;
(b) may decide only constitutional matters, and issues connected with decisions on constitutional matters; and
(c) makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter.

(4) Only the constitutional Court may—
(a) decide disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state;
(b) decide on the constitutionality of any parliamentary or provincial Bill, but may do so only in the circumstances anticipated in section 79 or 121;
(c) decide applications envisaged in section 80 or 122;
(d) decide on the constitutionality of any amendment to the Constitution;
(e) decide that Parliament or the President has failed to fulfil a constitutional obligation; or
(f) certify a provincial constitution in terms of section 144.

(5) The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force.

(6) National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court—
(a) to bring a matter directly to the Constitutional Court; or
(b) to appeal directly to the Constitutional Court from any other court.

(7) A constitutional matter includes any issue involving the interpretation, protection or enforcement of the Constitution.

168 Supreme Court of Appeal

(1) The Supreme Court of Appeal consists of a President, a Deputy President and the number of judges of appeal determined in terms an Act of Parliament.

(2) A matter before the Supreme Court of Appeal must be decided by the number of judges determined in terms of an Act of Parliament.

(3) The Supreme Court of Appeal may decide appeals in any matter. It is the highest court of appeal except in constitutional matters, and may decide only—
(a) appeals;
(b) issues connected with appeals; and
(c) any other matter that may be referred to it in circumstances defined by an Act of Parliament.

169 High Courts

A High Court may decide—

(a) any constitutional matter except a matter that—
   (i) only the Constitutional Court may decide; or
   (ii) is assigned by an Act of Parliament to another court of a status similar to a High Court; and
(b) any other matter not assigned to another court by an Act of Parliament.

170 Magistrates’ Courts and other courts

Magistrates’ Courts and all other courts may decide any matter determined by an Act of Parliament, but a court of a status lower than a High Court may not enquire into or rule on the constitutionality of any legislation or any conduct of the President.

171 Court procedures

All courts function in terms of national legislation, and their rules and procedures must be provided for in terms of national legislation.

172 Powers of courts in constitutional matters

(1) When deciding a constitutional matter within its power, a court—
   (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
   (b) may make any order that is just and equitable, including—
       (i) an order limiting the retrospective effect of the declaration of invalidity; and
       (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

(2) (a) The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.

   (b) A court which makes an order of constitutional invalidity may grant a temporary interdict or other temporary relief to a party, or may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of that Act or conduct.

   (c) National legislation must provide for the referral of an order of constitutional invalidity to the Constitutional Court.

   (d) Any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection.

173 Inherent power

The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.

174 Appointment of judicial officers

(1) Any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer. Any person to be appointed to the Constitutional Court must also be a South African citizen.

(2) The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed.

(3) The President as head of the national executive, after consulting the Judicial Service Commission and the leader of parties represented in the National Assembly, appoints the Chief Justice and the Deputy Chief Justice and, after consulting the Judicial Service Commission, appoints the President and Deputy President of the Supreme Court of Appeal.

(4) The other judges of the Constitutional Court are appointed by the President, as head of the national executive, after consulting the Chief Justice and the leaders of parties represented in the National Assembly, in accordance with the following procedure—
   (a) The Judicial Service Commission must prepare a list of nominees with three names more than the number of appointments to be made, and submit the list to the President.
   (b) The President may make appointments from the list, and must advise the Judicial Service Commission, with reasons, if any of the nominees are unacceptable and any appointment remains to be made.
(c) The Judicial Service Commission must supplement the list with further nominees and the President
must make the remaining appointments from the supplemented list.

(5) At all times, at least four members of the Constitutional Court must be persons who were judges at the
time they were appointed to the Constitutional Court.

(6) The President must appoint the judges of all other courts on the advice of the Judicial Service Commis-
sion.

(7) Other judicial officers must be appointed in terms of an Act of Parliament which must ensure that the
appointment, promotion, transfer or dismissal of, or disciplinary steps against, these judicial officers take
place without favour or prejudice.

(8) Before judicial officers begin to perform their functions, they must take an oath or affirm, in accordance
with Schedule 2, that they will uphold and protect the Constitution.

175 Acting judges

(1) The President may appoint a woman or a man to be an acting judge of the Constitutional Court if there
is a vacancy or if a judge is absent. The appointment must be made on the recommendation of the Cabinet
member responsible for the administration of justice acting with the concurrence of the Chief Justice.

(2) The Cabinet member responsible for the administration of justice must appoint acting judges to other
courts after consulting the senior judge of the court on which the acting judge will serve.

176 Terms of office and remuneration

(1) A Constitutional Court judge holds office for a non-renewable term of 12 years, or until he or she attains
the age of 70, whichever occurs first, except where an Act of Parliament extends the term of office of a
Constitutional Court judge.

(2) Other judges hold office until they are discharged from active service in terms of an Act of Parliament.

(3) The salaries, allowances and benefits of judges may not be reduced.

177 Removal

(1) A judge may be removed from office only if—
   (a) the Judicial Service Commission finds that the judge suffers from an incapacity, is grossly incom-
   petent or is guilty of gross misconduct; and
   (b) the National Assembly calls for that judge to be removed, by a resolution adopted with a supporting
   vote of at least two thirds of its members.

(2) The President must remove a judge from office upon adoption of a resolution calling for that judge to be
removed.

(3) The President, on the advice of the Judicial Service Commission, may suspend a judge who is the
subject of a procedure in terms of subsection (1).

178 Judicial Service Commission

(1) There is a Judicial Service Commission consisting of—
   (a) the Chief Justice, who presides at meetings of the Commission;
   (b) the President of the Supreme Court of Appeal;
   (c) one Judge President designated by the Judges President;
   (d) the Cabinet member responsible for the administration of justice, or an alternate designated by that
   Cabinet member;
   (e) two practising advocates nominated from within the advocates’ profession to represent the profes-
   sion as a whole, and appointed by the President;
   (f) two practising attorneys nominated from within the attorneys’ profession to represent the profession
   as a whole, and appointed by the President;
   (g) one teacher of law designated by teachers of law at South African universities;
   (h) six persons designated by the National Assembly from among its members, at least three of whom
   must be members of opposition parties represented in the Assembly;
   (i) four permanent delegates to the National Council of Provinces designated together by the Council
   with a supporting vote of at least six provinces;
   (j) four persons designated by the President as head of the national executive, after consulting the lead-
   ers of all the parties in the National Assembly; and
(k) when considering matters relating to a specific High Court, the Judge President of that Court and the Premier of the province concerned, or an alternate designated by each of them.

(2) If the number of persons nominated from within the advocates’ or attorneys’ profession in terms of subsection (1) (e) or (f) equals the number of vacancies to be filled, the President must appoint them. If the number of persons nominated exceeds the number of vacancies to be filled, the President, after consulting the relevant profession, must appoint sufficient of the nominees to fill the vacancies, taking into account the need to ensure that those appointed represent the profession as a whole.

(3) Members of the Commission designated by the National Council of Provinces serve until they are replaced together, or until any vacancy occurs in their number. Other members who were designated or nominated to the Commission serve until they are replaced by those who designated or nominated them.

(4) The Judicial Service Commission has the powers and functions assigned to it in the Constitution and national legislation.

(5) The Judicial Service Commission may advise the national government on any matter relating to the judiciary or the administration of justice, but when it considers any matter except the appointment of a judge, it must sit without the members designated in terms of subsection (1) (h) and (i).

(6) The Judicial Service Commission may determine its own procedure, but decisions of the Commission must be supported by a majority of its members.

(7) If the Chief Justice or the President of the Supreme Court of Appeal is temporarily unable to serve on the Commission, the Deputy Chief Justice or the Deputy President of the Supreme Court of Appeal, as the case may be, acts as his or her alternate on the Commission.

(8) The President and the persons who appoint, nominate or designate the members of the Commission in terms of subsection (1) (c), (e), (f) and (g), may, in the same manner appoint, nominate or designate an alternate for each of those members, to serve on the Commission whenever the member concerned is temporarily unable to do so by reason of his or her incapacity or absence from the Republic or for any other sufficient reason.

179 Prosecuting authority

(1) There is a single national prosecuting authority in the Republic, structured in terms of an Act of Parliament, and consisting of—

(a) a National Director of Public Prosecutions, who is the head of the prosecuting authority, and is appointed by the President, as head of the national executive; and

(b) Directors of Public Prosecutions and prosecutors as determined by an Act of Parliament.

(2) The prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings.

(3) National legislation must ensure that the Directors of Public Prosecutions—

(a) are appropriately qualified; and

(b) are responsible for prosecutions in specific jurisdictions, subject to subsection (5).

(4) National legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice.

(5) The National Director of Public Prosecutions—

(a) must determine, with the concurrence of the Cabinet member responsible for the administration of justice, and after consulting the Directors of Public Prosecutions, prosecution policy, which must be observed in the prosecution process;

(b) must issue policy directives which must be observed in the prosecution process;

(c) may intervene in the prosecution process when policy directives are not complied with; and

(d) may review a decision to prosecute or not to prosecute, after consulting the relevant Director of Public Prosecutions and after taking representations within a period specified by the National Director of Public Prosecutions, from the following—

(i) The accused person.

(ii) The complainant.

(iii) Any other person or party whom the National Director considers to be relevant.

(6) The Cabinet member responsible for the administration of justice must exercise final responsibility over the prosecuting authority.
(7) All other matters concerning the prosecuting authority must be determined by national legislation.

180 Other matters concerning administration of justice

National legislation may provide for any matter concerning the administration of justice that is not dealt with in the Constitution, including—

(a) training programmes for judicial officers;
(b) procedures for dealing with complaints about judicial officers; and (c) the participation of people other than judicial officers in court decisions.

CHAPTER 9
STATE INSTITUTIONS SUPPORTING CONSTITUTIONAL DEMOCRACY (ss 181–194)

181 Establishment and governing principles

(1) The following state institutions strengthen constitutional democracy in the Republic—

(a) The Public Protector.
(b) The South African Human Rights Commission.
(c) The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.
(d) The Commission for Gender Equality.
(e) The Auditor-General.
(f) The Electoral Commission.

(2) These institutions are independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice.

(3) Other organs of state, through legislative and other measures, must assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions.

(4) No person or organ of state may interfere with the functioning of these institutions.

(5) These institutions are accountable to the National Assembly, and must report on their activities and the performance of their functions to the Assembly at least once a year.

Public Protector (ss 182–183)

182 Functions of Public Protector

(1) The Public Protector has the power, as regulated by national legislation—

(a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;
(b) to report on that conduct; and
(c) to take appropriate remedial action.

(2) The Public Protector has the additional powers and functions prescribed by national legislation.

(3) The Public Protector may not investigate court decisions.

(4) The Public Protector must be accessible to all persons and communities.

(5) An report issued by the Public Protector must be open to the public unless exceptional circumstances, to be determined in terms of national legislation, require that a report be kept confidential.

183 Tenure

The Public Protector is appointed for a non-renewable period of seven years.

South African Human Rights Commission (s 184)

184 Functions of South African Human Rights Commission

(1) The South African Human Rights Commission must—

(a) promote respect for human rights and a culture of human rights;
(b) promote the protection, development and attainment of human rights; and
(c) monitor and assess the observance of human rights in the Republic.

(2) The South African Human Rights Commission has the powers, as regulated by national legislation, necessary to perform its functions, including the power—

(a) to investigate and to report on the observance of human rights;
(b) to take steps to secure appropriate redress where human rights have been violated;
(c) to carry out research; and
(d) to educate.

(3) Each year, the South African Human Rights Commission must require relevant organs of state to provide
the Commission with information on the measures that they have taken towards the realisation of the rights
in the Bill of Rights concerning housing, health care, food, water, social security, education and the envi-
ronment.

(4) The South African Human Rights Commission has the additional powers and functions prescribed by
national legislation.

Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Commu-
nities (ss 185–186)

185 Functions of Commission

(1) The primary objects of the Commission for the Promotion and Protection of the Rights of Cultural, Reli-
gious and Linguistic Communities are—
(a) to promote respect for the rights of cultural, religious and linguistic communities;
(b) to promote and develop peace, friendship, humanity, tolerance and national unity among cultural,
religious and linguistic communities, on the basis of equality, non-discrimination and free association; and
(c) to recommend the establishment or recognition, in accordance with national legislation, of a cultural
or other council or councils for a community or communities in South Africa.

(2) The Commission has the power, as regulated by national legislation, necessary to achieve its primary
objects, including the power to monitor, investigate, research, educate, lobby, advise and report on issues
concerning the rights of cultural, religious and linguistic communities.

(3) The Commission may report any matter which falls within its powers and functions to the South African
Human Rights Commission for investigation.

(4) The Commission has the additional powers and functions prescribed by national legislation.

186 Composition of Commission

(1) The number of members of the Commission for the Promotion and Protection of the Rights of Cultural,
Religious and Linguistic Communities and their appointment and terms of office must be prescribed by
national legislation.

(2) The composition of the Commission must—
(a) be broadly representative of the main cultural, religious and linguistic communities in South Africa; and
(b) broadly reflect the gender composition of South Africa.

Commission for Gender Equality (s 187)

187 Functions of Commission for Gender Equality

(1) The Commission for Gender Equality must promote respect for gender equality and the protection,
development and attainment of gender equality.

(2) The Commission for Gender Equality has the power, as regulated by national legislation, necessary to
perform its functions, including the power to monitor, investigate, research, educate, lobby, advise and report on issues
concerning gender equality.

(3) The Commission for Gender Equality has the additional powers and functions prescribed by national
legislation.

Auditor-General (ss 188–189)

188 Functions of Auditor-General

(1) The Auditor-General must audit and report on the accounts, financial statements and financial manage-
ment of—
(a) all national and provincial state departments and administrations;
(b) all municipalities; and
(c) any other institution or accounting entity required by national or provincial legislation to be audited
by the Auditor-General.
(2) In addition to the duties prescribed in subsection (1), and subject to any legislation, the Auditor-General may audit and report on the accounts, financial statements and financial management of—

(a) any institution funded from the National Revenue Fund or a Provincial Revenue Fund or by a municipality; or

(b) any institution that is authorised in terms of any law to receive money for a public purpose.

(3) The Auditor-General must submit audit reports to any legislature that has a direct interest in the audit, and to any other authority prescribed by national legislation. All reports must be made public.

(4) The Auditor-General has the additional powers and functions prescribed by national legislation.

189 Tenure
The Auditor-General must be appointed for a fixed, non-renewable term of between five and ten years.

Electoral Commission (ss 190–191)

190 Functions of Electoral Commission
(1) The Electoral Commission must—

(a) manage elections of national, provincial and municipal legislative bodies in accordance with national legislation;

(b) ensure that those elections are free and fair; and

(c) declare the results of those elections within a period that must be prescribed by national legislation and that is as short as reasonably possible.

(2) The Electoral Commission has the additional powers and functions prescribed by national legislation.

191 Composition of Electoral Commission
The Electoral Commission must be composed of at least three persons. The number of members and their terms of office must be prescribed by national legislation.

Independent Authority to Regulate Broadcasting (s 192)

192 Broadcasting Authority
National legislation must establish an independent authority to regulate broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African society.

General Provisions (ss 193–194)

193 Appointments
(1) The Public Protector and the members of any Commission established by this Chapter must be women or men who—

(a) are South African citizens;

(b) are fit and proper persons to hold the particular office; and

(c) comply with any other requirements prescribed by national legislation.

(2) The need for a Commission established by this Chapter to reflect broadly the race and gender composition of South Africa must be considered when members are appointed.

(3) The Auditor-General must be a woman or a man who is a South African citizen and a fit and proper person to hold that office. Specialised knowledge of, or experience in, auditing, state finances and public administration must be given due regard in appointing the Auditor-General.

(4) The President, on the recommendation of the National Assembly, must appoint the Public Protector, the Auditor-General and the members of—

(a) the South African Human Rights Commission;

(b) the Commission for Gender Equality; and

(c) the Electoral Commission.

(5) The National Assembly must recommend persons—

(a) nominated by a committee of the Assembly proportionally composed of members of all parties represented in the Assembly; and

(b) approved by the Assembly by a resolution adopted with a supporting vote—

(i) of at least 60 per cent of the members of the Assembly, if the recommendation concerns the appointment of the Public Protector or the Auditor-General; or
(ii) of a majority of the members of the Assembly, if the recommendation concerns the appointment of a member of a Commission.

(6) The involvement of civil society in the recommendation process may be provided for as envisaged in section 59 (1) (a).

194 Removal from office

(1) The Public Protector, the Auditor-General or a member of a Commission established by this Chapter may be removed from office only on—

(a) the ground of misconduct, incapacity or incompetence;

(b) a finding to that effect by a committee of the National Assembly; and

(c) the adoption by the Assembly of a resolution calling for that person’s removal from office

(2) A resolution of the National Assembly concerning the removal from office of—

(a) the Public Protector or the Auditor-General must be adopted with a supporting vote of at least two thirds of the members of the Assembly; or

(b) a member of a Commission must be adopted with a supporting vote of a majority of the members of the Assembly.

(3) The President—

(a) may suspend a person from office at any time after the start of the proceedings of a committee of the National Assembly for the removal of that person; and

(b) must remove a person from office upon adoption by the Assembly of the resolution calling for that person’s removal.

CHAPTER 10
PUBLIC ADMINISTRATION (ss 195–197)

195 Basic values and principles governing public administration

(1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles—

(a) A high standard of professional ethics must be promoted and maintained.

(b) Efficient, economic and effective use of resources must be promoted.

(c) Public administration must be development-oriented.

(d) Services must be provided impartially, fairly, equitably and without bias.

(e) People’s needs must be responded to, and the public must be encouraged to participate in policy-making.

(f) Public administration must be accountable.

(g) Transparency must be fostered by providing the public with timely, accessible and accurate information.

(h) Good human-resource management and career-development practices, to maximise human potential, must be cultivated.

(i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.

(2) The above principles apply to—

(a) administration in every sphere of government;

(b) organs of state; and

(c) public enterprises.

(3) National legislation must ensure the promotion of the values and principles listed in subsection (1).

(4) The appointment in public administration of a number of persons on policy considerations is not precluded, but national legislation must regulate these appointments in the public service.

(5) Legislation regulating public administration may differentiate between different sectors, administrations or institutions.

(6) The nature and functions of different sectors, administrations or institutions of public administration are relevant factors to be taken into account in legislation regulating public administration.
196 Public Service Commission

(1) There is a single Public Service Commission for the Republic.

(2) The Commission is independent and must be impartial, and must exercise its powers and perform its functions without fear, favour or prejudice in the interest of the maintenance of effective and efficient public administration and a high standard of professional ethics in the public service. The Commission must be regulated by national legislation.

(3) Other organs of state, through legislative and other measures, must assist and protect the Commission to ensure the independence, impartiality, dignity and effectiveness of the Commission. No person or organ of state may interfere with the functioning of the Commission.

(4) The powers and functions of the Commission are—

(a) to promote the values and principles set out in section 195, throughout the public service;

(b) to investigate, monitor and evaluate the organisation and administration, and the personnel practices, of the public service;

(c) to propose measures to ensure effective and efficient performance within the public service;

(d) to give directions aimed at ensuring that personnel procedures relating to recruitment, transfers, promotions and dismissals comply with the values and principles set out in section 195;

(e) to report in respect of its activities and the performance of its functions, including any finding it may make and directions and advice it may give, and to provide an evaluation of the extent to which the values and principles set out in section 195 are complied with; and

(f) either of its own accord or on receipt of any complaint—

(i) to investigate and evaluate the application of personnel and public administration practices, and to report to the relevant executive authority and legislature;

(ii) to investigate grievances of employees in the public service concerning official acts or omissions, and recommend appropriate remedies;

(iii) to monitor and investigate adherence to applicable procedures in the public service; and

(iv) to advise national and provincial organs of state regarding personnel practices in the public service, including those relating to the recruitment, appointment, transfer, discharge and other aspects of the careers of employees in the public service.

(g) to exercise or perform the additional powers or functions prescribed by an Act of Parliament.

(5) The Commission is accountable to the National Assembly.

(6) The Commission must report at least once a year in terms of subsection (4)(e)

(a) to the National Assembly; and

(b) in respect of its activities in a province, to the legislature of that province.

(7) The Commission has the following 14 commissioners appointed by the President—

(a) Five commissioners approved by the National Assembly in accordance with subsection (8) (a); and

(b) one commissioner for each province nominated by the Premier of the province in accordance with subsection (8) (b).

(8) (a) A commissioner appointed in terms of subsection (7) (a) must be—

(i) recommended by a committee of the National Assembly that is proportionally composed of members of all parties represented in the Assembly; and

(ii) approved by the Assembly by a resolution adopted with a supporting vote of a majority of its members.

(b) A commissioner nominated by the Premier of a province must be—

(i) recommended by a committee of the provincial legislature that is proportionally composed of members of all parties represented in the legislature; and

(ii) approved by the legislature by a resolution adopted with a supporting vote of a majority of its members.

(9) An Act of Parliament must regulate the procedure for the appointment of commissioners.

(10) A commissioner is appointed for a term of five years, which is renewable for one additional term only, and must be a woman or a man who is—
(a) a South African citizen; and
(b) a fit and proper person with knowledge of, or experience in, administration, management or the provision of public services.

(11) A commissioner may be removed from office only on—
(a) the ground of misconduct, incapacity or incompetence;
(b) a finding to that effect by a committee of the National Assembly or, in the case of a commissioner nominated by the Premier of a province, by a committee of the legislature of that province; and
(c) the adoption by the Assembly or the provincial legislature concerned, of a resolution with a supporting vote of a majority of its members calling for the commissioner’s removal from office.

(12) The President must remove the relevant commissioner from office upon—
(a) the adoption by the Assembly of a resolution calling for that commissioner’s removal; or
(b) written notification by the Premier that the provincial legislature has adopted a resolution calling for that commissioner’s removal.

(13) Commissioners referred to in subsection (7) (b) may exercise the powers and perform the functions of the Commission in their provinces as prescribed by national legislation.

197 Public Service

(1) Within public administration there is a public service for the Republic, which must function, and be structured, in terms of national legislation, and which must loyally execute the lawful policies of the government of the day.

(2) The terms and conditions of employment in the public service must be regulated by national legislation. Employees are entitled to a fair pension as regulated by national legislation.

(3) No employee of the public service may be favoured or prejudiced only because that person supports a particular political party or cause.

(4) Provincial governments are responsible for the recruitment, appointment, promotion, transfer and dismissal of members of the public service in their administrations within a framework of uniform norms and standards applying to the public service.

CHAPTER 11
SECURITY SERVICES (ss 198–210)

198 Governing principles

The following principles govern national security in the Republic—
(a) National security must reflect the resolve of South Africans, as individuals and as a nation, to live as equals, to live in peace and harmony, to be free from fear and want and to seek a better life.
(b) The resolve to live in peace and harmony precludes any South African citizen from participating in armed conflict, nationally or internationally, except as provided for in terms of the Constitution or national legislation.
(c) National security must be pursued in compliance with the law, including international law.
(d) National security is subject to the authority of Parliament and the national executive.

199 Establishment, structuring and conduct of security services

(1) The security services of the Republic consist of a single defence force, a single police service and any intelligence services established in terms of the Constitution.

(2) The defence force is the only lawful military force in the Republic.

(3) Other than the security services established in terms of the Constitution, armed organisations or services may be established only in terms of national legislation.

(4) The security services must be structured and regulated by national legislation.

(5) The security services must act, and must teach and require their members to act, in accordance with the Constitution and the law, including customary international law and international agreements binding on the Republic.

(6) No member of any security service may obey a manifestly illegal order.

(7) Neither the security services, nor any of their members, may, in the performance of their functions—
(a) prejudice a political party interest that is legitimate in terms of the Constitution; or
(b) further, in a partisan manner, any interest of a political party.

(8) To give effect to the principles of transparency and accountability, multi-party parliamentary committees, have oversight of all security services in a manner determined by national legislation or the rules and orders of Parliament.

**Defence (ss 200–204)**

**200 Defence force**

(1) The defence force must be structured and managed as a disciplined military force.

(2) The primary object of the defence force is to defend and protect the Republic, its territorial integrity and its people in accordance with the Constitution and the principles of international law regulating the use of force.

**201 Political responsibility**

(1) A member of the Cabinet must be responsible for defence.

(2) Only the President, as head of the national executive, may authorise the employment of the defence force—

(a) in co-operation with the police service; 

(b) in defence of the Republic; or 

(c) in fulfilment of an international obligation.

(3) When the defence force is employed for any purpose mentioned in subsection (2), the President must inform Parliament, promptly and in appropriate detail, of—

(a) the reasons for the employment of the defence force; 

(b) any place where the force is being employed; 

(c) the number of people involved; and 

(d) the period for which the force is expected to be employed.

(4) If Parliament does not sit during the first seven days after the defence force is employed as envisaged in subsection (2), the President must provide the information required in subsection (3) to the appropriate oversight committee.

**202 Command of defence force**

(1) The President as head of the national executive is Commander-in-Chief of the defence force, and must appoint the Military Command of the defence force.

(2) Command of the defence force must be exercised in accordance with the directions of the Cabinet member responsible for defence, under the authority of the President.

**203 State of national defence**

(1) The President as head of the national executive may declare a state of national defence, and must inform Parliament promptly and in appropriate detail of—

(a) the reasons for the declaration; 

(b) any place where the defence force is being employed; and 

(c) the number of people involved.

(2) If Parliament is not sitting when a state of national defence is declared, the President must summon Parliament to an extraordinary sitting within seven days of the declaration.

(3) A declaration of a state of national defence lapses unless it is approved by Parliament within seven days of the declaration.

**204 Defence civilian secretariat**

A civilian secretariat for defence must be established by national legislation to function under the direction of the Cabinet member responsible for defence.

**Police (ss 205–208)**

**205 Police service**

(1) The national police service must be structured to function in the national, provincial and, where appropriate, local spheres of government.
(2) National legislation must establish the powers and functions of the police service and must enable the police service to discharge its responsibilities effectively, taking into account the requirements of the provinces.

(3) The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.

206 Political responsibility

(1) A member of the Cabinet must be responsible for policing and must determine national policing policy after consulting the provincial governments and taking into account the policing needs and priorities of the provinces as determined by the provincial executives.

(2) The national policing policy may make provision for different policies in respect of different provinces after taking into account the policing needs and priorities of these provinces.

(3) Each province is entitled—
   (a) to monitor police conduct;
   (b) to oversee the effectiveness and efficiency of the police service, including receiving reports on the police service;
   (c) to promote good relations between the police and the community;
   (d) to assess the effectiveness of visible policing; and
   (e) to liaise with the Cabinet member responsible for policing with respect to crime and policing in the province.

(4) A provincial executive is responsible for policing functions—
   (a) vested in it by this Chapter;
   (b) assigned to it in terms of national legislation; and
   (c) allocated to it in the national policing policy.

(5) In order to perform the functions set out in subsection (3), a province—
   (a) may investigate, or appoint a commission of inquiry into, any complaints of police inefficiency or a breakdown in relations between the police and any community; and
   (b) must make recommendations to the Cabinet member responsible for policing.

(6) On receipt of a complaint lodged by a provincial executive, an independent police complaints body established by national legislation must investigate any alleged misconduct of, or offence committed by, a member of the police service in the province.

(7) National legislation must provide a framework for the establishment, powers, functions and control of municipal police services.

(8) A committee composed of the Cabinet member and the members of the Executive Councils responsible for policing must be established to ensure effective coordination of the police service and effective cooperation among the spheres of government.

(9) A provincial legislature may require the provincial commissioner of the province to appear before it or any of its committees to answer questions.

207 Control of police service

(1) The President as head of the national executive must appoint a woman or a man as the National Commissioner of the police service, to control and manage the police service.

(2) The National Commissioner must exercise control over and manage the police service in accordance with the national policing policy and the directions of the Cabinet member responsible for policing.

(3) The National Commissioner, with the concurrence of the provincial executive, must appoint a woman or a man as the provincial commissioner for that province, but if the National Commissioner and the provincial executive are unable to agree on the appointment, the Cabinet member responsible for policing must mediate between the parties.

(4) The provincial commissioners are responsible for policing in their respective provinces—
   (a) as prescribed by national legislation; and
   (b) subject to the power of the National Commissioner to exercise control over and manage the police service in terms of subsection (2).
(5) The provincial commissioner must report to the provincial legislature annually on policing in the province, and must send a copy of the report to the National Commissioner.

(6) If the provincial commissioner has lost the confidence of the provincial executive, that executive may institute appropriate proceedings for the removal or transfer of, or disciplinary action against, that commissioner, in accordance with national legislation.

208 Police civilian secretariat

A civilian secretariat for the police service must be established by national legislation to function under the direction of the Cabinet member responsible for policing.

**Intelligence (ss 209–210)**

209 Establishment and control of intelligence services

(1) Any intelligence service, other than any intelligence division of the defence force or police service, may be established only by the President, as head of the national executive, and only in terms of national legislation.

(2) The President as head of the national executive must appoint a woman or a man as head of each intelligence service established in terms of subsection (1), and must either assume political responsibility for the control and direction of any of those services, or designate a member of the Cabinet to assume that responsibility.

210 Powers, functions and monitoring

National legislation must regulate the objects, powers and functions of the intelligence services, including any intelligence division of the defence force or police service, and must provide for—

(a) the co-ordination of all intelligence services; and

(b) civilian monitoring of the activities of those services by an inspector appointed by the President, as head of the national executive, and approved by a resolution adopted by the National Assembly with a supporting vote of at least two thirds of its members.

CHAPTER 12

TRADITIONAL LEADERS (ss 211–212)

211 Recognition

(1) The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.

(2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.

(3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.

212 Role of traditional leaders

(1) National legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities.

(2) To deal with matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities observing a system of customary law—

(a) national or provincial legislation may provide for the establishment of houses of traditional leaders; and

(b) national legislation may establish a council of traditional leaders.

CHAPTER 13

FINANCE (ss 213–230A)

General Financial Matters (ss 213–219)

213 National Revenue Fund

(1) There is a National Revenue Fund into which all money received by the national government must be paid, except money reasonably excluded by an Act of Parliament.

(2) Money may be withdrawn from the National Revenue Fund only—

(a) in terms of an appropriation by an Act of Parliament; or

(b) as a direct charge against the National Revenue Fund, when it is provided for in the Constitution or an Act of Parliament.
(3) A province’s equitable share of revenue raised nationally is a direct charge against the National Revenue Fund.

214 Equitable shares and allocations of revenue

(1) An Act of Parliament must provide for—

(a) the equitable division of revenue raised nationally among the national, provincial and local spheres of government;
(b) the determination of each province’s equitable share of the provincial share of that revenue; and
(c) any other allocations to provinces, local government or municipalities from the national government’s share of that revenue, and any conditions on which those allocations may be made.

(2) The Act referred to in subsection (1) may be enacted only after the provincial governments, organised local government and the Financial and Fiscal Commission have been consulted, and any recommendations of the Commission have been considered, and must take into account—

(a) the national interest;
(b) any provision that must be made in respect of the national debt and other national obligations;
(c) the needs and interests of the national government, determined by objective criteria;
(d) the need to ensure that the provinces and municipalities are able to provide basic services and perform the functions allocated to them;
(e) the fiscal capacity and efficiency of the provinces and municipalities;
(f) developmental and other needs of provinces, local government and municipalities;
(g) economic disparities within and among the provinces;
(h) obligations of the provinces and municipalities in terms of national legislation;
(i) the desirability of stable and predictable allocations of revenue shares; and
(j) the need for flexibility in responding to emergencies or other temporary needs, and other factors based on similar objective criteria.

215 National, provincial and municipal budgets

(1) National, provincial and municipal budgets and budgetary processes must promote transparency, accountability and the effective financial management of the economy, debt and the public sector.

(2) National legislation must prescribe—

(a) the form of national, provincial and municipal budgets;
(b) when national and provincial budgets must be tabled; and
(c) that budgets in each sphere of government must show the sources of revenue and the way in which proposed expenditure will comply with national legislation.

(3) Budgets in each sphere of government must contain—

(a) estimates of revenue and expenditure, differentiating between capital and current expenditure;
(b) proposals for financing any anticipated deficit for the period to which they apply; and
(c) an indication of intentions regarding borrowing and other forms of public liability that will increase public debt during the ensuing year.

216 Treasury control

(1) National legislation must establish a national treasury and prescribe measures to ensure both transparency and expenditure control in each sphere of government, by introducing—

(a) generally recognised accounting practice;
(b) uniform expenditure classifications; and
(c) uniform treasury norms and standards.

(2) The national treasury must enforce compliance with the measures established in terms of subsection (1), and may stop the transfer of funds to an organ of state if that organ of state commits a serious or persistent material breach of those measures.

(3) A decision to stop the transfer of funds due to a province in terms of section 214 (1) (b) may be taken only in the circumstances mentioned in subsection (2) and—

(a) may not stop the transfer of funds for more than 120 days; and
(b) may be enforced immediately, but will lapse retrospectively unless Parliament approves it following a process substantially the same as that established in terms of section 76 (1) and prescribed by the joint rules and orders of Parliament. This process must be completed within 30 days of the decision by the national treasury.

(4) Parliament may renew a decision to stop the transfer of funds for no more than 120 days at a time, following the process established in terms of subsection (3).

(5) Before Parliament may approve or renew a decision to stop the transfer of funds to a province—
   (a) the Auditor-General must report to Parliament; and
   (b) the province must be given an opportunity to answer the allegations against it, and to state its case, before a committee.

217 Procurement

(1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

(2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for—
   (a) categories of preference in the allocation of contracts; and
   (b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.

(3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented.

218 Government guarantees

(1) The national government, a provincial government or a municipality may guarantee a loan only if the guarantee complies with any conditions set out in national legislation.

(2) National legislation referred to in subsection (1) may be enacted only after any recommendations of the Financial and Fiscal Commission have been considered.

(3) Each year, every government must publish a report on the guarantees it has granted.

219 Remuneration of persons holding public office

(1) An Act of Parliament must establish a framework for determining—
   (a) the salaries, allowances and benefits of members of the National Assembly, permanent delegates to the National Council of Provinces, members of the Cabinet, Deputy Ministers, traditional leaders and members of any councils of traditional leaders; and
   (b) the upper limit of salaries, allowances or benefits of members of provincial legislatures, members of Executive Councils and members of Municipal Councils of the different categories.

(2) National legislation must establish an independent commission to make recommendations concerning the salaries, allowances and benefits referred to in subsection.

(3) Parliament may pass the legislation referred to in subsection (1) only after considering any recommendations of the commission established in terms of subsection (2).

(4) The national executive, a provincial executive, a municipality or any other relevant authority may implement the national legislation referred to in subsection (1) only after considering any recommendations of the commission established in terms of subsection (2).

(5) National legislation must establish frameworks for determining the salaries, allowances and benefits of judges, the Public Protector, the Auditor-General, and members of any commission provided for in the Constitution, including the broadcasting authority referred to in section 192.

Financial and Fiscal Commission (ss 220–222)

220 Establishment and functions

(1) There is a Financial and Fiscal Commission for the Republic which makes recommendations envisaged in this Chapter, or in national legislation, to Parliament, provincial legislatures and any other authorities determined by national legislation.

(2) The Commission is independent and subject only to the Constitution and the law, and must be impartial.

(3) The Commission must function in terms of an Act of Parliament and, in performing its functions, must consider all relevant factors, including those listed in section 214 (2).
221 Appointment and tenure of members

(1) The Commission consists of the following women and men appointed by the President, as head of the national executive—

(a) A chairperson and deputy chairperson;
(b) three persons selected, after consulting the Premiers, from a list compiled in accordance with a process prescribed by national legislation;
(c) two persons selected, after consulting organised local government, from a list compiled in accordance with a process prescribed by national legislation; and
(d) two other persons.

(1A) National legislation referred to in subsection (1) must provide for the participation of—

(a) the Premiers in the compilation of a list envisaged in subsection (1) (b); and
(b) organised local government in the compilation of a list envisaged in subsection (1) (c).

(2) Members of the Commission must have appropriate expertise.

(3) Members serve for a term established in terms of national legislation. The President may remove a member from office on the ground of misconduct, incapacity or incompetence.

222 Reports

The Commission must report regularly both to Parliament and to the provincial legislatures.

Central Bank (ss 223–225)

223 Establishment

The South African Reserve Bank is the central bank of the Republic and is regulated in terms of an Act of Parliament.

224 Primary object

(1) The primary object of the South African Reserve Bank is to protect the value of the currency in the interest of balanced and sustainable economic growth in the Republic.

(2) The South African Reserve Bank, in pursuit of its primary object, must perform its functions independently and without fear, favour or prejudice, but there must be regular consultation between the Bank and the Cabinet member responsible for national financial matters.

225 Powers and functions

The powers and functions of the South African Reserve Bank are those customarily exercised and performed by central banks, which powers and functions must be determined by an Act of Parliament and must be exercised or performed subject to the conditions prescribed in terms of that Act.

Provincial and Local Financial Matters (ss 226–230A)

226 Provincial Revenue Funds

(1) There is a Provincial Revenue Fund for each province into which all money received by the provincial government must be paid, except money reasonably excluded by an Act of Parliament.

(2) Money may be withdrawn from a Provincial Revenue Fund only—

(a) in terms of an appropriation by a provincial Act; or
(b) as a direct charge against the Provincial Revenue Fund, when it is provided for in the Constitution or a provincial Act.

(3) Revenue allocated through a province to local government in that province in terms of section 214 (1), is a direct charge against that province’s Revenue Fund.

(4) National legislation may determine a framework within which—

(a) a provincial Act may in terms of subsection (2) (b) authorise the withdrawal of money as a direct charge against a Provincial Revenue Fund; and
(b) revenue allocated through a province to local government in that province in terms of subsection (3) must be paid to municipalities in the province.

227 National sources of provincial and local government funding

(1) Local government and each province—
(a) is entitled to an equitable share of revenue raised nationally to enable it to provide basic services and perform the functions allocated to it; and

(b) may receive other allocations from national government revenue, either conditionally or unconditionally.

(2) Additional revenue raised by provinces or municipalities may not be deducted from their share of revenue raised nationally, or from other allocations made to them out of national government revenue. Equally, there is no obligation on the national government to compensate provinces or municipalities that do not raise revenue commensurate with their fiscal capacity and tax base.

(3) A province’s equitable share of revenue raised nationally must be transferred to the province promptly and without deduction, except when the transfer has been stopped in terms of section 216.

(4) A province must provide for itself any resources that it requires, in terms of a provision of its provincial constitution, that are additional to its requirements envisaged in the Constitution.

228 Provincial taxes

(1) A provincial legislature may impose—

(a) taxes, levies and duties other than income tax, value-added tax, general sales tax, rates on property or customs duties; and

(b) flat-rate surcharges on any tax, levy or duty that is imposed by national legislation, other than on corporate income tax, value-added tax, rates on property or customs duties.

(2) The power of a provincial legislature to impose taxes, levies, duties and surcharges—

(a) may not be exercised in a way that materially and unreasonably prejudices national economic policies, economic activities across provincial boundaries, or the national mobility of goods, services, capital or labour; and

(b) must be regulated in terms of an Act of Parliament, which may be enacted only after any recommendations of the Financial and Fiscal Commission have been considered.

229 Municipal fiscal powers and functions

(1) Subject to subsections (2), (3) and (4), a municipality may impose—

(a) rates on property and surcharges on fees for services provided by or on behalf of the municipality; and

(b) if authorised by national legislation, other taxes, levies and duties appropriate to local government or to the category of local government into which that municipality falls, but no municipality may impose income tax, value-added tax, general sales tax or customs duty.

(2) The power of a municipality to impose rates on property, surcharges on fees for services provided by or on behalf of the municipality, or other taxes, levies or duties—

(a) may not be exercised in a way that materially and unreasonably prejudices national economic policies, economic activities across municipal boundaries, or the national mobility of goods, services, capital or labour; and

(b) may be regulated by national legislation.

(3) When two municipalities have the same fiscal powers and functions with regard to the same area, an appropriate division of those powers and functions must be made in terms of national legislation. The division may be made only after taking into account at least the following criteria—

(a) The need to comply with sound principles of taxation.

(b) The powers and functions performed by each municipality.

(c) The fiscal capacity of each municipality.

(d) The effectiveness and efficiency of raising taxes, levies and duties.

(e) Equity.

(4) Nothing in this section precludes the sharing of revenue raised in terms of this section between municipalities that have fiscal power and functions in the same area.

(5) National legislation envisaged in this section may be enacted only after organised local government and the Financial and Fiscal Commission have been consulted, and any recommendations of the Commission have been considered.
230 Provincial loans

(1) A province may raise loans for capital or current expenditure in accordance with national legislation, but loans for current expenditure may be raised only when necessary for bridging purposes during a fiscal year. National legislation referred to in subsection (1) may be enacted only after any recommendations of the Financial and Fiscal Commission have been considered.

230A Municipal loans

(1) A Municipal Council may, in accordance with national legislation—
(a) raise loans for capital or current expenditure for the municipality, but loans for current expenditure may be raised only when necessary for bridging purposes during a fiscal year; and
(b) bind itself and a future Council in the exercise of its legislative and executive authority to secure loans or investments for the municipality.

(2) National legislation referred to in subsection (1) may be enacted only after any recommendations of the Financial and Fiscal Commission have been considered.

CHAPTER 14
GENERAL PROVISIONS (ss 231–243)

International Law (ss 231–233)

231 International agreements

(1) The negotiating and signing of all international agreements is the responsibility of the national executive.

(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).

(3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.

(4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

(5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.

232 Customary international law
Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

233 Application of international law
When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

Other Matters (ss 234–243)

234 Charters of Rights
In order to deepen the culture of democracy established by the Constitution, Parliament may adopt Charters of Rights consistent with the provisions of the Constitution.

235 Self-determination
The right of the South African people as a whole to self-determination, as manifested in this Constitution, does not preclude, within the framework of this right, recognition of the right of self-determination of any community sharing a common cultural and language heritage, within a territorial entity in the Republic or in any other way, determined by national legislation.

236 Funding for political parties
To enhance multi-party democracy, national legislation must provide for the funding of political parties participating in national and provincial legislatures on an equitable and proportional basis.

237 Diligent performance of obligations
All constitutional obligations must be performed diligently and without delay.
238 Agency and delegation

An executive organ of state in any sphere of government may—

(a) delegate any power or function that is to be exercised or performed in terms of legislation to any other executive organ of state, provided the delegation is consistent with the legislation in terms of which the power is exercised or the function is performed; or

(b) exercise any power or perform any function for any other executive organ of state on an agency or delegation basis.

239 Definitions

In the Constitution, unless the context indicates otherwise

“national legislation” includes

(a) subordinate legislation made in terms of an Act of Parliament; and

(b) legislation that was in force when the Constitution took effect and that is administered by the national government;

“organ of state” means

(a) any department of state or administration in the national, provincial or local sphere of government; or

(b) any other functionary or institution—

(i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer;

“provincial legislation” includes

(a) subordinate legislation made in terms of a provincial Act; and

(b) legislation that was in force when the Constitution took effect and that is administered by a provincial government.

240 Inconsistencies between different texts

In the event of an inconsistency between different texts of the Constitution, the English text prevails.

241 Transitional arrangements

Schedule 6 applies to the transition to the new constitutional order established by this Constitution, and any matter incidental to that transition.

242 Repeal of laws

The laws mentioned in Schedule 7 are repealed, subject to section 243 and Schedule 6.

243 Short title and commencement

(1) This Act is called the Constitution of the Republic of South Africa, 1996, and comes into effect as soon as possible on a date set by the President by proclamation, which may not be a date later than 1 July 1997.

(2) The President may set different dates before the date mentioned in subsection (1) in respect of different provisions of the Constitution.

(3) Unless the context otherwise indicates, a reference in a provision of the Constitution to a time when the Constitution took effect must be construed as a reference to the time when that provision took effect.

(4) If a different date is set for any particular provision of the Constitution in terms of subsection (2), any corresponding provision of the Constitution of the Republic of South Africa, 1993 (Act 200 of 1993), mentioned in the proclamation, is repealed with effect from the same date.

(5) Sections 213, 214, 215, 216, 218, 226, 227, 228, 229 and 230 come into effect on 1 January 1998, but this does not preclude the enactment in terms of this Constitution of legislation envisaged in any of these provisions before that date. Until that date any corresponding and incidental provisions of the Constitution of the Republic of South Africa, 1993, remain in force.

Schedule 1

NATIONAL FLAG

(1) The national flag is rectangular; it is one and a half times longer than it is wide.

(2) It is black, gold, green, white, chilli red and blue.
(3) It has a green Y-shaped band that is one fifth as wide as the flag. The centre lines of the band start in the top and bottom corners next to the flag post, converge in the centre of the flag, and continue horizontally to the middle of the free edge.

(4) The green band is edged, above and below in white, and towards the flag post end, in gold. Each edging is one fifteenth as wide as the flag.

(5) The triangle next to the flag post is black.

(6) The upper horizontal band is chilli red and the lower horizontal band is blue. These bands are each one third as wide as the flag.

### Schedule 1A

#### GEOGRAPHICAL AREAS OF PROVINCES

**The Province of the Eastern Cape**
- Map No. 3 of Schedule 1 to Notice 1998 of 2005
- Map No. 6 of Schedule 2 to Notice 1998 of 2005
- Map No. 7 of Schedule 2 to Notice 1998 of 2005
- Map No. 8 of Schedule 2 to Notice 1998 of 2005
- Map No. 9 of Schedule 2 to Notice 1998 of 2005
- Map No. 10 of Schedule 2 to Notice 1998 of 2005
- Map No. 11 of Schedule 2 to Notice 1998 of 2005

**The Province of the Free State**
- Map No. 12 of Schedule 2 to Notice 1998 of 2005
- Map No. 13 of Schedule 2 to Notice 1998 of 2005
- Map No. 14 of Schedule 2 to Notice 1998 of 2005
- Map No. 15 of Schedule 2 to Notice 1998 of 2005
- Map No. 16 of Schedule 2 to Notice 1998 of 2005

**The Province of Gauteng**
- Map No. 4 in Notice 1490 of 2008
- Map No. 17 of Schedule 2 to Notice 1998 of 2005
- Map No. 18 of Schedule 2 to Notice 1998 of 2005
- Map No. 19 of Schedule 2 to Notice 1998 of 2005
- Map No. 20 of Schedule 2 to Notice 1998 of 2005
- Map No. 21 of Schedule 2 to Notice 1998 of 2005

**The Province of KwaZulu-Natal**
- Map No. 22 of Schedule 2 to Notice 1998 of 2005
- Map No. 23 of Schedule 2 to Notice 1998 of 2005
- Map No. 24 of Schedule 2 to Notice 1998 of 2005
- Map No. 25 of Schedule 2 to Notice 1998 of 2005
- Map No. 26 of Schedule 2 to Notice 1998 of 2005
- Map No. 27 of Schedule 2 to Notice 1998 of 2005
- Map No. 28 of Schedule 2 to Notice 1998 of 2005
- Map No. 29 of Schedule 2 to Notice 1998 of 2005
- Map No. 30 of Schedule 2 to Notice 1998 of 2005
- Map No. 31 of Schedule 2 to Notice 1998 of 2005
- Map No. 32 of Schedule 2 to Notice 1998 of 2005

**The Province of Limpopo**
- Map No. 33 of Schedule 2 to Notice 1998 of 2005
- Map No. 34 of Schedule 2 to Notice 1998 of 2005
- Map No. 35 of Schedule 2 to Notice 1998 of 2005
- Map No. 36 of Schedule 2 to Notice 1998 of 2005
- Map No. 37 of Schedule 2 to Notice 1998 of 2005

**The Province of Mpumalanga**
- Map No. 38 of Schedule 2 to Notice 1998 of 2005
- Map No. 39 of Schedule 2 to Notice 1998 of 2005
- Map No. 40 of Schedule 2 to Notice 1998 of 2005

**The Province of the Northern Cape**
- Map No. 41 of Schedule 2 to Notice 1998 of 2005
1 Oath or solemn affirmation of President and Acting President

The President or Acting President, before the Chief Justice, or another judge designated by the Chief Justice, must swear/affirm as follows—

In the presence of everyone assembled here, and in full realisation of the high calling I assume as President/Acting President of the Republic of South Africa, I, A.B., swear/solemnly affirm that I will be faithful to the Republic of South Africa, and will obey, observe, uphold and maintain the Constitution and all other law of the Republic; and I solemnly and sincerely promise that I will always—

promote all that will advance the Republic, and oppose all that may harm it;

protect and promote the rights of all South Africans;

discharge my duties with all my strength and talents to the best of my knowledge and ability and true to the dictates of my conscience;

do justice to all; and

devote myself to the well-being of the Republic and all of its people.

(In the case of an oath: So help me God.)

2 Oath or solemn affirmation of Deputy President

The Deputy President, before the Chief Justice or another judge designated by the Chief Justice, must swear/affirm as follows—

In the presence of everyone assembled here, and in full realisation of the high calling I assume as Deputy President of the Republic of South Africa, I, A.B., swear/solemnly affirm that I will be faithful to the Republic of South Africa and will obey, observe, uphold and maintain the Constitution and all other law of the Republic; and I solemnly and sincerely promise that I will always—

promote all that will advance the Republic, and oppose all that may harm it;

be a true and faithful counsellor;

discharge my duties with all my strength and talents to the best of my knowledge and ability and true to the dictates of my conscience;

do justice to all; and

devote myself to the well-being of the Republic and all of its people.

(In the case of an oath: So help me God)

3 Oath or solemn affirmation of Ministers and Deputy Ministers

Each Minister and Deputy Minister, before the Chief Justice or another judge designated by the Chief Justice, must swear/affirm as follows—

I, A.B., swear/solemnly affirm that I will be faithful to the Republic of South Africa and will obey, respect and uphold the Constitution and all other law of the Republic; and I undertake to hold my office as Minister/Deputy Minister with honour and dignity; to be a true and faithful counsellor; not to divulge directly or indirectly any secret matter entrusted to me; and to perform the functions of my office conscientiously and to the best of my ability.
4 Oath or solemn affirmation of members of the National Assembly, permanent delegates to the National Council of Provinces and members of the provincial legislatures

(1) Members of the National Assembly, permanent delegates to the National Council of Provinces and members of provincial legislatures, before the Chief Justice or a judge designated by the Chief Justice, must swear or affirm as follows—

I, A.B., swear/solemnly affirm that I will be faithful to the Republic of South Africa and will obey, respect and uphold the Constitution and all other law of the Republic; and I solemnly promise to perform my functions as a member of the National Assembly/permanent delegate to the National Council of Provinces/member of the legislature of the province of C.D. to the best of my ability.

(In the case of an oath: So help me God.)

(2) Persons filling a vacancy in the National Assembly, a permanent delegation to the National Council of Provinces or a provincial legislature may swear or affirm in terms of subitem (1) before the presiding officer of the Assembly, Council or legislature, as the case may be.

5 Oath or solemn affirmation of Premiers, Acting Premiers and members of provincial Executive Councils

The Premier or Acting Premier of a province, and each member of the Executive Council of a province, before the Chief Justice or a judge designated by the Chief Justice, must swear/affirm as follows—

I, A.B., swear/solemnly affirm that I will be faithful to the Republic of South Africa and will obey, respect and uphold the Constitution and all other law of the Republic; and I undertake to hold my office as Premier/Acting Premier/member of the Executive Council of the province of C.D. with honour and dignity; to be a true and faithful counsellor; not to divulge directly or indirectly any secret matter entrusted to me; and to perform the functions of my office conscientiously and to the best of my ability.

(In the case of an oath: So help me God.)

6 Oath or solemn affirmation of Judicial Officers

(1) Each judge or acting judge, before the Chief Justice or another judge designated by the Chief Justice, must swear or affirm as follows—

I, A.B., swear/solemnly affirm that, as a Judge of the Constitutional Court/Supreme Court of Appeal/High Court/E.F. Court, I will be faithful to the Republic of South Africa, will uphold and protect the Constitution and the human rights entrenched in it, and will administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law.

(In the case of an oath: So help me God.)

(2) A person appointed to the office of Chief Justice who is not already a judge at the time of that appointment must swear or affirm before the Deputy Chief Justice, or failing that judge, the next most senior available judge of the Constitutional Court.

(3) Judicial officers, and acting judicial officers, other than judges, must swear/affirm in terms of national legislation.

Schedule 3
ELECTION PROCEDURES
Part A—Election procedures for constitutional office-bearers

1 Application

The procedure see out in this Schedule applies whenever—

(a) the National Assembly meets to elect the President, or the Speaker or Deputy Speaker of the Assembly;

(b) the National Council of Provinces meets to elect its Chairperson or a Deputy Chairperson; or

(c) a provincial legislature meets to elect the Premier of the province or the Speaker or Deputy Speaker of the legislature.

2 Nominations

The person presiding at a meeting to which this Schedule applies must call for the nomination of candidates at the meeting.

3 Formal requirements

(1) A nomination must be made on the form prescribed by the rules mentioned in item 9.

(2) The form on which a nomination is made must be signed—
(a) by two members of the National Assembly, if the President or the Speaker or Deputy Speaker of the Assembly is to be elected;
(b) on behalf of two provincial delegations, if the Chairperson or a Deputy Chairperson of the National Council of Provinces is to be elected; or
(c) by two members of the relevant provincial legislature, if the Premier of the province or the Speaker or Deputy Speaker of the legislature is to be elected.

(3) A person who is nominated must indicate acceptance of the nomination by signing either the nomination form or any other form of written confirmation.

4 Announcement of names of candidates
At a meeting to which this Schedule applies, the person presiding must announce the names of the persons who have been nominated as candidates, but may not permit any debate.

5 Single candidate
If only one candidate is nominated, the person presiding must declare that candidate elected.

6 Election procedure
If more than one candidate is nominated—
(a) a vote must be taken at the meeting by secret ballot;
(b) each member present, or if it is a meeting of the National Council of Provinces each province represented, at the meeting may cast one vote; and
(c) the person presiding must declare elected the candidate who receives a majority of the votes.

7 Elimination procedure
(1) If no candidate receives a majority of the votes, the candidate who receives the lowest number of votes must be eliminated and a further vote taken on the remaining candidates in accordance with item 6. This procedure must be repeated until a candidate receives a majority of the votes.
(2) When applying subitem (1), if two or more candidates each have the lowest number of votes, a separate vote must be taken on those candidates, and repeated as often as may be necessary to determine which candidate is to be eliminated.

8 Further meetings
(1) If only two candidates are nominated, or if only two candidates remain after an elimination procedure has been applied, and those two candidates receive the same number of votes, a further meeting must be held within seven days, at a time determined by the person presiding.
(2) If a further meeting is held in terms of subitem (1), the procedure prescribed in this Schedule must be applied at that meeting as if it were the first meeting for the election in question.

9 Rules
(1) The Chief Justice must make rules prescribing—
(a) the procedure for meetings to which this Schedule applies;
(b) the duties of any person presiding at a meeting, and of any person assisting the person presiding;
(c) the form on which nominations must be submitted; and
(d) the manner in which voting is to be conducted.
(2) These rules must be made known in the way that the Chief Justice determines.

Part B—Formula to determine party participation in provincial delegations to the National Council of Provinces

1. The number of delegates in a provincial delegation to the National Council of Provinces to which a party is entitled, must be determined by multiplying the number of seats the party holds in the provincial legislature by ten and dividing the result by the number of seats in the legislature plus one.
2. If a calculation in terms of item 1 yields a surplus not absorbed by the delegates allocated to a party in terms of that item, the surplus must compete with similar surpluses accruing to any other party or parties, and any undistributed delegates in the delegation must be allocated to the party or parties in the sequence of the highest surplus.
3. If the competing surpluses envisaged in item 2 are equal, the undistributed delegates in the delegation must be allocated to the party or parties with the same surplus in the sequence from the highest to the
lowest number of votes that have been recorded for those parties during the last election for the provincial legislature concerned.

4. If more than one party with the same surplus recorded the same number of votes during the last election for the provincial legislature concerned, the legislature concerned must allocate the undistributed delegates in the delegation to the party or parties with the same surplus in a manner which is consistent with democracy.

Schedule 4
FUNCTIONAL AREAS OF CONCURRENT NATIONAL AND PROVINCIAL LEGISLATIVE COMPETENCE

PART A

Administration of indigenous forests
Agriculture
Airports other than international and national airports
Animal control and diseases
Casinos, racing, gambling and wagering, excluding lotteries and sports pools
Consumer protection
Cultural matters
Disaster management
Education at all levels, excluding tertiary education
Environment
Health services
Housing
Indigenous law and customary law, subject to Chapter 12 of the Constitution
Industrial promotion
Language policy and the regulation of official languages to the extent that the provisions of section 6 of the Constitution expressly confer upon the provincial legislatures legislative competence
Media services directly controlled or provided by the provincial government, subject to section 192
Nature conservation, excluding national parks, national botanical gardens and marine resources
Police to the extent that the provisions of Chapter 11 of the Constitution confer upon the provincial legislatures legislative competence
Pollution control
Population development
Property transfer fees
Provincial public enterprises in respect of the functional areas in this Schedule and Schedule 5
Public transport
Public works only in respect of the needs of provincial government departments in the discharge of their responsibilities to administer functions specifically assigned to them in terms of the Constitution or any other law
Regional planning and development
Road traffic regulation
Soil conservation
Tourism
Trade
Traditional leadership, subject to Chapter 12 of the Constitution
Urban and rural development
Vehicle licensing
Welfare services

PART B

The following local government matters to the extent set out in section 155 (6) (a) and (7):

Air pollution
Building regulations
Child care facilities
Electricity and gas reticulation
Firefighting services
Local tourism
Municipal airports
Municipal planning
Municipal health services
Municipal public transport
Municipal public works only in respect of the needs of municipalities in the discharge of their responsibilities to administer functions specifically assigned to them under this Constitution or any other law
Pontoon, ferries, jetties, piers and harbours, excluding the regulation of international and national shipping and matters related thereto
Stormwater management systems in built-up areas
Trading regulations
Water and sanitation services limited to potable water supply systems and domestic waste-water and sewage disposal systems

Schedule 5
FUNCTIONAL AREAS OF EXCLUSIVE PROVINCIAL LEGISLATIVE COMPETENCE

PART A
Abattoirs
Ambulance services
Archives other than national archives
Libraries other than national libraries
Liquor licences
Museums other than national museums
Provincial planning
Provincial cultural matters
Provincial recreation and amenities
Provincial sport
Provincial roads and traffic
Veterinary services, excluding regulation of the profession

PART B
The following local government matters to the extent set out for provinces in section 155 (6) (a) and (7):

Beaches and amusement facilities
Billboards and the display of advertisements in public places
Cemeteries, funeral parlours and crematoria
Cleansing
Control of public nuisances
Control of undertakings that sell liquor to the public
Facilities for the accommodation, care and burial of animals
Fencing and fences
Licensing of dogs
Licensing and control of undertakings that sell food to the public
Local amenities
Local sport facilities
Markets
Municipal abattoirs
Municipal parks and recreation
Municipal roads
Noise pollution
Pounds
Public places
Refuse removal, refuse dumps and solid waste disposal
Street trading
Street lighting
Traffic and parking

Schedule 6
TRANSITIONAL ARRANGEMENTS

1 Definitions
In this Schedule, unless inconsistent with the context—

‘homeland’ means a part of the Republic which, before the previous Constitution took effect, was dealt with in South African legislation as an independent or a self-governing territory;
‘new Constitution’ means the Constitution of the Republic of South Africa, 1996;
‘old order legislation’ means legislation enacted before the previous Constitution took effect;

2 Continuation of existing law

(1) All law that was in force when the new Constitution took effect, continues in force, subject to—
   (a) any amendment or repeal; and
   (b) consistency with the new Constitution.

(2) Old order legislation that continues in force in terms of subitem (1)—
   (a) does not have a wider application, territorially or otherwise, than it had before the previous Constitution took effect unless subsequently amended to have a wider application; and
   (b) continues to be administered by the authorities that administered it when the new Constitution took effect, subject to the new Constitution.

3 Interpretation of existing legislation

(1) Unless inconsistent with the context or clearly inappropriate, a reference in any legislation that existed when the new Constitution took effect—
   (a) to the Republic of South Africa or a homeland (except when it refers to a territorial area), must be construed as a reference to the Republic of South Africa under the new Constitution;
   (b) to Parliament, the National Assembly or the Senate, must be construed as a reference to Parliament, the National Assembly or the National Council of Provinces under the new Constitution;
   (c) to the President, an Executive Deputy President, a Minister, a Deputy Minister or the Cabinet, must be construed as a reference to the President, the Deputy President, a Minister, a Deputy Minister or the Cabinet under the new Constitution, subject to item 9 of this Schedule;
   (d) to the President of the Senate, must be construed as a reference to the Chairperson of the National Council of Provinces;
   (e) to a provincial legislature, Premier, Executive Council or member of an Executive Council of a province, must be construed as a reference to a provincial legislature, Premier, Executive Council or member of an Executive Council under the new Constitution, subject to item 12 of this Schedule; or
   (f) to an official language or languages, must be construed as a reference to any of the official languages under the new Constitution.

(2) Unless inconsistent with the context or clearly inappropriate, a reference in any remaining old order legislation—
   (a) to a Parliament, a House of a Parliament or a legislative assembly or body of the Republic or of a homeland, must be construed as a reference to—
      (i) Parliament under the new Constitution, if the administration of that legislation has been allocated or assigned in terms of the previous Constitution or this Schedule to the national executive; or
      (ii) the provincial legislature of a province, if the administration of that legislation has been allocated or assigned in terms of the previous Constitution or this Schedule to a provincial executive; or
   (b) to a State President, Chief Minister, Administrator or other chief executive, Cabinet, Ministers’ Council or executive council of the Republic or of a homeland, must be construed as a reference to—
      (i) the President under the new Constitution, if the administration of that legislation has been allocated or assigned in terms of the previous Constitution or this Schedule to the national executive; or
      (ii) the Premier of a province under the new Constitution, if the administration of that legislation has been allocated or assigned in terms of the previous Constitution or this Schedule to a provincial executive.

4 National Assembly

(1) Anyone who was a member or office-bearer of the National Assembly when the new Constitution took effect, becomes a member or office-bearer of the National Assembly under the new Constitution, and holds office as a member or office-bearer in terms of the new Constitution.

(2) The National Assembly as constituted in terms of subitem (1) must be regarded as having been elected under the new Constitution for a term that expires on 30 April 1999.

(3) The National Assembly consists of 400 members for the duration of its term that expires on 30 April 1999, subject to section 49 (4) of the new Constitution.
(4) The rules and orders of the National Assembly in force when the new Constitution took effect, continue in force, subject to any amendment or repeal.

5 Unfinished business before Parliament

(1) Any unfinished business before the National Assembly when the new Constitution takes effect must be proceeded with in terms of the new Constitution.

(2) Any unfinished business before the Senate when the new Constitution takes effect must be referred to the National Council of Provinces, and the Council must proceed with that business in terms of the new Constitution.

6 Elections of National Assembly

(1) No election of the National Assembly may be held before 30 April 1999 unless the Assembly is dissolved in terms of section 50 (2) after a motion of no confidence in the President in terms of section 102(2) of the new Constitution.

(2) Section 50 (1) of the new Constitution is suspended until 30 April 1999.

(3) Despite the repeal of the previous Constitution, Schedule 2 to that Constitution, as amended by Annexure A to this Schedule, applies—

(a) to the first election of the National Assembly under the new Constitution;

(b) to the loss of membership of the Assembly in circumstances other than those provided for in section 47 (3) of the new Constitution; and

(c) to the filling of vacancies in the Assembly, and the supplementation, review and use of party lists for the filling of vacancies, until the second election of the Assembly under the new Constitution.

(4) Section 47 (4) of the new Constitution is suspended until the second election of the National Assembly under the new Constitution.

7 National Council of Provinces

(1) For the period which ends immediately before the first sitting of a provincial legislature held after its first election under the new Constitution—

(a) the proportion of party representation in the province’s delegation to the National Council of Provinces must be the same as the proportion in which the province’s 10 senators were nominated in terms of section 48 of the previous Constitution; and

(b) the allocation of permanent delegates and special delegates to the parties represented in the provincial legislature, is as follows—

<table>
<thead>
<tr>
<th>Province</th>
<th>Permanent Delegates</th>
<th>Special Delegates</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Eastern Cape</td>
<td>ANC 5 NP 1</td>
<td>ANC 4</td>
</tr>
<tr>
<td>2. Free State</td>
<td>ANC 4 FF 1 NP 1</td>
<td>ANC 4</td>
</tr>
<tr>
<td>3. Gauteng</td>
<td>ANC 3 DP 1 FF 1 NP 1</td>
<td>ANC 3 NP 1</td>
</tr>
<tr>
<td>4. KwaZulu-Natal</td>
<td>ANC 1 DP 1 IFP 3 NP 1</td>
<td>ANC 2 IFP 2</td>
</tr>
<tr>
<td>5. Mpumalanga</td>
<td>ANC 4 FF 1 NP 1</td>
<td>ANC 4</td>
</tr>
<tr>
<td>6. Northern Cape</td>
<td>ANC 3 FF 1 NP 2</td>
<td>ANC 2 NP 2</td>
</tr>
</tbody>
</table>
8 Former senators

(1) A former senator who is not appointed as a permanent delegate to the National Council of Provinces is entitled to become a full voting member of the legislature of the province from which that person was nominated as a senator in terms of section 48 of the previous Constitution.

(2) If a former senator elects not to become a member of a provincial legislature that person is regarded as having resigned as a senator the day before the new Constitution took effect.

(3) The salary, allowances and benefits of a former senator appointed as a permanent delegate or as a member of a provincial legislature may not be reduced by reason only of that appointment.

9 National executive

(1) Anyone who was the President, an Executive Deputy President, a Minister or a Deputy Minister under the previous Constitution when the new Constitution took effect, continues in and holds that office in terms of the new Constitution, but subject to subitem (2).

(2) Until 30 April 1999, sections 84, 89, 90, 91, 93 and 96 of the new Constitution must be regarded to read as set out in Annexure B to this Schedule.

(3) Subitem (2) does not prevent a Minister who was a senator when the new Constitution took effect, from continuing as a Minister referred to in section 91 (1) (a) of the new Constitution, as that section reads in Annexure B.

10 Provincial legislatures

(1) Anyone who was a member or office-bearer of a province’s legislature when the new Constitution took effect, becomes a member or office-bearer of the legislature for that province under the new Constitution, and holds office as a member or office-bearer in terms of the new Constitution and any provincial constitution that may be enacted.

(2) A provincial legislature as constituted in terms of subitem (1) must be regarded as having been elected under the new Constitution for a term that expires on 30 April 1999.

(3) For the duration of its term that expires on 30 April 1999, and subject to section 108 (4), a provincial legislature consists of the number of members determined for that legislature under the previous Constitution plus the number of former senators who became members of the legislature in terms of item 8 of this Schedule.

(4) The rules and orders of a provincial legislature in force when the new Constitution took effect, continue in force, subject to any amendment or repeal.
11 Elections of provincial legislatures

(1) Despite the repeal of the previous Constitution, Schedule 2 to that Constitution, as amended by Annex-ure A to this Schedule, applies—

(a) to the first election of a provincial legislature under the new Constitution;

(b) to the loss of membership of a legislature in circumstances other than those provided for in section 106 (3) of the new Constitution; and

(c) to the filling of vacancies in a legislature, and the supplementation, review and use of party lists far the filling of vacancies, until the second election of the legislature under the new Constitution.

(2) Section 106 (4) of the new Constitution is suspended in respect of a provincial legislature until the second election of the legislature under the new Constitution.

12 Provincial executives

(1) Anyone who was the Premier or a member of the Executive Council of a province when the new Con-stitution took effect, continues in and holds that office in terms of the new Constitution and any provincial constitution that may be enacted, but subject to subitem (2).

(2) Until the Premier elected after the first election of a province’s legislature under the new Constitution assumes office, or the province enacts its constitution, whichever occurs first, sections 132 and 136 of the new Constitution must be regarded to read as set out in Annexure C to this Schedule.

13 Provincial constitutions

A provincial constitution passed before the new Constitution took effect must comply with section 143 of the new Constitution.

14 Assignment of legislation to provinces

(1) Legislation with regard to a matter within a functional area listed in Schedule 4 or 5 to the new Consti-tution and which, when the new Constitution took effect, was administered by an authority within the national executive, may be assigned by the President, by proclamation, to an authority within a provincial executive designated by the Executive Council of the province.

(2) To the extent that it is necessary for an assignment of legislation under subitem (1) to be effectively carried out, the President, by proclamation, may—

(a) amend or adapt the legislation to regulate its interpretation or application;

(b) where the assignment does not apply to the whole of any piece of legislation, repeal and re-enact, with or without any amendments or adaptations referred to in paragraph (a), those provisions to which the assignment applies or to the extent that the assignment applies to them; or

(c) regulate any other matter necessary as a result of the assignment, including the transfer or second-ment of staff, or the transfer of assets, liabilities, rights and obligations, to or from the national or a provincial executive or any department of state, administration, security service or other institution.

(3) (a) A copy of each proclamation issued in terms of subitem (1) or (2) must be submitted to the National Assembly and the National Council of Provinces within 10 days of the publication of the proclamation.

(b) If both the National Assembly and the National Council by resolution disapprove the proclamation or any provision of it, the proclamation or provision lapses, but without affecting—

(i) the validity of anything done in terms of the proclamation or provision before it lapsed; or

(ii) a right or privilege acquired or an obligation or liability incurred before it lapsed.

(4) When legislation is assigned under subitem (1), any reference in the legislation to an authority adminis-tering it, must be construed as a reference to the authority to which it has been assigned.

(5) Any assignment of legislation under section 235 (8) of the previous Constitution, including any amend-ment, adaptation or repeal and re-enactment of any legislation and any other action taken under that sec-tion, is regarded as having been done under this item.

15 Existing legislation outside Parliament’s legislative power

(1) An authority within the national executive that administers any legislation falling outside Parliament’s legislative power when the new Constitution takes effect, remains competent to administer that legislation until it is assigned to an authority within a provincial executive in terms of item 14 of this Schedule.

(2) Subitem (1) lapses two years after the new Constitution took effect.
16 Courts

(1) Every court, including courts of traditional leaders, existing when the new Constitution took effect, continues to function and to exercise jurisdiction in terms of the legislation applicable to it, and anyone holding office as a judicial officer continues to hold office in terms of the legislation applicable to that office, subject to—

(a) any amendment or repeal of that legislation; and

(b) consistency with the new Constitution.

(2) (a) The Constitutional Court established by the previous Constitution becomes the Constitutional Court under the new Constitution.

(b) . . . . .

(3) (a) The Appellate Division of the Supreme Court of South Africa becomes the Supreme Court of Appeal under the new Constitution.

(b) . . . . .

(4) (a) A provincial or local division of the Supreme Court of South Africa or a supreme court of a homeland or a general division of such a court, becomes a High Court under the new Constitution without any alteration in its area of jurisdiction, subject to any rationalisation contemplated in subitem (6).

(b) Anyone holding office or deemed to hold office as the Judge President, the Deputy Judge President or a judge of a court referred to in paragraph (a) when the new Constitution takes effect, becomes the Judge President, the Deputy Judge President or a judge of such a court under the new Constitution, subject to any rationalisation contemplated in subitem (6).

(5) Unless inconsistent with the context or clearly inappropriate, a reference in any legislation or process to—

(a) the Constitutional Court under the previous Constitution, must be construed as a reference to the Constitutional Court under the new Constitution;

(b) the Appellate Division of the Supreme Court of South Africa, must be construed as a reference to the Supreme Court of Appeal; and

(c) a provincial or local division of the Supreme Court of South Africa or a supreme court of a homeland or general division of that court, must be construed as a reference to a High Court.

(6) (a) As soon as is practical after the new Constitution took effect all courts, including their structure, composition, functioning and jurisdiction, and all relevant legislation, must be rationalised with a view to establishing a judicial system suited to the requirements of the new Constitution.

(b) The Cabinet member responsible for the administration of justice, acting after consultation with the Judicial Service Commission, must manage the rationalisation envisaged in paragraph (a).

(7) (a) Anyone holding office, when the Constitution of the Republic of South Africa Amendment Act, 2001, takes effect, as—

(i) the President of the Constitutional Court, becomes the Chief Justice as contemplated in section 167 (1) of the new Constitution;

(ii) the Deputy President of the Constitutional Court, becomes the Deputy Chief Justice as contemplated in section 167 (1) of the new Constitution;

(iii) the Chief Justice, becomes the President of the Supreme Court of Appeal as contemplated in section 168 (1) of the new Constitution; and

(iv) the Deputy Chief Justice, becomes the Deputy President of the Supreme Court of Appeal as contemplated in section 168 (1) of the new Constitution.

(b) All rules, regulations or directions made by the President of the Constitutional Court or the Chief Justice in force immediately before the Constitution of the Republic of South Africa Amendment Act, 2001, takes effect, continue in force until repealed or amended.

(c) Unless inconsistent with the context or clearly inappropriate, a reference in any law or process to the Chief Justice or to the President of the Constitutional Court, must be construed as a reference to the Chief Justice as contemplated in section 167 (1) of the new Constitution.

17 Cases pending before courts

All proceedings which were pending before a court when the new Constitution took effect, must be disposed of as if the new Constitution had not been enacted, unless the interests of justice require otherwise.
18 Prosecuting authority

(1) Section 108 of the previous Constitution continues in force until the Act of Parliament envisaged in section 179 of the new Constitution takes effect. This subitem does not affect the appointment of the National Director of Public Prosecutions in terms of section 179.

(2) An attorney-general holding office when the new Constitution takes effect, continues to function in terms of the legislation applicable to that office, subject to subitem (1).

19 Oaths and affirmations

A person who continues in office in terms of this Schedule and who has taken the oath of office or has made a solemn affirmation under the previous Constitution, is not obliged to repeat the oath of office or solemn affirmation under the new Constitution.

20 Other constitutional institutions

(1) In this section ‘constitutional institution’ means—

(a) the Public Protector;
(b) the South African Human Rights Commission;
(c) the Commission on Gender Equality;
(d) the Auditor-General;
(e) the South African Reserve Bank;
(f) the Financial and Fiscal Commission;
(g) the Judicial Service Commission; or
(h) the Pan South African Language Board.

(2) A constitutional institution established in terms of the previous Constitution continues to function in terms of the legislation applicable to it, and anyone holding office as a commission member, a member of the board of the Reserve Bank or the Pan South African Language Board, the Public Protector or the Auditor-General when the new Constitution takes effect, continues to hold office in terms of the legislation applicable to that office, subject to—

(a) any amendment or repeal of that legislation; and
(b) consistency with the new Constitution.

(3) Sections 199 (1), 200 (1), (3) and (5) to (11) and 201 to 206 of the previous Constitution continue in force until repealed by an Act of Parliament passed in terms of section 75 of the new Constitution.

(4) The members of the Judicial Service Commission referred to in section 105 (1) (h) of the previous Constitution cease to be members of the Commission when the members referred to in section 178 (1) (i) of the new Constitution are appointed.

(5) (a) The Volkstaat Council established in terms of the previous Constitution continues to function in terms of the legislation applicable to it, and anyone holding office as a member of the Council when the new Constitution takes effect, continues to hold office in terms of the legislation applicable to that office, subject to—

(i) any amendment or repeal of that legislation; and
(ii) consistency with the new Constitution.

(b) Sections 184A and 184B (1) (a), (b) and (d) of the previous Constitution continue in force until repealed by an Act of Parliament passed in terms of section 75 of the new Constitution.

21 Enactment of legislation required by new Constitution

(1) Where the new Constitution requires the enactment of national or provincial legislation, that legislation must be enacted by the relevant authority within a reasonable period of the date the new Constitution took effect.

(2) Section 198 (b) of the new Constitution may not be enforced until the legislation envisaged in that section has been enacted.

(3) Section 199 (3) (a) of the new Constitution may not be enforced before the expiry of three months after the legislation envisaged in that section has been enacted.

(4) National legislation envisaged in section 217 (3) of the new Constitution must be enacted within three years of the date on which the new Constitution took effect, but the absence of this legislation during this period does not prevent the implementation of the policy referred to in section 217 (2).
Until the Act of Parliament referred to in section 65 (2) of the new Constitution is enacted each provincial legislature may determine its own procedure in terms of which authority is conferred on its delegation to cast votes on its behalf in the National Council of Provinces.

Until the legislation envisaged in section 229 (1) (b) of the new Constitution is enacted, a municipality remains competent to impose any tax, levy or duty which it was authorised to impose when the Constitution took effect.

### 22 National unity and reconciliation

(1) Notwithstanding the other provisions of the new Constitution and despite the repeal of the previous Constitution, all the provisions relating to amnesty contained in the previous Constitution under the heading ‘National Unity and Reconciliation’ are deemed to be part of the new Constitution for the purposes of the Promotion of National Unity and Reconciliation Act, 1995 (Act 34 of 1995), as amended, including for the purposes of its validity.

(2) For the purposes of subitem (1), the date '6 December 1993' where it appears in the provisions of the previous Constitution under the heading ‘National Unity and Reconciliation,’ must be read as '11 May 1994.'

### 23 Bill of Rights

(1) National legislation envisaged in sections 9 (4), 32 (2) and 33 (3) of the new Constitution must be enacted within three years of the date on which the new Constitution took effect.

(2) Until the legislation envisaged in sections 32 (2) and 33 (3) of the new Constitution is enacted—

(a) section 32 (1) must be regarded to read as follows

> ‘(1) Every person has the right of access to all information held by the state or any of its organs in any sphere of government in so far as that information is required for the exercise or protection of any of their rights.’; and

(b) section 33 (1) and (2) must be regarded to read as follows:

> ‘Every person has the right to

(a) lawful administrative action where any of their rights or interests is affected or threatened;

(b) procedurally fair administrative action where any of their rights or legitimate expectations is affected or threatened;

(c) be furnished with reasons in writing for administrative action which affects any of their rights or interests unless the reasons for that action have been made public; and

(d) administrative action which is justifiable in relation to the reasons given for it where any of their rights is affected or threatened.’

(3) Sections 32 (2) and 33 (3) of the new Constitution lapse if the legislation envisaged in those sections, respectively, is not enacted within three years of the date the new Constitution took effect.

### 24 Public administration and security services

(1) Sections 82 (4) (b), 215, 218 (1), 219 (1), 224 to 228, 236 (1), (2), (3), (6), (7) (b) and (8), 237 (1) and (2) (a) and 239 (4) and (5) of the previous Constitution continue in force as if the previous Constitution had not been repealed, subject to—

(a) the amendments to those sections as set out in Annexure D;

(b) any further amendment or any repeal of those sections by an Act of Parliament passed in terms of section 75 of the new Constitution; and (c) consistency with the new Constitution.

(2) The Public Service Commission and the provincial service commissions referred to in Chapter 13 of the previous Constitution continue to function in terms of that Chapter and the legislation applicable to it as if that Chapter had not been repealed, until the Commission and the provincial service commissions are abolished by an Act of Parliament passed in terms of section 75 of the new Constitution.

(3) The repeal of the previous Constitution does not affect any proclamation issued under section 237 (3) of the previous Constitution, and any such proclamation continues in force, subject to—

(a) any amendment or repeal; and

(b) consistency with the new Constitution.

### 25 Additional disqualification for legislatures

(1) Anyone who, when the new Constitution took effect, was serving a sentence in the Republic of more than 12 months’ imprisonment without the option of a fine, is not eligible to be a member of the National Assembly or a provincial legislature.

(2) The disqualification of a person in terms of subitem (1)
(a) lapses if the conviction is set aside on appeal, or the sentence is reduced on appeal to a sentence that does not disqualify that person; and
(b) ends five years after the sentence has been completed.

26 Local government

(1) Notwithstanding the provisions of sections 151, 155, 156 and 157 of the new Constitution—

(a) the provisions of the Local Government Transition Act, 1993 (Act 209 of 1993), as may be amended from time to time by national legislation consistent with the new Constitution, remain in force in respect of a Municipal Council until a Municipal Council replacing that Council has been declared elected as a result of the first general election of Municipal Councils after the commencement of the new Constitution; and

(b) a traditional leader of a community observing a system of indigenous law and residing on land within the area of a transitional local council, transitional rural council or transitional representative council, referred to in the Local Government Transition Act, 1993, and who has been identified as set out in section 182 of the previous Constitution, is ex officio entitled to be a member of that council until a Municipal Council replacing that council has been declared elected as a result of the first general election of Municipal Councils after the commencement of the new Constitution.

(2) Section 245 (4) of the previous Constitution continues in force until the application of that section lapses. Section 16 (5) and (6) of the Local Government Transition Act, 1993, may not be repealed before 30 April 2000.


Sections 82 and 124 of the new Constitution do not affect the safekeeping of Acts of Parliament or provincial Acts passed before the new Constitution took effect.

28 Registration of immovable property owned by the state

(1) On the production of a certificate by a competent authority that immovable property owned by the state is vested in a particular government in terms of section 239 of the previous Constitution, a registrar of deeds must make such entries or endorsements in or on any relevant register, title deed or other document to register that immovable property in the name of that government.

(2) No duty, fee or other charge is payable in respect of a registration in terms of subitem (1).

ANNEXURE A

AMENDMENTS TO SCHEDULE 2 TO THE PREVIOUS CONSTITUTION

1. The replacement of item 1 with the following item—

‘1. Parties registered in terms of national legislation and contesting an election of the National Assembly, shall nominate candidates for such election on lists of candidates prepared in accordance with this Schedule and national legislation.’

2. The replacement of item 2 with the following item—

‘2. The seats in the National Assembly as determined in terms of section 46 of the new Constitution, shall be filled as follows—

(a) One half of the seats from regional lists submitted by the respective parties, with a fixed number of seats reserved for each region as determined by the Commission for the next election of the Assembly, taking into account available scientifically based data in respect of voters, and representations by interested parties.

(b) The other half of the seats from national lists submitted by the respective parties, or from regional lists where national lists were not submitted.’

3. The replacement of item 3 with the following item—

‘3. The lists of candidates submitted by a party, shall in total contain the names of not more than a number of candidates equal to the number of seats in the National Assembly, and each such list shall denote such names in such fixed order of preference as the party may determine.’

4. The amendment of item 5 by replacing the words preceding paragraph (a) with the following words—

‘5. The seats referred to in item 2 (a) shall be allocated per region to the parties contesting an election, as follows:.’

5. The amendment of item 6

(a) by replacing the words preceding paragraph (a) with the following words—

‘6. The seats referred to in item 2 (b) shall be allocated to the parties contesting an election, as follows:’;

and

(b) by replacing paragraph (a) with the following paragraph—
'(a) A quota of votes per seat shall be determined by dividing the total number of votes cast nationally by the number of seats in the National Assembly, plus one, and the result plus one, disregarding fractions, shall be the quota of votes per seat.'

6. The amendment of item 7 (3) by replacing paragraph (b) with the following paragraph—

'(b) An amended quota of votes per seat shall be determined by dividing the total number of votes cast nationally, minus the number of votes cast nationally in favour of the party referred to in paragraph (a), by the number of seats in the Assembly, plus one, minus the number of seats finally allocated to the said party in terms of paragraph (a).'

7. The replacement of item 10 with the following item—

'10. The number of seats in each provincial legislature shall be as determined in terms of section 105 of the new Constitution.'

8. The replacement of item 11 with the following item—

'11. Parties registered in terms of national legislation and contesting an election of a provincial legislature, shall nominate candidates for election to such provincial legislature on provincial lists prepared in accordance with this Schedule and national legislation.'

9. The replacement of item 16 with the following item—

'Designation of representatives

16 (1) After the counting of votes has been concluded, the number of representatives of each party has been determined and the election result has been declared in terms of section 190 of the new Constitution, the Commission shall, within two days after such declaration, designate from each list of candidates, published in terms of national legislation, the representatives of each party in the legislature.

(2) Following the designation in terms of subitem (1), if a candidate’s name appears on more than one list for the National Assembly or on lists for both the National Assembly and a provincial legislature (if an election of the Assembly and a provincial legislature is held at the same time), and such candidate is due for designation as a representative in more than one case, the party which submitted such lists shall, within two days after the said declaration, indicate to the Commission from which list such candidate will be designated or in which legislature the candidate will serve, as the case may be, in which event the candidate’s name shall be deleted from the other lists.

(3) The Commission shall forthwith publish the list of names of representatives in the legislature or legislatures.'

10. The amendment of item 18 by replacing paragraph (b) with the following paragraph—

'(b) a representative is appointed as a permanent delegate to the National Council of Provinces.'

11. The replacement of item 19 with the following item—

'19. Lists of candidates of a party referred to in item 16 (1) may be supplemented on one occasion only at any time during the first 12 months following the date on which the designation of representatives in terms of item 16 has been concluded, in order to fill casual vacancies: Provided that any such supplementation shall be made at the end of the list.'

12. The replacement of item 23 with the following item—

'Vacancies

23 (1) In the event of a vacancy in a legislature to which this Schedule applies, the party which nominated the vacating member shall fill the vacancy by nominating a person—

(a) whose name appears on the list of candidates from which the vacating member was originally nominated; and

(b) who is the next qualified and available person on the list.

(2) A nomination to fill a vacancy shall be submitted to the Speaker in writing.

(3) If a party represented in a legislature dissolves or ceases to exist and the members in question vacate their seats in consequence of item 23A (1), the seats in question shall be allocated to the remaining parties mutatis mutandis as if such seats were forfeited seats in terms of item 7 or 14, as the case may be.'

13. The insertion of the following item after item 23—

'Additional ground for loss of membership of legislatures

23A (1) A person loses membership of a legislature to which this Schedule applies if that person ceases to be a member of the party which nominated that person as a member of the legislature.

(2) Despite subitem (1) any existing political party may at any time change its name.

(3) An Act of Parliament may, within a reasonable period after the new Constitution took effect, be passed in accordance with section 76 (1) of the new Constitution to amend this item and item 23 to provide for the manner in which it will be possible for a member of a legislature who ceases to be a member of the party which nominated that member, to retain membership of such legislature.

(4) An Act of Parliament referred to in subitem (3) may also provide for—

(a) any existing party to merge with another party; or

(b) any party to subdivide into more than one party.'

14. The deletion of item 24.

15. The amendment of item 25—
(a) by replacing the definition of ‘Commission’ with the following definition: ‘Commission’ means the Electoral Commission referred to in section 190 of the new Constitution; and

(b) by inserting the following definition after the definition of ‘national list’: ‘new Constitution’ means the Constitution of the Republic of South Africa, 1996;’


ANNEXURE B
GOVERNMENT OF NATIONAL UNITY: NATIONAL SPHERE

1. Section 84 of the new Constitution is deemed to contain the following additional subsection—

‘(3) The President must consult the Executive Deputy Presidents—

(a) in the development and execution of the policies of the national government;
(b) in all matters relating to the management of the Cabinet and the performance of Cabinet business;
(c) in the assignment of functions to the Executive Deputy Presidents;
(d) before making any appointment under the Constitution or any legislation, including the appointment of ambassadors or other diplomatic representatives;
(e) before appointing commissions of inquiry;
(f) before calling a referendum; and
(g) before pardoning or reprieving offenders.’

2. Section 89 of the new Constitution is deemed to contain the following additional subsection—

‘(3) Subsections (1) and (2) apply also to an Executive Deputy President.’

3. Paragraph (a) of section 90 (1) of the new Constitution is deemed to read as follows—

‘(a) an Executive Deputy President designated by the President;’

4. Section 91 of the new Constitution is deemed to read as follows—

‘Cabinet

91 (1) The Cabinet consists of the President, the Executive Deputy Presidents and—

(a) not more than 27 Ministers who are members of the National Assembly and appointed in terms of subsections (8) to (12); and

(b) not more than one Minister who is not a member of the National Assembly and appointed in terms of subsection (13), provided the President, acting in consultation with the Executive Deputy Presidents and the leaders of the participating parties, deems the appointment of such a Minister expedient.

(2) Each party holding at least 80 seats in the National Assembly is entitled to designate an Executive Deputy President from among the members of the Assembly.

(3) If no party or only one party holds 80 or more seats in the Assembly, the party holding the largest number of seats and the party holding the second largest number of seats are each entitled to designate one Executive Deputy President from among the members of the Assembly.

(4) On being designated, an Executive Deputy President may elect to remain or cease to be a member of the Assembly.

(5) An Executive Deputy President may exercise the powers and must perform the functions vested in the office of Executive Deputy President by the Constitution or assigned to that office by the President.

(6) An Executive Deputy President holds office—

(a) until 30 April 1999 unless replaced or recalled by the party entitled to make the designation in terms of subsections (2) and (3); or

(b) until the person elected President after any election of the National Assembly held before 30 April 1999, assumes office.

(7) A vacancy in the office of an Executive Deputy President may be filled by the party which designated that Deputy President.

(8) A party holding at least 20 seats in the National Assembly and which has decided to participate in the government of national unity, is entitled to be allocated one or more of the Cabinet portfolios in respect of which Ministers referred to in subsection (1) (a) are to be appointed, in proportion to the number of seats held by it in the National Assembly relative to the number of seats held by the other participating parties.

(9) Cabinet portfolios must be allocated to the respective participating parties in accordance with the following formula—

(a) A quota of seats per portfolio must be determined by dividing the total number of seats in the National Assembly held jointly by the participating parties by the number of portfolios in respect of which Ministers referred to in subsection (1) (a) are to be appointed, plus one.

(b) The result, disregarding third and subsequent decimals, if any, is the quota of seats per portfolio.

(c) The number of portfolios to be allocated to a participating party is determined by dividing the total number of seats held by that party in the National Assembly by the quota referred to in paragraph (b).
(d) The result, subject to paragraph (e), indicates the number of portfolios to be allocated to that party.

(e) Where the application of the above formula yields a surplus not absorbed by the number of portfolios allocated to a party, the surplus competes with other similar surpluses accruing to another party or parties, and any portfolio or portfolios which remain unallocated must be allocated to the party or parties concerned in sequence of the highest surplus.

(10) The President after consultation with the Executive Deputy Presidents and the leaders of the participating parties must—

(a) determine the specific portfolios to be allocated to the respective participating parties in accordance with the number of portfolios allocated to them in terms of subsection (9);
(b) appoint in respect of each such portfolio a member of the National Assembly who is a member of the party to which that portfolio was allocated under paragraph (a), as the Minister responsible for that portfolio;
(c) if it becomes necessary for the purposes of the Constitution or in the interest of good government, vary any determination under paragraph (a), subject to subsection (9);
(d) terminate any appointment under paragraph (b)—

(i) if the President is requested to do so by the leader of the party of which the Minister in question is a member; or
(ii) if it becomes necessary for the purposes of the Constitution or in the interest of good government; or
(e) fill, when necessary, subject to paragraph (b), a vacancy in the office of Minister.

(11) Subsection (10) must be implemented in the spirit embodied in the concept of a government of national unity, and the President and the other functionaries concerned must in the implementation of that subsection seek to achieve consensus at all times: Provided that if consensus cannot be achieved on—

(a) the exercise of a power referred to in paragraph (a), (c) or (d) (ii) of that subsection, the President’s decision prevails;
(b) the exercise of a power referred to in paragraph (b), (d) (i) or (e) of that subsection affecting a person who is not a member of the President’s party, the decision of the leader of the party of which that person is a member prevails; and
(c) the exercise of a power referred to in paragraph (b) or (e) of that subsection affecting a person who is a member of the President’s party, the President’s decision prevails.

(12) If any determination of portfolio allocations is varied under subsection (10) (c), the affected Ministers must vacate their portfolios but are eligible, where applicable, for reappointment to other portfolios allocated to their respective parties in terms of the varied determination.

(13) The President—

(a) in consultation with the Executive Deputy Presidents and the leaders of the participating parties, must—

(i) determine a specific portfolio for a Minister referred to in subsection (1) (b) should it become necessary pursuant to a decision of the President under that subsection;
(ii) appoint in respect of that portfolio a person who is not a member of the National Assembly, as the Minister responsible for that portfolio; and
(iii) fill, if necessary, a vacancy in respect of that portfolio; or
(b) after consultation with the Executive Deputy Presidents and the leaders of the participating parties, must terminate any appointment under paragraph (a) if it becomes necessary for the purposes of the Constitution or in the interest of good government.

(14) Meetings of the Cabinet must be presided over by the President, or, if the President so instructs, by an Executive Deputy President: Provided that the Executive Deputy Presidents preside over meetings of the Cabinet in turn unless the exigencies of government and the spirit embodied in the concept of a government of national unity otherwise demand.

(15) The Cabinet must function in a manner which gives consideration to the consensus-seeking spirit embodied in the concept of a government of national unity as well as the need for effective government.’

5. Section 93 of the new Constitution is deemed to read as follows—

‘Appointment of Deputy Ministers

93 (1) The President may, after consultation with the Executive Deputy Presidents and the leaders of the parties participating in the Cabinet, establish deputy ministerial posts.

(2) A party is entitled to be allocated one or more of the deputy ministerial posts in the same proportion and according to the same formula that portfolios in the Cabinet are allocated.

(3) The provisions of section 91 (10) to (12) apply, with the necessary changes, in respect of Deputy Ministers, and in such application a reference in that section to a Minister or a portfolio must be read as a reference to a Deputy Minister or a deputy ministerial post, respectively.

(4) If a person is appointed as the Deputy Minister of any portfolio entrusted to a Minister—

(a) that Deputy Minister must exercise and perform on behalf of the relevant Minister any of the powers and functions assigned to that Minister in terms of any legislation or otherwise which may, subject to the directions of the President, be assigned to that Deputy Minister by that Minister; and
1. Section 132 of the new Constitution is deemed to read as follows—

(b) any reference in any legislation to that Minister must be construed as including a reference to the Deputy Minister acting in terms of an assignment under paragraph (a) by the Minister for whom that Deputy Minister acts.

(5) Whenever a Deputy Minister is absent or for any reason unable to exercise or perform any of the powers or functions of office, the President may appoint any other Deputy Minister or any other person to act in the said Deputy Minister's stead, either generally or in the exercise or performance of any specific power or function.'

6. Section 96 of the new Constitution is deemed to contain the following additional subsections—

(3) Ministers are accountable individually to the President and to the National Assembly for the administration of their portfolios, and all members of the Cabinet are correspondingly accountable collectively for the performance of the functions of the national government and for its policies.

(4) Ministers must administer their portfolios in accordance with the policy determined by the Cabinet.

(5) If a Minister fails to administer the portfolio in accordance with the policy of the Cabinet, the President may require the Minister concerned to bring the administration of the portfolio into conformity with that policy.

(6) If the Minister concerned fails to comply with a requirement of the President under subsection (5), the President may remove the Minister from office—

(a) if it is a Minister referred to in section 91 (1) (a), after consultation with the Minister and, if the Minister is not a member of the President's party or is not the leader of a participating party, also after consultation with the leader of that Minister's party; or

(b) if it is a Minister referred to in section 91 (1) (b), after consultation with the Executive Deputy Presidents and the leaders of the participating parties.'

ANNEXURE C

GOVERNMENT OF NATIONAL UNITY: PROVINCIAL SPHERE

1. Section 132 of the new Constitution is deemed to read as follows—

'Executive Councils

132 (1) The Executive Council of a province consists of the Premier and not more than 10 members appointed by the Premier in accordance with this section.

(2) A party holding at least 10 per cent of the seats in a provincial legislature and which has decided to participate in the government of national unity, is entitled to be allocated one or more of the Executive Council portfolios in proportion to the number of seats held by it in the legislature relative to the number of seats held by the other participating parties.

(3) Executive Council portfolios must be allocated to the respective participating parties according to the same formula set out in section 91 (9), and in applying that formula a reference in that section to—

(a) the Cabinet, must be read as a reference to an Executive Council;

(b) a Minister, must be read as a reference to a member of an Executive Council; and

(c) the National Assembly, must be read as a reference to the provincial legislature.

(4) The Premier of a province after consultation with the leaders of the participating parties must—

(a) determine the specific portfolios to be allocated to the respective participating parties in accordance with the number of portfolios allocated to them in terms of subsection (3);

(b) appoint in respect of each such portfolio a member of the provincial legislature who is a member of the party to which that portfolio was allocated under paragraph (a), as the member of the Executive Council responsible for that portfolio;

(c) if it becomes necessary for the purposes of the Constitution or in the interest of good government, vary any determination under paragraph (a), subject to subsection (3);

(d) terminate any appointment under paragraph (b)—

(i) if the Premier is requested to do so by the leader of the party of which the Executive Council member in question is a member; or

(ii) if it becomes necessary for the purposes of the Constitution or in the interest of good government;

(e) fill, when necessary, subject to paragraph (b), a vacancy in the office of a member of the Executive Council.

(5) Subsection (4) must be implemented in the spirit embodied in the concept of a government of national unity, and the Premier and the other functionaries concerned must in the implementation of that subsection seek to achieve consensus at all times: Provided that if consensus cannot be achieved on—

(a) the exercise of a power referred to in paragraph (a), (c) or (d) (ii) of that subsection, the Premier’s decision prevails;

(b) the exercise of a power referred to in paragraph (b), (d) (i) or (e) of that subsection affecting a person who is not a member of the Premier’s party, the decision of the leader of the party of which such person is a member prevails; and

(c) the exercise of a power referred to in paragraph (b) or (e) of that subsection affecting a person who is a member of the Premier’s party, the Premier’s decision prevails.

(6) If any determination of portfolio allocations is varied under subsection (4) (c), the affected members must vacate their portfolios but are eligible, where applicable, for reappointment to other portfolios allocated to their respective parties in terms of the varied determination.
(7) Meetings of an Executive Council must be presided over by the Premier of the province.

(8) An Executive Council must function in a manner which gives consideration to the consensus-seeking spirit embodied in the concept of a government of national unity, as well as the need for effective government.

2. Section 136 of the new Constitution is deemed to contain the following additional subsections—

(3) Members of Executive Councils are accountable individually to the Premier and to the provincial legislature for the administration of their portfolios, and all members of the Executive Council are correspondingly accountable collectively for the performance of the functions of the provincial government and for its policies.

(4) Members of Executive Councils must administer their portfolios in accordance with the policy determined by the Council.

(5) If a member of an Executive Council fails to administer the portfolio in accordance with the policy of the Council, the Premier may require the member concerned to bring the administration of the portfolio into conformity with that policy.

(6) If the member concerned fails to comply with a requirement of the Premier under subsection (5), the Premier may remove the member from office after consultation with the member, and if the member is not a member of the Premier’s party or is not the leader of a participating party, also after consultation with the leader of that member’s party.

ANNEXURE D
PUBLIC ADMINISTRATION AND SECURITY SERVICES: AMENDMENTS TO SECTIONS OF THE PREVIOUS CONSTITUTION

1. The amendment of section 218 of the previous Constitution—

(a) by replacing in subsection (1) the words preceding paragraph (a) with the following words—

'(1) Subject to the directions of the Minister of Safety and Security, the National Commissioner shall be responsible for—';

(b) by replacing paragraph (b) of subsection (1) with the following paragraph—

'(b) the appointment of provincial commissioners;';

(c) by replacing paragraph (d) of subsection (1) with the following paragraph—

'(d) the investigation and prevention of organised crime or crime which requires national investigation and prevention or specialised skills;'; and

(d) by replacing paragraph (k) of subsection (1) with the following paragraph—

'(k) the establishment and maintenance of a national public order policing unit to be deployed in support of and at the request of the Provincial Commissioner;.'

2. The amendment of section 219 of the previous Constitution by replacing in subsection (1) the words preceding paragraph (a) with the following words—

'(1) Subject to section 218 (1), a Provincial Commissioner shall be responsible for—.'

3. The amendment of section 224 of the previous Constitution by replacing the proviso to subsection (2) with the following proviso—

'Provided that this subsection shall also apply to members of any armed force which submitted its personnel list after the commencement of the Constitution of the Republic of South Africa, 1993 (Act 200 of 1993), but before the adoption of the new constitutional text as envisaged in section 73 of that Constitution, if the political organisation under whose authority and control it stands or with which it is associated and whose objectives it promotes did participate in the Transitional Executive Council or did take part in the first election of the National Assembly and the provincial legislatures under the said Constitution.'

4. The amendment of section 227 of the previous Constitution by replacing subsection (2) with the following subsection—

'(2) The National Defence Force shall exercise its powers and perform its functions solely in the national interest in terms of Chapter 11 of the Constitution of the Republic of South Africa, 1996.'

5. The amendment of section 236 of the previous Constitution—

(a) by replacing subsection (1) with the following subsection—

'(1) A public service, department of state, administration or security service which immediately before the commencement of the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as ‘the new Constitution’), performed governmental functions, continues to function in terms of the legislation applicable to it until it is abolished or incorporated or integrated into any appropriate institution or is rationalised or consolidated with any other institution;';

(b) by replacing subsection (6) with the following subsection—

'(6) (a) The President may appoint a commission to review the conclusion or amendment of a contract, the appointment or promotion, or the award of a term or condition of service or other benefit, which occurred between 27 April 1993 and 30 September 1994 in respect of any person referred to in subsection (2) or any class of such persons.

(b) The commission may reverse or alter a contract, appointment, promotion or award if not proper or justifiable in the circumstances of the case.; and

(c) by replacing ‘this Constitution,’ wherever this occurs in section 236, with ‘the new Constitution.’
6. The amendment of section 237 of the previous Constitution—

(a) by replacing paragraph (a) of subsection (1) with the following paragraph—

'(a) The rationalisation of all institutions referred to in section 236 (1), excluding military forces referred to in section 224 (2), shall after the commencement of the Constitution of the Republic of South Africa, 1996, continue, with a view to establishing—

(i) an effective administration in the national sphere of government to deal with matters within the jurisdiction of the national sphere; and

(ii) an effective administration for each province to deal with matters within the jurisdiction of each provincial government;'; and

(b) by replacing subparagraph (i) of subsection (2) (a) with the following subparagraph—

'(i) institutions referred to in section 236 (1), excluding military forces, shall rest with the national government, which shall exercise such responsibility in co-operation with the provincial governments;'

7. The amendment of section 239 of the previous Constitution by replacing subsection (4) with the following subsection—

'(4) Subject to and in accordance with any applicable law, the assets, rights, duties and liabilities of all forces referred to in section 224 (2) shall devolve upon the National Defence Force in accordance with the directions of the Minister of Defence.'

Schedule 6A
[Repealed]

Schedule 6B
[Repealed]

Schedule 7
LAWS REPEALED

Number and Year of Law Title
There are some remarkable differences in the ways that Canada and the United States have structured their federalisms—differences that teach us not only about the two systems involved but also about the possibilities of federalism generally. . . .

If anyone ever entertained the notion that there was a “normal” way for federalism to be structured, a comparison of the distribution of legislative power in the United States and Canada would dispel that notion. On one level, there are noticeable differences in where particular powers are lodged. Marriage and divorce and criminal law, for example, are governed by the central government in Canada but the state governments in the United States, while labor law, nationalized in the United States, is an area jealously guarded by Canada’s provincial governments. Moreover, Canadian provinces have much more exclusive power over local commerce. . . . The U.S. Congress, by comparison, has authority to regulate essentially all economic activity.

Even more basic than the different distribution of particular powers are the structural differences between the systems. In Canada, the federal and provincial governments are each assigned certain categories of legislation, to the exclusion of the other. If the government to which the subject has been entrusted does not act, therefore, the subject goes unregulated. In the United States, by contrast, the norm is that the nonexercise of federal power to regulate increases the area for state regulation; there are few if any separate spheres in which it is constitutionally permissible only for states to regulate. . . .

In both countries the intent was that the government with the residual power would play the stronger role. The framers of the U.S. Constitution intended federal law to be supreme, but they also assumed that the subject matter of federal law would be limited, so that the [Tenth Amendment]—“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people”—would have some content. The general lawmaking power thus retained by states, including the basic police power functions of government, were thought to have some significant scope. But because in the U.S. governmental structure the tenth amendment was only a truism, granting to states only whatever power was not possessed by the federal government, expansions of federal power ipso facto cut down on what was reserved to the states. Eventually, federal powers in the United States were interpreted so broadly that little or nothing remained of the residuum. . . .

In Canada, by contrast, the clause giving the central government control over trade and commerce has been interpreted to allow regulation of only international or interprovincial trade. That narrow interpretation of the commerce power is part of a more general cutback on the powers of the central government. Other legislative powers, most notably the power of the central government “to make laws for the Peace, Order and good Government of Canada” (“POGG”), were also narrowly read—artificially narrowly, and certainly more narrowly than the original framers had intended. Indeed, the experiences of both nations attest to the relative unimportance of both constitutional language and framers’ intent in determining results. . . .

In the United States, the Constitution does not define the areas in which state law can operate; instead, it leaves that decision to be made primarily by Congress. While in comparison to the Canadian provinces the states are weak vis-a-vis the national legislature (except for their representation there), they are more insulated from national control in other ways. There is no predefined area in which state law can operate in the United States, but when it does operate, it is more autonomous and has more independent force than provincial law does in Canada.

In the United States, national courts sometimes apply state law, but they never claim to be its interpreter. State law is, by definition, what that state’s supreme court says it is. However unrea-
sonable a state's reading of its own law may appear to the U.S. Supreme Court, that law nonetheless governs unless the U.S. Supreme Court holds that the law, so interpreted, violates the U.S. Constitution.

Here again the Canadian system illustrates that the United States's ways of doing things are not the inevitable ones. Nor are they the only workable ones. Canada has a system of provincial courts, which are in fact the primary courts in Canada. When it reviews their decisions, however, the Canadian Supreme Court has the final word in deciding issues of common law and also in interpreting provincial enactments. Provincial law is not separated from national law or from the input of national judicial decisionmakers in the same way state law is in the United States.

In ... *Erie R.R. v. Tompkins*, the Supreme Court ruled that lower federal court judges faced with state common law issues should not fathom their own solutions but should follow decisions of the supreme court of the relevant state. The concept behind *Erie* was the same as *Murdock*'s--that to have control over their own law, state courts, and not federal, must be the authority concerning the law's meaning.

The Canadian system of allowing federal judicial input into the meaning of provincial law is something like the system that *Erie* overruled, the system we associate with *Swift v. Tyson*. *Swift* set out the pre-*Erie* system wherein federal judges decided for themselves state common law issues. . . .

In short, while the Canadian model recognizes much more of a separate and exclusive legislative sphere for provincial lawmaking than the U.S. model does for the states, it does not grant as much independence to the provincial law that is thus made; Canada has more centralized judicial control of provincial law, and provincial courts have less of a separate sphere than provincial legislatures do, or than the state judicial system does in the United States.

This may tell us something about federalism. It certainly suggests that there are varied ways for the different levels of government, which are the essence of federalism, to maintain their significance. It may be that one reason Canada does not need a separate, more independent provincial law is that the Canadian Constitution leaves for provinces important spheres of activity in which only provincial law can operate. Maybe as long as a nation has one of these forms of strong state or provincial power, it does not need others for there to be a strong intergovernmental relationship--strong enough to satisfy the demands of a viable federalism. Even powers as basic as a separate sphere of legislative competence or the ability to interpret one's own laws are not necessary in order for governments to retain significance if governments have other important powers.
South Africa’s structural framework is tilted heavily in favor of the national government and allocates very little constitutional space to the provinces. Additionally, as a descriptive matter, provincial constitutions have not become a significant source of substantive law. Rather, the provinces are analogous to regional administrative agencies of the national government—delivering services that are financed primarily by national funds and developing almost no independent constitutional law.

… [Under] the National Constitution (NC), … South Africa is a devolutionary federal system. A unitary state theoretically preceded any subnational units, and that state subsequently instituted the provinces. The provinces are creatures of the national government and have only those powers specifically conferred on them by the NC.

There are three provincial constitutional competencies. First, a provincial constitution may include any provision that would fall within the province’s legislative authority. Second, a provincial constitution may establish “executive and legislative structures and procedures” that differ from the default provisions of the NC. Finally, provincial constitutions may provide for “the institution, role, authority and status of a traditional monarch.”

Provincial government’s legislative authority is defined in Schedules 4 and 5 of the NC. Schedule 4 lists areas of concurrent national and provincial legislative competence, with the most notable being traditional leadership, trade, tourism, housing, and education. Schedule 5 lists twelve rather insignificant areas of exclusive provincial competency. Thus, because the provinces can legislate in respect of traditional leadership under Schedule 4, government structure and procedure is the only constitutional competence that is not also within a province’s legislative authority.

That overlap between constitutional and legislative competency is significant because of the NC’s conflict of law rules. The NC provides specific rules with respect to how conflicts between national and provincial laws should be resolved, with national law superseding provincial law in almost all situations. Section 147 equates provincial constitutions with provincial legislation for purposes of resolving conflicts between national and provincial law. Section 147, however, does not implicate provisions relating to government structure and procedure. With that one exception, therefore, provincial constitutions are no more insulated from national preemption than provincial legislation, and the bounds of a province’s constitutional space are dependent largely on the existence of preemptory national legislation.

An additional, and perhaps more significant, limitation on the competency of the provinces is their ability to tax. Under Chapter 3 of the NC, provinces are precluded from assessing any sales, property, income, or value-added tax. The provinces, however, are entitled to an equitable share of the national tax revenue. Distribution of the equitable share is determined by national legislation. The NC provides that the equitable share must be sufficient for the provinces to provide “basic services” and perform the functions allocated to them under national law. Thus, the provinces are not entitled to additional funding for expenses created by provincial law, and their ability to raise independent revenue is severely limited.
Federalism, as a structural model of government, has not been widely (or very successfully) used in Africa. In the South African constitutional negotiations, the adoption of a federal model was controversial and far from a foregone conclusion. A federal compromise was struck, however, providing South Africa with a very new constitutional structure. In the words of Dawid van Wyk, describing the interim constitution:

First, instead of four provinces and ten nominally independent or self-governing "home lands", South Africa has nine new provinces, each with an elected provincial legislature and a provincial executive of national unity. The pattern is virtually the same as that of the national government. Secondly, a provincial legislature enjoys wider legislative powers than the erstwhile provincial councils, and is entitled to enact its own provincial Constitution.

Therefore, it is clear that South Africa's federalism is a devolutionary federalism, in the words of Koen Lenaerts, where power has been devolved from "a previously unitary State [to]... component entities."

South Africa's new constitution, which replaced the interim constitution, was adopted by the Constitutional Assembly on May 8, 1996. It contains an entire chapter, chapter 6, concerning the government structure and competency of the provincial governments. To this extent, the new South African constitution serves both as a national and a provincial constitution. It is, therefore, much less "incomplete" than the American and some other federal constitutions. Interestingly, however, section 142 of the constitution authorized the provincial legislature to adopt or amend a provincial constitution by a two-thirds vote of its members. Such a provincial constitution, according to section 143, had to be consistent with the national constitution but could provide for "provincial legislative or executive structures and procedures that differ from those provided for in this chapter." Thus, the provincial legislature could, through the adoption of a provincial constitution, vary some of the mandated provincial structures. This is an interesting approach, with the national constitution serving as a "default" provincial constitution, but subject to local variations. This approach had also been taken in the interim constitution, in section 160.

There have now been enough decisions handed down by the Constitutional Court about South Africa's federal structure and the provincial constitutions to provide the beginnings of a jurisprudence of South African subnational constitutional law. Under the interim constitution the Constitutional Court was created and given authority to review and approve both the new national constitution as well as the provincial constitutions. This is a process referred to as certification. The Court's opinions provide a wealth of information about the new federal arrangements generally and about provincial constitutions specifically.

The only two provinces to date that have exercised their provincial constitution making authority are, first KwaZulu/Natal under the interim constitution in March, 1996, and Western Cape Province under the new 1996 constitution in February, 1997. Neither of these provinces were controlled by the African National Congress, and therefore their constitution-making efforts could be seen as a form of opposition national politics. Subnational constitution-making can, as was demonstrated in the United States particularly during the Civil War, but also as part of Jacksonian Democracy, and the Populist and Progressive eras, reflect elements of national politics.

When the proposed national constitution for South Africa was submitted to the Constitutional Court for approval, the Court accepted written submissions on its validity, and heard nine days of oral argument before ruling on
September 6, 1996, that the proposed constitution could not be certified . . . and sent it back to the Constitutional Assembly. The Constitutional Assembly reconvened and adopted amendments to the new constitution not only responding to the grounds the Court had stated for its refusal to certify the constitution, but it also adopted a number of other amendments. In October of 1996, this revised new constitution was adopted by the Constitutional Assembly and transmitted back to the Constitutional Court. After three more days of oral argument in November of 1996, the Court rendered its decision, approving the new constitution for South Africa on December 4, 1996. . . .

[A]ccording to the terms of the Interim Constitution, a provincial constitution could not take effect until the Constitutional Court had certified that it complied with the requirements of the national constitution. Therefore, the draft constitution of KwaZulu/Natal was submitted to the Constitutional Court. On the same day that it declined to certify the proposed new national constitution, the Court also refused to certify the draft constitution of KwaZulu/Natal. In this case, the Constitutional Court found that "there are fundamental respects in which the provincial Constitution is fatally flawed." . . . The Constitutional Court concluded that the draft of the KwaZulu/Natal Constitution purported to usurp a number of national powers. Specifically, the Court stated that "it is clearly beyond the capacity of a provincial legislature to pass constitutional provisions concerning the status of a province within the Republic. After all, the provinces are the recipients and not the source of power." Quoting from one of its earlier decisions, the Court stated that "Unlike their counterparts in the United States of America, the provinces in South Africa are not sovereign states. They were created by the Constitution and have only those powers that are specifically conferred on them under the Constitution."

One of the most interesting elements of the Court's decision dealt with Chapter 3 of proposed KwaZulu/Natal Constitution, the Bill of Rights. The Court concluded that "there can in principal be no objection to a province embodying a bill of rights in its constitution." The Court stated that most constitutions had bills of rights, and that the Interim Constitution "neither prescribes nor proscribes any form or structure or content for such [provincial] constitution." It noted that the only restriction on a provincial bill of rights would be the requirement that it could not be inconsistent with the national constitution. . . .

The Court found a number of other problems with the draft provincial constitution, including an invalid attempt to create a provincial constitutional court. "The interim Constitution nowhere confers any power on a province to establish courts of law..." The resulting constitutional inability of the provinces to establish a dual system of provincial courts may, of course, have substantial implications for judicial enforcement of independent subnational constitutional rights guarantees. A dual system of state courts, however, is not common in federal systems other than the United States, and is therefore not a necessary condition for subnational constitutional rights enforcement beyond the national minimum standards. . . .

The unanimous adoption of the KwaZulu/Natal provincial constitution reflected an important, and hard-fought compromise among the competing national political parties within the province. This "peace" may be, in the long run, much more important than a valid provincial constitution. The fact that, after the Constitutional Court declined to certify the KwaZulu/Natal provincial constitution, the provincial parliament did not, and does not appear likely to return to its constitution-making efforts may be explained on this basis. The draft constitution itself represented the underlying political compromise that became reality long before the draft was invalidated, and this has been the reality that has continued after the Court refused to approve the provincial constitution. . . .
Reference re Secession of Quebec, [1998] 2 S.C.R. 217 [Supreme Court (Canada)]

Present: Lamer C.J. and L’Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Major, Bastarache and Binnie JJ.

Reference by governor in council

THE COURT --

I. Introduction

1. This Reference requires us to consider momentous questions that go to the heart of our system of constitutional government. . . . In our view, it is not possible to answer the questions that have been put to us without a consideration of a number of underlying principles. An exploration of the meaning and nature of these underlying principles is not merely of academic interest. On the contrary, such an exploration is of immense practical utility. Only once those underlying principles have been examined and delineated may a considered response to the questions we are required to answer emerge.

2. The question[] posed by the Governor in Council by way of Order in Council P.C. 1996-1497, dated September 30, 1996, read[s] as follows:

   1. Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally? . . .

3. Before turning to Question 1, as a preliminary matter, it is necessary to deal with the issues raised with regard to this Court's reference jurisdiction.

II. The Preliminary Objections to the Court's Reference Jurisdiction

4. The amicus curiae argued that s. 101 of the Constitution Act, 1867 does not give Parliament the authority to grant this Court the jurisdiction provided for in s. 53 of the Supreme Court Act, R.S.C., 1985, c. S-26. . . .

8. . . . Section 53 . . . imposes a duty on the Court to render advisory opinions. Section 53 is therefore constitutionally valid only if . . . a “general court of appeal” may properly undertake other legal functions, such as the rendering of advisory opinions. . . .

12. The amicus curiae submits that

[TRANSLATION] [e]ither this constitutional power [to give the highest court in the federal jurisdiction to give advisory opinions] is expressly provided for by the Constitution, as is the case in India (Constitution of India, art. 143), or it is not provided for therein and so it simply does not exist. This is what the Supreme Court of the United States has held. . . .

13. However, the U.S. Supreme Court did not conclude that it was unable to render advisory opinions because no such express power was included in the United States Constitution. Quite the contrary, it based this conclusion on the express limitation in art. III, § 2 restricting federal court jurisdiction to actual “cases” or “controversies” . . . . This section reflects the strict separation of powers in the American federal constitutional arrangement. Where the “case or controversy” limitation is missing from their respective state constitutions, some American state courts do undertake advisory functions (e.g., in at least two states -- Alabama and Delaware -- advisory opinions are authorized, in certain circumstances, by statute: see Ala. Code 1975 § 12-2-10; Del. Code Ann. tit. 10, § 141 (1996 Supp.)).

14. In addition, the judicial systems in several European countries (such as Germany, France, Italy, Spain, Portugal and Belgium) include courts dedicated to the review of constitutional claims; these tribunals do not require a concrete dispute involving individual rights to examine the constitutionality of a new law -- an “abstract or objective question” is sufficient. . . . The European Court of Justice, the European Court of Human Rights, and the Inter-American Court of Human Rights also all enjoy explicit grants of jurisdiction to render advisory opinions. . . . There is no plausible basis on which to conclude that a court is, by its nature,
inherently precluded from undertaking another legal function in tandem with its judicial duties.

15. Moreover, the Canadian Constitution does not insist on a strict separation of powers. Parliament and the provincial legislatures may properly confer other legal functions on the courts, and may confer certain judicial functions on bodies that are not courts. The exception to this rule relates only to s. 96 courts. Thus, even though the rendering of advisory opinions is quite clearly done outside the framework of adversarial litigation, and such opinions are traditionally obtained by the executive from the law officers of the Crown, there is no constitutional bar to this Court's receipt of jurisdiction to undertake such an advisory role. The legislative grant of reference jurisdiction found in s. 53 of the *Supreme Court Act* is therefore constitutionally valid. . . .

III. Reference Questions

A. Question 1

Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally?

(1) Introduction

32. As we confirmed in *Reference re Objection by Quebec to a Resolution to amend the Constitution*, [1982] 2 S.C.R. 793, at p. 806, “The Constitution Act, 1982 is now in force. Its legality is neither challenged nor assailable.” The “Constitution of Canada” certainly includes the constitutional texts enumerated in s. 52(2) of the *Constitution Act, 1982*. Although these texts have a primary place in determining constitutional rules, they are not exhaustive. The Constitution also “embraces unwritten, as well as written rules”. . . . Finally, the Constitution of Canada includes the global system of rules and principles which govern the exercise of constitutional authority in the whole and in every part of the Canadian state.

These supporting principles and rules, which include constitutional conventions and the workings of Parliament, are a necessary part of our Constitution because problems or situations may arise which are not expressly dealt with by the text of the Constitution. In order to endure over time, a constitution must contain a comprehensive set of rules and principles which are capable of providing an exhaustive legal framework for our system of government. Such principles and rules emerge from an understanding of the constitutional text itself, the historical context, and previous judicial interpretations of constitutional meaning. In our view, there are four fundamental and organizing principles of the Constitution which are relevant to addressing the question before us (although this enumeration is by no means exhaustive): federalism; democracy; constitutionalism and the rule of law; and respect for minorities. The foundation and substance of these principles are addressed in the following paragraphs. We will then turn to their specific application to the first reference question before us. . . .

48. We think it apparent from even this brief historical review that the evolution of our constitutional arrangements has been characterized by adherence to the rule of law, respect for democratic institutions, the accommodation of minorities, insistence that governments adhere to constitutional conduct and a desire for continuity and stability. We now turn to a discussion of the general constitutional principles that bear on the present Reference.

(3) Analysis of the Constitutional Principles

(a) Nature of the Principles

49. What are those underlying principles? Our Constitution is primarily a written one, the product of 131 years of evolution. Behind the written word is an historical lineage stretching back through the ages, which aids in the consideration of the underlying constitutional principles. These principles inform and sustain the constitutional text: they are the vital unstated assumptions upon which the text is based. The following discussion addresses the four foundational constitutional principles that are most germane for resolution of this Reference: federalism, democracy, constitutionalism and the rule of law, and respect for minority rights.
These defining principles function in symbiosis. No single principle can be defined in isolation from the others, nor does any one principle trump or exclude the operation of any other. . . .

(b) Federalism

55. It is undisputed that Canada is a federal state. . . .

58. The principle of federalism recognizes the diversity of the component parts of Confederation, and the autonomy of provincial governments to develop their societies within their respective spheres of jurisdiction. The federal structure of our country also facilitates democratic participation by distributing power to the government thought to be most suited to achieving the particular societal objective having regard to this diversity. The scheme of the Constitution Act, 1867, it was said in Re the Initiative and Referendum Act, [1919] A.C. 935 (P.C.), at p. 942, was “not to weld the Provinces into one, nor to subordinate Provincial Governments to a central authority, but to establish a central government in which these Provinces should be represented, entrusted with exclusive authority only in affairs in which they had a common interest. Subject to this each Province was to retain its independence and autonomy and to be directly under the Crown as its head.”. . .

The principle of federalism facilitates the pursuit of collective goals by cultural and linguistic minorities which form the majority within a particular province. This is the case in Quebec, where the majority of the population is French-speaking, and which possesses a distinct culture. This is not merely the result of chance. The social and demographic reality of Quebec explains the existence of the province of Quebec as a political unit and indeed, was one of the essential reasons for establishing a federal structure for the Canadian union in 1867. The experience of both Canada East and Canada West under the Union Act, 1840 (U.K.), 3-4 Vict., c. 35, had not been satisfactory. The federal structure adopted at Confederation enabled French-speaking Canadians to form a numerical majority in the province of Quebec, and so exercise the considerable provincial powers conferred by the Constitution Act, 1867 in such a way as to promote their language and culture. It also made provision for certain guaranteed representation within the federal Parliament itself. . . .

(c) Democracy

61. Democracy is a fundamental value in our constitutional law and political culture. While it has both an institutional and an individual aspect, the democratic principle was also argued before us in the sense of the supremacy of the sovereign will of a people, in this case potentially to be expressed by Quebecers in support of unilateral secession. It is useful to explore in a summary way these different aspects of the democratic principle.

62. The principle of democracy has always informed the design of our constitutional structure, and continues to act as an essential interpretive consideration to this day. A majority of this Court in OPSEU v. Ontario, supra, at p. 57, confirmed that “the basic structure of our Constitution, as established by the Constitution Act, 1867, contemplates the existence of certain political institutions, including freely elected legislative bodies at the federal and provincial levels”. As is apparent from an earlier line of decisions emanating from this Court, . . . the democracy principle can best be understood as a sort of baseline against which the framers of our Constitution, and subsequently, our elected representatives under it, have always operated. It is perhaps for this reason that the principle was not explicitly identified in the text of the Constitution Act, 1867 itself. To have done so might have appeared redundant, even silly, to the framers. As explained in the Provincial Judges Reference, it is evident that our Constitution contemplates that Canada shall be a constitutional democracy. Yet this merely demonstrates the importance of underlying constitutional principles that are nowhere explicitly described in our constitutional texts. The representative and democratic nature of our political institutions was simply assumed.
63. Democracy is commonly understood as being a political system of majority rule. It is essential to be clear what this means. The evolution of our democratic tradition can be traced back to the Magna Carta (1215) and before, through the long struggle for Parliamentary supremacy which culminated in the English Bill of Rights of 1689, the emergence of representative political institutions in the colonial era, the development of responsible government in the 19th century, and eventually, the achievement of Confederation itself in 1867. “[T]he Canadian tradition”, the majority of this Court held in Reference re Provincial Electoral Boundaries (Sask.), [1991] 2 S.C.R. 158, at p. 186, is “one of evolutionary democracy moving in uneven steps toward the goal of universal suffrage and more effective representation”. Since Confederation, efforts to extend the franchise to those unjustly excluded from participation in our political system — such as women, minorities, and aboriginal peoples — have continued, with some success, to the present day.

64. Democracy is not simply concerned with the process of government. On the contrary, as suggested in Switzman v. Elbling, supra, at p. 306, democracy is fundamentally connected to substantive goals, most importantly, the promotion of self-government. Democracy accommodates cultural and group identities: Reference re Provincial Electoral Boundaries, at p. 188. Put another way, a sovereign people exercises its right to self-government through the democratic process. In considering the scope and purpose of the Charter, the Court in R. v. Oakes, [1986] 1 S.C.R. 103, articulated some of the values inherent in the notion of democracy (at p. 136):

The Court must be guided by the values and principles essential to a free and democratic society which I believe to embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.

65. In institutional terms, democracy means that each of the provincial legislatures and the federal Parliament is elected by popular franchise. These legislatures, we have said, are “at the core of the system of representative government”: New Brunswick Broadcasting, supra, at p. 387. In individual terms, the right to vote in elections to the House of Commons and the provincial legislatures, and to be candidates in those elections, is guaranteed to “Every citizen of Canada” by virtue of s. 3 of the Charter. Historically, this Court has interpreted democracy to mean the process of representative and responsible government and the right of citizens to participate in the political process as voters. In addition, the effect of s. 4 of the Charter is to oblige the House of Commons and the provincial legislatures to hold regular elections and to permit citizens to elect representatives to their political institutions. The democratic principle is affirmed with particular clarity in that s. 4 is not subject to the notwithstanding power contained in s. 33.

66. It is, of course, true that democracy expresses the sovereign will of the people. Yet this expression, too, must be taken in the context of the other institutional values we have identified as pertinent to this Reference. The relationship between democracy and federalism means, for example, that in Canada there may be different and equally legitimate majorities in different provinces and territories and at the federal level. No one majority is more or less “legitimate” than the others as an expression of democratic opinion, although, of course, the consequences will vary with the subject matter. A federal system of government enables different provinces to pursue policies responsive to the particular concerns and interests of people in that province. At the same time, Canada as a whole is also a democratic community in which citizens construct and achieve goals on a national scale through a federal government acting within the limits of its jurisdiction. The function of federalism is to enable citizens to participate concurrently in different collectivities and to pursue goals at both a provincial and a federal level.
67. The consent of the governed is a value that is basic to our understanding of a free and democratic society. Yet democracy in any real sense of the word cannot exist without the rule of law. It is the law that creates the framework within which the “sovereign will” is to be ascertained and implemented. To be accorded legitimacy, democratic institutions must rest, ultimately, on a legal foundation. That is, they must allow for the participation of, and accountability to, the people, through public institutions created under the Constitution. Equally, however, a system of government cannot survive through adherence to the law alone. A political system must also possess legitimacy, and in our political culture, that requires an interaction between the rule of law and the democratic principle. The system must be capable of reflecting the aspirations of the people. But there is more. Our law’s claim to legitimacy also rests on an appeal to moral values, many of which are imbedded in our constitutional structure. It would be a grave mistake to equate legitimacy with the “sovereign will” or majority rule alone, to the exclusion of other constitutional values.

68. Finally, we highlight that a functioning democracy requires a continuous process of discussion. The Constitution mandates government by democratic legislatures, and an executive accountable to them, “resting ultimately on public opinion reached by discussion and the interplay of ideas” (Saumur v. City of Quebec, supra, at p. 330). At both the federal and provincial level, by its very nature, the need to build majorities necessitates compromise, negotiation, and deliberation. No one has a monopoly on truth, and our system is predicated on the faith that in the marketplace of ideas, the best solutions to public problems will rise to the top. Inevitably, there will be dissenting voices. A democratic system of government is committed to considering those dissenting voices, and seeking to acknowledge and address those voices in the laws by which all in the community must live.

69. The Constitution Act, 1982 gives expression to this principle, by conferring a right to initiate constitutional change on each participant in Confederation. In our view, the existence of this right imposes a corresponding duty on the participants in Confederation to engage in constitutional discussions in order to acknowledge and address democratic expressions of a desire for change in other provinces. This duty is inherent in the democratic principle which is a fundamental predicate of our system of governance.

(d) Constitutionalism and the Rule of Law

70. The principles of constitutionalism and the rule of law lie at the root of our system of government. . . . At its most basic level, the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs. It provides a shield for individuals from arbitrary state action.

72. The constitutionalism principle bears considerable similarity to the rule of law, although they are not identical. The essence of constitutionalism in Canada is embodied in s. 52(1) of the Constitution Act, 1982, which provides that “[t]he Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.” Simply put, the constitutionalism principle requires that all government action comply with the Constitution. The rule of law principle requires that all government action must comply with the law, including the Constitution. . . .

73. An understanding of the scope and importance of the principles of the rule of law and constitutionalism is aided by acknowledging explicitly why a constitution is entrenched beyond the reach of simple majority rule. There are three overlapping reasons.

74. First, a constitution may provide an added safeguard for fundamental human rights and individual freedoms which might otherwise be susceptible to government interference. Although democratic government is generally solicitous of those rights, there are occasions when the majority will be tempted to ignore fundamental rights in order to accomplish col-
lective goals more easily or effectively. Constitutional entrenchment ensures that those rights will be given due regard and protection. Second, a constitution may seek to ensure that vulnerable minority groups are endowed with the institutions and rights necessary to maintain and promote their identities against the assimilative pressures of the majority. And third, a constitution may provide for a division of political power that allocates political power amongst different levels of government. That purpose would be defeated if one of those democratically elected levels of government could usurp the powers of the other simply by exercising its legislative power to allocate additional political power to itself unilaterally.

75. The argument that the Constitution may be legitimately circumvented by resort to a majority vote in a province-wide referendum is superficially persuasive, in large measure because it seems to appeal to some of the same principles that underlie the legitimacy of the Constitution itself, namely, democracy and self-government. In short, it is suggested that as the notion of popular sovereignty underlies the legitimacy of our existing constitutional arrangements, so the same popular sovereignty that originally led to the present Constitution must (it is argued) also permit “the people” in their exercise of popular sovereignty to secede by majority vote alone. However, closer analysis reveals that this argument is unsound, because it misunderstands the meaning of popular sovereignty and the essence of a constitutional democracy.

76. Canadians have never accepted that ours is a system of simple majority rule. Our principle of democracy, taken in conjunction with the other constitutional principles discussed here, is richer. Constitutional government is necessarily predicated on the idea that the political representatives of the people of a province have the capacity and the power to commit the province to be bound into the future by the constitutional rules being adopted. These rules are “binding” not in the sense of frustrating the will of a majority of a province, but as defining the majority which must be consulted in order to alter the fundamental balances of political power (including the spheres of autonomy guaranteed by the principle of federalism), individual rights, and minority rights in our society. Of course, those constitutional rules are themselves amenable to amendment, but only through a process of negotiation which ensures that there is an opportunity for the constitutionally defined rights of all the parties to be respected and reconciled.

77. In this way, our belief in democracy may be harmonized with our belief in constitutionalism. Constitutional amendment often requires some form of substantial consensus precisely because the content of the underlying principles of our Constitution demand it. By requiring broad support in the form of an “enhanced majority” to achieve constitutional change, the Constitution ensures that minority interests must be addressed before proposed changes which would affect them may be enacted.

78. It might be objected, then, that constitutionalism is therefore incompatible with democratic government. This would be an erroneous view. Constitutionalism facilitates — indeed, makes possible — a democratic political system by creating an orderly framework within which people may make political decisions. Viewed correctly, constitutionalism and the rule of law are not in conflict with democracy; rather, they are essential to it. Without that relationship, the political will upon which democratic decisions are taken would itself be undermined.

(e) Protection of Minorities

79. The fourth underlying constitutional principle we address here concerns the protection of minorities. There are a number of specific constitutional provisions protecting minority language, religion and education rights. . . . In the absence of such protection, it was felt that the minorities in what was then Canada East and Canada West would be submerged and assimilated. . . .

80. However, we highlight that even though those provisions were the product of negotiation and political compromise, that does not render them unprincipled. Rather, such a concern reflects a broader principle related to the
protection of minority rights. Undoubtedly, the three other constitutional principles inform the scope and operation of the specific provisions that protect the rights of minorities.

81. The concern of our courts and governments to protect minorities has been prominent in recent years, particularly following the enactment of the Charter. Undoubtedly, one of the key considerations motivating the enactment of the Charter, and the process of constitutional judicial review that it entails, is the protection of minorities. However, it should not be forgotten that the protection of minority rights had a long history before the enactment of the Charter. Indeed, the protection of minority rights was clearly an essential consideration in the design of our constitutional structure even at the time of Confederation. Although Canada's record of upholding the rights of minorities is not a spotless one, that goal is one towards which Canadians have been striving since Confederation, and the process has not been without successes. The principle of protecting minority rights continues to exercise influence in the operation and interpretation of our Constitution.

(4) The Operation of the Constitutional Principles in the Secession Context

83. Secession is the effort of a group or section of a state to withdraw itself from the political and constitutional authority of that state, with a view to achieving statehood for a new territorial unit on the international plane. In a federal state, secession typically takes the form of a territorial unit seeking to withdraw from the federation. Secession is a legal act as much as a political one. By the terms of Question 1 of this Reference, we are asked to rule on the legality of unilateral secession “under the Constitution of Canada”. This is an appropriate question, as the legality of unilateral secession must be evaluated, at least in the first instance, from the perspective of the domestic legal order of the state from which the unit seeks to withdraw. As we shall see below, it is also argued that international law is a relevant standard by which the legality of a purported act of secession may be measured.

84. The secession of a province from Canada must be considered, in legal terms, to require an amendment to the Constitution, which perforce requires negotiation. The amendments necessary to achieve a secession could be radical and extensive. Some commentators have suggested that secession could be a change of such a magnitude that it could not be considered to be merely an amendment to the Constitution. We are not persuaded by this contention. It is of course true that the Constitution is silent as to the ability of a province to secede from Confederation but, although the Constitution neither expressly authorizes nor prohibits secession, an act of secession would purport to alter the governance of Canadian territory in a manner which undoubtedly is inconsistent with our current constitutional arrangements. The fact that those changes would be profound, or that they would purport to have a significance with respect to international law, does not negate their nature as amendments to the Constitution of Canada.

85. The Constitution is the expression of the sovereignty of the people of Canada. It lies within the power of the people of Canada, acting through their various governments duly elected and recognized under the Constitution, to effect whatever constitutional arrangements are desired within Canadian territory, including, should it be so desired, the secession of Quebec from Canada. As this Court held in the Manitoba Language Rights Reference, supra, at p. 745, “[t]he Constitution of a country is a statement of the will of the people to be governed in accordance with certain principles held as fundamental and certain prescriptions restrictive of the powers of the legislature and government”. The manner in which such a political will could be formed and mobilized is a somewhat speculative exercise, though we are asked to assume the existence of such a political will for the purpose of answering the question before us. By the terms of this Reference, we have been asked to consider whether it would be constitutional in such a circumstance for the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada unilaterally.
86. The “unilateral” nature of the act is of cardinal importance and we must be clear as to what is understood by this term. In one sense, any step towards a constitutional amendment initiated by a single actor on the constitutional stage is “unilateral”. We do not believe that this is the meaning contemplated by Question 1, nor is this the sense in which the term has been used in argument before us. Rather, what is claimed by a right to secede “unilaterally” is the right to effectuate secession without prior negotiations with the other provinces and the federal government. At issue is not the legality of the first step but the legality of the final act of purported unilateral secession. The supposed juridical basis for such an act is said to be a clear expression of democratic will in a referendum in the province of Quebec. This claim requires us to examine the possible juridical impact, if any, of such a referendum on the functioning of our Constitution, and on the claimed legality of a unilateral act of secession.

87. Although the Constitution does not itself address the use of a referendum procedure, and the results of a referendum have no direct role or legal effect in our constitutional scheme, a referendum undoubtedly may provide a democratic method of ascertaining the views of the electorate on important political questions on a particular occasion. The democratic principle identified above would demand that considerable weight be given to a clear expression by the people of Quebec of their will to secede from Canada, even though a referendum, in itself and without more, has no direct legal effect, and could not in itself bring about unilateral secession. Our political institutions are premised on the democratic principle, and so an expression of the democratic will of the people of a province carries weight, in that it would confer legitimacy on the efforts of the government of Quebec to initiate the Constitution's amendment process in order to secede by constitutional means. In this context, we refer to a “clear” majority as a qualitative evaluation. The referendum result, if it is to be taken as an expression of the democratic will, must be free of ambiguity both in terms of the question asked and in terms of the support it achieves.

88. The federalism principle, in conjunction with the democratic principle, dictates that the clear repudiation of the existing constitutional order and the clear expression of the desire to pursue secession by the population of a province would give rise to a reciprocal obligation on all parties to Confederation to negotiate constitutional changes to respond to that desire. The amendment of the Constitution begins with a political process undertaken pursuant to the Constitution itself. In Canada, the initiative for constitutional amendment is the responsibility of democratically elected representatives of the participants in Confederation. Those representatives may, of course, take their cue from a referendum, but in legal terms, constitution-making in Canada, as in many countries, is undertaken by the democratically elected representatives of the people. The corollary of a legitimate attempt by one participant in Confederation to seek an amendment to the Constitution is an obligation on all parties to come to the negotiating table. The clear repudiation by the people of Quebec of the existing constitutional order would confer legitimacy on demands for secession, and place an obligation on the other provinces and the federal government to acknowledge and respect that expression of democratic will by entering into negotiations and conducting them in accordance with the underlying constitutional principles already discussed.

89. What is the content of this obligation to negotiate? . . .

95. Refusal of a party to conduct negotiations in a manner consistent with constitutional principles and values would seriously put at risk the legitimacy of that party's assertion of its rights, and perhaps the negotiation process as a whole. Those who quite legitimately insist upon the importance of upholding the rule of law cannot at the same time be oblivious to the need to act in conformity with constitutional principles and values, and so do their part to contribute to the maintenance and promotion of an environment in which the rule of law may flourish.

96. No one can predict the course that such negotiations might take. The possibility that they
might not lead to an agreement amongst the parties must be recognized. Negotiations following a referendum vote in favour of seeking secession would inevitably address a wide range of issues, many of great import. After 131 years of Confederation, there exists, inevitably, a high level of integration in economic, political and social institutions across Canada. The vision of those who brought about Confederation was to create a unified country, not a loose alliance of autonomous provinces. Accordingly, while there are regional economic interests, which sometimes coincide with provincial boundaries, there are also national interests and enterprises (both public and private) that would face potential dismemberment. There is a national economy and a national debt. Arguments were raised before us regarding boundary issues. There are linguistic and cultural minorities, including aboriginal peoples, unevenly distributed across the country who look to the Constitution of Canada for the protection of their rights. Of course, secession would give rise to many issues of great complexity and difficulty. These would have to be resolved within the overall framework of the rule of law, thereby assuring Canadians resident in Quebec and elsewhere a measure of stability in what would likely be a period of considerable upheaval and uncertainty. Nobody seriously suggests that our national existence, seamless in so many aspects, could be effortlessly separated along what are now the provincial boundaries of Quebec. As the Attorney General of Saskatchewan put it in his oral submission:

A nation is built when the communities that comprise it make commitments to it, when they forego choices and opportunities on behalf of a nation, . . . when the communities that comprise it make compromises, when they offer each other guarantees, when they make transfers and perhaps most pointedly, when they receive from others the benefits of national solidarity. The threads of a thousand acts of accommodation are the fabric of a nation. . . .

97. In the circumstances, negotiations following such a referendum would undoubtedly be difficult. While the negotiators would have to contemplate the possibility of secession, there would be no absolute legal entitlement to it and no assumption that an agreement reconciling all relevant rights and obligations would actually be reached. It is foreseeable that even negotiations carried out in conformity with the underlying constitutional principles could reach an impasse. We need not speculate here as to what would then transpire. Under the Constitution, secession requires that an amendment be negotiated. . . .

101. If the circumstances giving rise to the duty to negotiate were to arise, the distinction between the strong defence of legitimate interests and the taking of positions which, in fact, ignore the legitimate interests of others is one that also defies legal analysis. The Court would not have access to all of the information available to the political actors, and the methods appropriate for the search for truth in a court of law are ill-suited to getting to the bottom of constitutional negotiations. To the extent that the questions are political in nature, it is not the role of the judiciary to interpose its own views on the different negotiating positions of the parties, even were it invited to do so. Rather, it is the obligation of the elected representatives to give concrete form to the discharge of their constitutional obligations which only they and their electors can ultimately assess. The reconciliation of the various legitimate constitutional interests outlined above is necessarily committed to the political rather than the judicial realm, precisely because that reconciliation can only be achieved through the give and take of the negotiation process. Having established the legal framework, it would be for the democratically elected leadership of the various participants to resolve their differences. . . .

IV. Summary of Conclusions

149. The Reference requires us to consider whether Quebec has a right to unilateral secession. . . . [s]ecession of a province “under the Constitution” could not be achieved unilaterally, that is, without principled negotiation with other participants in Confederation within the existing constitutional framework. . . .
151. Quebec could not, despite a clear referendum result, purport to invoke a right of self-determination to dictate the terms of a proposed secession to the other parties to the federation. . . . [Yet the] continued existence and operation of the Canadian constitutional order could not be indifferent to a clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada. The other provinces and the federal government would have no basis to deny the right of the government of Quebec to pursue secession, should a clear majority of the people of Quebec choose that goal, so long as in doing so, Quebec respects the rights of others. The negotiations that followed such a vote would address the potential act of secession as well as its possible terms should in fact secession proceed. There would be no conclusions predetermined by law on any issue. Negotiations would need to address the interests of the other provinces, the federal government, Quebec and indeed the rights of all Canadians both within and outside Quebec, and specifically the rights of minorities. No one suggests that it would be an easy set of negotiations. . . .

153. The task of the Court has been to clarify the legal framework within which political decisions are to be taken “under the Constitution”, not to usurp the prerogatives of the political forces that operate within that framework. The obligations we have identified are binding obligations under the Constitution of Canada. However, it will be for the political actors to determine what constitutes “a clear majority on a clear question” in the circumstances under which a future referendum vote may be taken. Equally, in the event of demonstrated majority support for Quebec secession, the content and process of the negotiations will be for the political actors to settle. The reconciliation of the various legitimate constitutional interests is necessarily committed to the political rather than the judicial realm precisely because that reconciliation can only be achieved through the give and take of political negotiations. To the extent issues addressed in the course of negotiation are political, the courts, appreciating their proper role in the constitutional scheme, would have no supervisory role. . . .
SHORT TITLE
1. This Act may be cited as the Supreme Court Act.

THE COURT
3. The court of law and equity in and for Canada now existing under the name of the Supreme Court of Canada is hereby continued under that name, as a general court of appeal for Canada, and as an additional court for the better administration of the laws of Canada, and shall continue to be a court of record.

SPECIAL JURISDICTION

References by Governor in Council
53. (1) The Governor in Council may refer to the Court for hearing and consideration important questions of law or fact concerning
(a) the interpretation of the Constitution Acts;
(b) the constitutionality or interpretation of any federal or provincial legislation;
(c) the appellate jurisdiction respecting educational matters, by the Constitution Act, 1867, or by any other Act or law vested in the Governor in Council; or
(d) the powers of the Parliament of Canada, or of the legislatures of the provinces, or of the respective governments thereof, whether or not the particular power in question has been or is proposed to be exercised.

(2) The Governor in Council may refer to the Court for hearing and consideration important questions of law or fact concerning any matter, whether or not in the opinion of the Court ejusdem generis with the enumerations contained in subsection (1), with reference to which the Governor in Council sees fit to submit any such question.

(3) Any question concerning any of the matters mentioned in subsections (1) and (2), and referred to the Court by the Governor in Council, shall be conclusively deemed to be an important question.

(4) Where a reference is made to the Court under subsection (1) or (2), it is the duty of the Court to hear and consider it and to answer each question so referred, and the Court shall certify to the Governor in Council, for his information, its opinion on each question, with the reasons for each answer, and the opinion shall be pronounced in like manner as in the case of a judgment on an appeal to the Court, and any judges who differ from the opinion of the majority shall in like manner certify their opinions and their reasons.

(5) Where the question relates to the constitutional validity of any Act passed by the legislature of any province, or of any provision in any such Act, or in case, for any reason, the government of any province has any special interest in any such question, the attorney general of the province shall be notified of the hearing in order that the attorney general may be heard if he thinks fit.

(6) The Court has power to direct that any person interested or, where there is a class of persons interested, any one or more persons as representatives of that class shall be notified of the hearing on any reference under this section, and those persons are entitled to be heard thereon.

(7) The Court may, in its discretion, request any counsel to argue the case with respect to any interest that is affected and with respect to which counsel does not appear, and the reasonable expenses thereby occasioned may be paid by the Minister of Finance out of any moneys appropriated by Parliament for expenses of litigation.
Hans, a citizen of Louisiana and owner of some Louisiana state bonds, sued the state of Louisiana in federal court. He claimed that Louisiana had violated the Contracts Clause by repudiating its obligations under State bonds that the post-Civil War Republican state government had issued in 1874, during Reconstruction. The Contracts Clause, Art. I § 10, cl. 1, states that “No State shall … pass any … Law impairing the Obligation of Contracts.” The federal courts had jurisdiction, he said, by virtue of Art. III § 2 cl. 1, which provides that the federal judicial power “shall extend to all cases … arising under this Constitution [and] the laws of the United States.” (Note that suits asserting violations of the federal constitution or federal laws are said to fall within the federal courts’ “federal question” jurisdiction.)

Louisiana asserted that the federal courts lacked subject matter jurisdiction over the case in light of the Eleventh Amendment, which states:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Hans replied that the Eleventh Amendment did not by its text apply to a suit against a state by a citizen of that state, at least when the suit was brought under Article III’s federal question jurisdiction.

MR. JUSTICE BRADLEY … delivered the opinion of the court.

… That a State cannot be sued by a citizen of another State, or of a foreign state, on the mere ground that the case is one arising under the Constitution or laws of the United States, is clearly established by the decisions of this court in several recent cases. …

In the present case the plaintiff in error contends that he, being a citizen of Louisiana, is not embarrassed by the obstacle of the Eleventh Amendment, inasmuch as that amendment only prohibits suits against a State which are brought by the citizens of another State, or by citizens or subjects of a foreign State. It is true, the amendment does so read: and if there were no other reason or ground for abating his suit, it might be maintainable; and then we should have this anomalous result, that in cases arising under the Constitution or laws of the United States, a State may be sued in the federal courts by its own citizens, though it cannot be sued for a like cause of action by the citizens of other States, or of a foreign state; and may be thus sued in the federal courts, although not allowing itself to be sued in its own courts. …

Any such power as that of authorizing the federal judiciary to entertain suits by individuals against the States, had been expressly disclaimed, and even resented, by the great defenders of the Constitution whilst it was on its trial before the American people.

… Can we suppose that, when the Eleventh Amendment was adopted, it was understood to be left open for citizens of a State to sue their own state in the federal courts, whilst the idea of suits by citizens of other states, or of foreign states, was indignantly repelled? Suppose that Congress, when proposing the Eleventh Amendment, had appended to it a proviso that nothing therein contained should prevent a State from being sued by its own citizens in cases arising under the Constitution or laws of the United States: can we imagine that it would have been adopted by the States? The supposition that it would is almost an absurdity on its face.

The truth is, that the cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the Constitution when establishing the judicial power of the United States. … The suability of a State without its consent was a thing unknown to the law. …

[The Court quoted Hamilton, from the Federalist:

“"It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind
…. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretension to a compulsive force. They confer no right of action independent of the sovereign will. To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be enforced? It is evident that it could not be done without waging war against the contracting State; and to ascribe to the federal courts by mere implication, and in destruction of a pre-existing right of the state governments, a power which would involve such a consequence, would be altogether forced and unwarrantable.”]

It is not necessary that we should enter upon an examination of the reason or expediency of the rule which exempts a sovereign State from prosecution in a court of justice at the suit of individuals. … It is enough for us to declare its existence.
Handed down in 1890, *Hans v. Louisiana* was one of the Court’s last major decisions in a wobbling line of post-Reconstruction cases involving repudiated southern state bonds. Beginning in the mid-1870s, for a variety of political and economic reasons, many of the white Democratic governments that came to power in the South with the end of Reconstruction began to repudiate or “readjust” their bonds. At the same time, unevenly but unmistakably, the Supreme Court began moving from protecting government bondholders under the Contract Clause to protecting repudiating states through the Eleventh Amendment. By the mid-1880s, the Court was ruling commonly that the amendment barred the federal courts from exercising jurisdiction over suits involving repudiated southern state bonds.

As the legal tide turned against the bondholders, their lawyers tried one of the last remaining legal theories open. Article III extended the federal judicial power to all cases arising under federal law, irrespective of the status of the parties. The Eleventh Amendment provided that the federal judicial power was not to be construed to reach suits against a state brought by “Citizens of another State, or by Citizens or Subjects of any Foreign State.” Thus, the bondholders reasoned, two interrelated arguments were open. One was that Article III and the general “federal question” statute conferred jurisdiction on the lower federal courts to hear “federal question” suits against any party, including states. The other was that the Eleventh Amendment was limited to suits brought by noncitizens and aliens and thus did not preclude federal judicial power over suits brought against a state by one of the state’s own citizens. Accordingly, in 1884 bondholders arranged for a citizen of Louisiana to bring suit against the State of Louisiana in a local federal court to recover interest due on the state’s bonds. They argued both of their theories together.

On March 3, 1890 the United States Supreme Court handed down its decision. [It] ruled that the Eleventh Amendment and the sovereign immunity of the states deprived the federal courts of jurisdiction.

*Hans* could have given effect to the amendment’s explicit language, and ruled in favor of plaintiff. [But] the Court wished not only to rule in favor of the State but to do so on broad and irreversible grounds. Determined to extinguish the southern state bond litigations with a stroke, it sought to achieve that goal by creating a constitutional “principle” that would banish such suits with finality.

In 1890, Reconstruction had long since ended, and sectional reconciliation was the order of the day. The Southern States had returned to the Union and reasserted their power, and the North was unwilling to try to force them to pay their debts. The Republican Party was divided, based increasingly on an electoral majority outside the South, and concerned with new economic issues rather than with old sectional disputes. The North lacked the political will to force Southern States to honor their debts, and the Court used *Hans* as a way to avoid issuing judgments that would, as a practical matter, likely be unenforceable.

Until the end of Reconstruction, at least, two legal principles relating to government bonds had seemed clearly established. One was that the Eleventh Amendment prohibited suits in the federal courts against states only when the states were formally named as defendants but not when such suits were brought against state officers in their official capacities—that was the doctrine the Marshall Court had established during the early years of the Republic. The other established principle was that the federal courts would enforce the rights of bondholders under the Contract Clause and take whatever measures were necessary to prevent repudiation by government entities.

When Reconstruction began to crumble, however, the resulting political realignments opened cracks in those principles. The Civil War devastated the southern economy, and the abolition of slavery destroyed a large part of the region’s wealth and its basic system of labor.
Prewar bonds, often in substantial arrears as a result of the war, and the large-scale issues floated by postwar Republican governments imposed onerous financial burdens on many states of the old Confederacy. Those burdens were not only heavy but galling, for the bonds issued during Reconstruction stirred intense political hostility as symbols of “Yankee domination,” social radicalism, and the alleged corruption that had characterized the era of “black rule.” The depression that wracked the mid-1870s compounded the region’s economic suffering. Thus, when the Democrats recaptured southern state governments, many of them began repudiating their state bonds, ante-bellum as well as Reconstruction issues. Adopting a variety of tactics, nine southern states—Alabama, Arkansas, Florida, Georgia, Louisiana, North Carolina, South Carolina, Tennessee, and Virginia—eliminated or unilaterally reduced bonded obligations in an amount that likely exceeded $150 million. Bondholders, not surprisingly, began suing in the federal courts, seeking to compel the Southern States to honor their obligations.

The Court was unwilling to abandon its general position guaranteeing the worth of government bonds, but it was squeezed between two overpowering realities. One was the determination of many post-Reconstruction southern state governments to reassert their power and repudiate their burdensome debts. The other was the fact that the federal government and most Americans had turned their backs on the goals and policies of Reconstruction. Sectional “reconciliation” was the highest good, and the North was no longer interested in attempting to force the South to honor its obligations. In that context, federal judicial orders seeking to compel southern states to pay their full debts would present grave enforceability problems.

The Court’s solution, many historians and legal scholars [have] concluded, was to qualify the protection that the federal courts offered bondholders by invoking the Eleventh Amendment and allowing the Southern States to repudiate without federal sanction. In a series of decisions between 1877 and 1890 the Court began expanding the amendment’s reach and holding that it deprived the federal courts of jurisdiction to hear suits seeking to collect on state bonds. Adapting pragmatically to the post-Reconstruction context, the Court followed a cautious and somewhat erratic course. It seemed to support bondholders when it could frame enforceable orders of relief, primarily in cases involving municipalities and counties in the Midwest and West. Indeed, in the same year that it decided Hans the Court also held that municipalities and counties did not come within the protection of the Eleventh Amendment. Conversely, when bondholders sought to collect on state bonds—where repudiation was limited to states in the South—and where the Court doubted its power to issue enforceable orders, it used the Eleventh Amendment to dismiss for lack of jurisdiction. In this context, then, Hans appeared as the culmination and broadest doctrinal rationalization of a series of state bond cases in which the Court reshaped the law to placate southern repudiationists and avoid rendering judgments that it feared it could not enforce. “The Hans decision can best be understood,” James W. Ely, Jr., concluded, “as part of the Supreme Court’s refusal, on claimed jurisdictional grounds, to confront the widespread repudiation of bonds by southern states.”

Hans was designed to serve as one of the final building blocks with which the Court legitimated the post-Reconstruction settlement. That settlement embodied the nation’s well-understood acquiescence in the South’s special, if limited, independence, an independence that allowed the region’s states to repudiate their bonds and, far more importantly, to impose their own systems of white racial supremacy. In effect, the North agreed that Reconstruction had failed, that the South had “suffered enough,” and that the financial and racial residues of the disruptive era should, for the most part, be swept aside. Southern States would be allowed to cancel or “readjust” their bonded debt, and the rights of black Americans—rights that the three Civil War amendments had made matters of “national” authority—would be redefined as essentially “local” and given over to state control.
II. The Eleventh Amendment Today: Why Bother Reading It?

[The Eleventh Amendment provides in full:]

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Amendment’s language is straightforward and concrete, with none of the grand abstractions that have been the object of much constitutional debate, for example, phrases like “due process of law,” or “cruel and unusual punishment.” Yet that straightforward language has been ignored. [T]he Amendment has been held also to bar suits by citizens against their own states. Although in the decades right after the Amendment was adopted it appeared that the Amendment was not understood to bar suits by foreign nations against states, in this century it has been held to bar such suits. [It has also been held to bar subjecting a state to federal administrative agency proceedings, and to bar Congress from requiring state courts to hear cases against states asserting violations of federal law.]

On the other hand, the Court has tried to ameliorate the effects of its overly broad, textually unconstrained version of the Eleventh Amendment. [E]arly in this century Ex parte Young [held] that federal actions against state officers who violate federal law are acceptable, as long as they are suits for prospective relief rather than damages actions that might drain the state treasury. The theory was that such suits were not against the state because no state would authorize its officers to violate federal law, and therefore such acts were ultra vires.

III. Textual Fidelity: Taking the Language Seriously

Much of the Constitutional dispute in recent years has concerned how to read the more abstract clauses. Ironically, the Court’s Eleventh Amendment jurisprudence presents an opposite but complementary problem, because the Court has chosen to ignore specific and relatively concrete language in favor of ill-defined principles that supposedly underlie those specific terms.

Once the Court chooses not to be limited to the text, it purports to turn to the Constitution’s architecture, to see what the “plan” of the document as a whole, or rather the plan of the convention that wrote the document, implies.

The Court’s assumption that the Eleventh Amendment exemplifies a broader principle, that it is as it were the tip of an iceberg, seems odd when one actually reads that Amendment and compares it to Article III, which the Amendment so clearly is intended to edit. Article III lists, rather specifically, ten types of suits that may be brought in federal court. The Amendment quite clearly addresses two of those types of suits--those between states and citizens of other states or foreign nations--and limits the power to those cases where the state brought the action. The editing may have been a bit ambiguous--were all suits by those not citizens of a state barred, or only those where the potential plaintiff’s diverse citizenship is the source of jurisdiction and there is no other? Ambiguous on that point or not, the text of the Amendment quite clearly does not limit the right of, for instance, a citizen of Pennsylvania to sue his own state if one of the other eight bases of jurisdiction from Article III applies. It is equally clear that, if such a result were wanted, it would have been quite easy to do so. Why was the Amendment written to give an “example” of one type of suit that could not be brought, but that Amendment failed to mention any of the other examples that were quite obvious to arise from the text of Article III?

C. The Rest of the Constitution--Present and Future

[T]he method by which the parallel Eleventh Amendment was achieved can affect the rest of
the Constitution as well. The method of ignoring specific textual commands to search for the principles those commands exemplify (a technique not to be confused with following open-ended textual commands to seek out broader principles) has troubling implications. The implications of that method are especially troubling when one considers the variety of new constitutional amendments that have been proposed in recent years.

For instance, a “Religious Freedom Amendment,” allowing the display of religious symbols on public property and the use of public funds for religious education, as well as making school prayer easier, and a “Victims Rights Amendment” both have been brought to the floor of Congress in recent years. Discussion of these proposed amendments often has turned on rather close textual analysis of their wording, with advocates pointing out that the commands are quite specific and intended to preserve the full scope of individual rights available under the extant Bill of Rights.

What, however, is to be done if the proposed amendments are enacted, but future Supreme Courts read them, not for the specific commands written in them, but for the implicit principles the amendments merely are “evidencing and exemplifying?” Would the Religious Freedom Amendment exemplify a commitment to theism as more American than atheism? Would that amendment exemplify a desire to inculcate the right sort of theism in Americans? Would it exemplify the principle that theists, being more American than others, should be treated more favorably than others by American governments?

Should the Court apply the same jurisprudential technique to the Victim’s Rights Amendment as it has to the Eleventh Amendment, however, the proponents of the former need not bother to be so careful. No matter how one circumscribes victims’ rights, the very notion that they have rights that must be equal to the accused’s suggests a balancing, and once the Court begins to balance the rights of the accused against the rights of the victims, there can be no limitation on what the Court will do to the rights of the accused found in such places as the Fourth, Fifth, Sixth, Seventh and even Eighth Amendments.

VIII. Conclusion

When the text gives specific commands, such as the requirement that the President be a natural-born citizen, we when acting as lawyers, and the Court when acting as a court of law, have no choice but to be bound. It is entirely conceivable that the best person for the position of President might be some highly prominent public servant whose parents brought her here from another country as immigrants. It is conceivable that the Court’s members would believe her to be the best candidate for the job, and further believe the Constitutional text reflect an unhealthy xenophobia. The Court is not bound to enforce the implicit principle of xenophobia that one can read in the text; but it is bound not to let her take the oath of office of President should that case come before it.

The Eleventh Amendment is such a specific command, a purposeful limitation of some of the grants of jurisdiction given to the federal courts in Article III of the Constitution less than a decade before the Eleventh Amendment was ratified. Although specific, the Amendment is equivocal; it has two plausible readings. The “acontextual” reading, which reads the Amendment to bar all suits against states by persons who happen to be citizens of other states or nations, and the “contextual” reading, which only bars suits against states in which federal jurisdiction is grounded solely in diversity of citizenship. To adopt the latter would be to obey the text, achieve results that are sensible and allow the Constitutional plan of popular sovereignty and federal supremacy to come to fruition. Unfortunately, the Court has adopted the former reading, the “acontextual” reading, which yielded results it found absurd, opening the door to a wholesale abandonment of the text and the development of the “parallel” Eleventh Amendment.
Article II declares that the President must be a “natural born citizen.” In recent years, the number of legal scholars attacking this provision has been growing, and there have been numerous calls for a constitutional amendment to repeal this provision. Oddly, no one has argued that this provision can be thrown out by judges; however, it seems clear that this provision is in complete contradiction to the current understanding of the Fifth Amendment’s Due Process Clause. Numerous Supreme Court precedents have said that classifications based on national origin are subject to strict scrutiny and are presumptively unconstitutional for the federal government or the states. Moreover, there is ample precedent for the view that a constitutional amendment can overrule an earlier part of the constitution by implication, as well as by explicit repeal. Hence, there is nothing radically new in the idea that the Due Process Clause of the Fifth Amendment can be held to overrule the “Natural Born Citizen” Clause of Article II.

I. Statutory Construction and Repeal of Earlier Provisions

It is a basic rule of legal interpretation that statutes should not be read to render one provision of a code voided by another unless there is a clear contradiction between the two provisions . . .

Where two constitutional provisions can be read harmoniously, they ought to be, unless there is a clear contradiction or clear intent to abrogate an earlier provision.

Nevertheless, there are times when there is an unavoidable conflict between two provisions and one must take precedence over the other. Before discussing the Fifth Amendment and the Natural Born Citizen Clause, it will be helpful to lay out the four different ways two provisions can be in conflict when an earlier provision can be regarded as abrogated by a later one.

The first is by an explicit repeal, for example, “The eighteenth article of amendment to the Constitution of the United States is hereby repealed.”

Second is by explicit limitation, for example, an amendment stating: “The Sixth Amendment right to trial by jury in criminal cases is hereby limited to felonies.” That would not repeal the sixth amendment but would limit it. This example is necessarily fictitious in the constitutional context because the United States Constitution has no such amendments, but this type of limitation is quite common in court decisions where a prior decision is not overruled but is “limited to the facts” of the prior case. A variation on explicit limitation is a clarifying amendment. For example, the Eleventh Amendment says “[t]he judicial power of the United States shall not be construed to extend to any suit” against states by citizens of other states. The amendment does not alter Article III, but it requires that Article III be construed more narrowly than its wording might otherwise suggest.

The third and most common way that a constitutional provision is overturned is by necessary implication because two provisions are logically contradictory. For example, the Seventeenth Amendment, providing for direct election of senators, necessarily contradicts the Article I provision providing for appointment of senators, even though the amendment makes no explicit reference to Article I. It is logically impossible for both provisions to exist at the same time.

The fourth way a constitutional provision can be overturned is by practical incompatibility. This occurs when, although the language of both provisions would permit each to exist without contradiction, one would limit the other so much that for all practical purposes they are regarded as incompatible. Another way to look at this is that the basic principles underlying two provisions are incompatible. This method of overruling an amendment by implication is somewhat controversial, but has been used by the Supreme Court on occasion. The example which will be fleshed out in more
detail below is the Supreme Court’s decision in Fitzpatrick v. Bitzer, which held that the principle of state sovereignty underlying the Eleventh Amendment was incompatible with the principle of national supremacy underlying the Fourteenth Amendment.

… The Natural Born Citizen Clause falls into the third category, and so presents a strong basis for finding the provision incompatible with the Fifth Amendment. . . .

II. National Origin as Invalid Classification

It is settled law that legal classifications based on national origin are subject to strict scrutiny and presumptively unconstitutional. It is worthwhile to briefly review some of this precedent. . . .

Since national origin is a suspect class, it is not absolutely unconstitutional to treat natural born and naturalized citizens differently in every case, but the different treatment must be narrowly tailored to serve a compelling state interest. It is hard to imagine any legitimate governmental interest in the Natural Born Citizen Clause, much less a compelling one.

The Eleventh Amendment presents a particularly interesting case to examine in the current context because it first changed, or clarified, the meaning of Article III, and then, in 1976, was itself found by the Supreme Court to have been limited or modified by the Fourteenth Amendment. The Eleventh Amendment required that the Article III clause providing for suits between states and citizens of other states should not be construed to permit suits against unconsenting states. This is important because no one has ever imagined that if there is a conflict between Article III and the Eleventh Amendment that Article III should be enforced. If there is a conflict between the two provisions, the later one must take precedence.

The story of the Eleventh Amendment becomes even more interesting when viewed in light of the Fourteenth Amendment. In 1976, in Fitzpatrick v. Bitzer, the Supreme Court held that the Fourteenth Amendment superceded the Eleventh Amendment and permitted suits against states which violated civil rights. . . .

The Court began by noting previous decisions recognizing the reconstruction amendments for what they are, “limitations of the power of the States and enlargements of the power of Congress.” From this observation the Court went on to declare:

[W]e think that the Eleventh Amendment, and the principle of state sovereignty which it embodies, see Hans v. Louisiana, are necessarily limited by the enforcement provisions of §5 of the Fourteenth Amendment. In that section Congress is expressly granted authority to enforce “by appropriate legislation” the substantive provisions of the Fourteenth Amendment, which themselves embody significant limitations on state authority. When Congress acts pursuant to §5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority. We think that Congress may, in determining what is “appropriate legislation” for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts.

This language does not leave any doubt as to what the Court was saying. Suits which are “constitutionally impermissible” are those forbidden by the Eleventh Amendment, but individuals may nevertheless bring suits against a state for civil rights violations if Congress provides for such suits [under the Fourteenth Amendment]. . . .

[T]he Fifth Amendment gives federal judges the same power to recreate and rewrite federal governmental structures as the Fourteenth Amendment gives them vis-a-vis the states. . . . If a state attempted to restrict office-holders to natural born citizens, there is no doubt it would be found unconstitutional. It is “unthinkable” that the same Constitution would impose a lesser duty on the Federal Government.

[In this case, which we will study in more detail later, the Supreme Court ruled that the federal government may not “commandeer” state legislatures, requiring them to enact state legislation along long lines set down by the federal government. Thus Congress lacked the power to require states to enact legislation dealing with the disposal of low-level radioactive waste. The Court reached this ruling even though it acknowledged that Congress could, through its power under the Commerce Clause and the Supremacy Clause, not only prescribe rules itself for the disposal of low-level radioactive waste, but also bar the states from enacting any legislation on the subject. In part, the Court based its ruling on a concern for accountability: if Congress could require states to enact state legislation, citizens would not know whom—the federal government or the state—to hold accountable for legislation governing what is a highly controversial topic. The majority opinion, written by Justice O’Connor, also asserted that its anti-commandeering holding was consistent with the Framers’ intent:]

... Indeed, the question whether the Constitution should permit Congress to employ state governments as regulatory agencies was a topic of lively debate among the Framers. Under the Articles of Confederation, Congress lacked the authority in most respects to govern the people directly. In practice, Congress “could not directly tax or legislate upon individuals; it had no explicit ‘legislative’ or ‘governmental’ power to make binding ‘law’ enforceable as such.” [Instead, it could act only through the state governments.]

The inadequacy of this governmental structure was responsible in part for the Constitutional Convention. . . . As Hamilton saw it, “. . . we must extend the authority of the Union to the persons of the citizens—the only proper objects of government.” The new National Government “must carry its agency to the persons of the citizens. It must stand in need of no intermediate legislations.... The government of the Union, like that of each State, must be able to address itself immediately to the hopes and fears of individuals.”

The Convention generated a great number of proposals for the structure of the new Government, but two quickly took center stage. Under the Virginia Plan, as first introduced by Edmund Randolph, Congress would exercise legislative authority directly upon individuals, without employing the States as intermediaries. Under the New Jersey Plan, as first introduced by William Paterson, Congress would continue to require the approval of the States before legislating, as it had under the Articles of Confederation. These two plans underwent various revisions as the Convention progressed, but they remained the two primary options discussed by the delegates. One frequently expressed objection to the New Jersey Plan was that it might require the Federal Government to coerce the States into implementing legislation. As Randolph explained the distinction, “[t]he true question is whether we shall adhere to the federal plan [i.e., the New Jersey Plan], or introduce the national plan. The insufficiency of the former has been fully displayed.... There are but two modes, by which the end of a General Government can be attained: the 1st is by coercion as proposed by Mr. Paterson’s plan, the 2nd by real legislation as proposed by the other plan. Coercion [is] impracticable, expensive, cruel to individuals.... We must resort therefore to a national Legislation over individuals.” Madison echoed this view: “The practicability of making laws, with coercive sanctions, for the States as political bodies, had been exploded on all hands.” . . .

In the end, the Convention opted for a Constitution in which Congress would exercise its legislative authority directly over individuals rather than over States; for a variety of reasons, it rejected the New Jersey Plan in favor of the Virginia Plan. This choice was made clear to the subsequent state ratifying conventions. Oliver Ellsworth, a member of the Connecticut delegation in Philadelphia, explained the distinction to his State’s convention: “This Constitution does not attempt to coerce sovereign bodies, states, in their political capacity.... But this legal coercion singles out the ... individual.” Charles Pinckney, another delegate at the
Constitutional Convention, emphasized to the South Carolina House of Representatives that in Philadelphia “the necessity of having a government which should at once operate upon the people, and not upon the states, was conceived to be indispensable by every delegation present.” . . .

In providing for a stronger central government, therefore, the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States. . . .

[To this analysis, Justice Stevens, dissenting in part, replied:]

Under the Articles of Confederation, the Federal Government had the power to issue commands to the States. Because that indirect exercise of federal power proved ineffective, the Framers of the Constitution empowered the Federal Government to exercise legislative authority directly over individuals within the States, even though that direct authority constituted a greater intrusion on state sovereignty. Nothing in that history suggests that the Federal Government may not also impose its will upon the several States as it did under the Articles. The Constitution enhanced, rather than diminished, the power of the Federal Government.

[And Justice White, dissenting in part, replied:]

…I do not read the majority’s many invocations of history to be anything other than elaborate window dressing. Certainly nowhere does the majority announce that its rule is compelled by an understanding of what the Framers may have thought about statutes of the type at issue here. Moreover, I would observe that, while its quotations add a certain flavor to the opinion, the majority’s historical analysis has a distinctly wooden quality. One would not know from reading the majority’s account, for instance, that the nature of federal-state relations changed fundamentally after the Civil War. That conflict produced in its wake a tremendous expansion in the scope of the Federal Government’s law-making authority, so much so that the persons who helped to found the Republic would scarcely have recognized the many added roles the National Government assumed for itself. Moreover, the majority fails to mention the New Deal era, in which the Court recognized the enormous growth in Congress’ power under the Commerce Clause. While I believe we should not be blind to history, neither should we read it so selectively as to restrict the proper scope of Congress’ powers under Article I, especially when the history not mentioned by the majority fully supports a more expansive understanding of the legislature’s authority than may have existed in the late 18th century.

Given the scanty textual support for the majority’s position, it would be far more sensible to defer to a coordinate branch of government in its decision to devise a solution to a national problem of this kind.
37. ... [Jeffrey Dudgeon] complained that under the law in force in Northern Ireland he is liable to criminal prosecution on account of his homosexual conduct and that he has experienced fear, suffering and psychological distress directly caused by the very existence of the laws in question, including fear of harassment and blackmail. He further complained that, following the search of his house in January 1976, he was questioned by the police about certain homosexual activities and that personal papers belonging to him were seized during the search and not returned until more than a year later.

He alleged that, in breach of Article 8 of the [European] Convention [on Human Rights, to which Britain and thus Northern Ireland is a party], he has thereby suffered, and continues to suffer, an unjustified interference with his right to respect for his private life.

38. Article 8 provides as follows:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

39. Although it is not homosexuality itself which is prohibited but the particular acts of gross indecency between males and buggery, there can be no doubt but that male homosexual practices whose prohibition is the subject of the applicant’s complaints come within the scope of the offences punishable under the impugned legislations; it is on that basis that the case has been argued by the Government, the applicant and the Commission. Furthermore, the offences are committed whether the act takes place in public or in private, whatever the age or relationship of the participants involved, and whether or not the participants are consenting. It is evident from Mr. Dudgeon’s submissions, however, that his complaint was in essence directed against the fact that capable of valid consent are criminal offences under the law of Northern Ireland. . . .

B. The existence of an interference with an Article 8 right

41. . . . [T]he maintenance in force of the impugned legislation constitutes a continuing interference with the applicant’s right to respect for his private life (which includes his sexual life) within the meaning of Article 8(1). In the personal circumstances of the applicant, the very existence of this legislation continues and directly affects his private life: either he respects the law and refrains from engaging (even in private with consenting male partners) in prohibited sexual acts to which he is disposed by reason of his homosexual tendencies, or he commits such acts and thereby becomes liable to criminal prosecution.

It cannot be said that the law in question is a dead letter in this sphere. It was, and still is, applied so as to prosecute persons with regard to private consensual homosexual acts involving males under 21 years of age. . . .

Moreover, the police investigation in January 1976 was, in relation to the legislation in question, a specific measure of implementation (albeit short of actual prosecution) which directly affected the applicant in the enjoyment of his right to respect for his private life (see § 33, above). As such, it showed that the threat hanging over him was real.

C. The existence of a justification for the interference found by the Court . . .

43. An interference with the exercise of an Article 8 right will not be compatible with Article 8(2) unless it is ‘in accordance with the law’, has an aim or aims that is or are legitimate under that paragraph and is ‘necessary in a democratic society’ for the aforesaid aim or
44. . . . [T]he interference is plainly ‘in accordance with the law’ since it results from the existence of certain provisions in the 1861 and 1885 Acts and the common law.

45. It next falls to be determined whether the interference is aimed at ‘the protection of . . . morals’ or ‘the protection of the rights and freedoms of others’ . . .

47. . . . [I]t is somewhat artificial in this context to draw a rigid distinction between ‘protection of the rights and freedoms of others’ and ‘protection of . . . morals’. The latter may imply safeguarding the moral ethos or moral standards of a society as a whole, but may also, as the Government pointed out, cover protection of the moral interests and welfare of a particular section of society, for example schoolchildren. Thus, ‘protection of the rights and freedoms of others’, when meaning the safeguarding of the moral interests and welfare of certain individuals or classes of individuals who are in need of special protection for reasons such as lack of maturity, mental disability or state of dependence, amounts to one aspect of ‘protection of . . . morals’. The Court will therefore take account of the two aims on this basis.

48. . . . [T]he cardinal issue arising under Article 8 in this case is to what extent, if at all, the maintenance in force of the legislation is ‘necessary in a democratic society’ for these aims.

49. There can be no denial that some degree of regulation of male homosexual conduct, as indeed of other forms of sexual conduct, by means of the criminal law can be justified as ‘necessary in a democratic society’. The overall function served by the criminal law in this field is, in the words of the Wolfenden report ‘to preserve public order and decency [and] to protect the citizen from what is offensive or injurious’.

In practice there is legislation on the matter in all the member States of the Council of Europe, but what distinguishes the law in Northern Ireland from that existing in the great majority of the member-States is that it prohibits generally gross indecency between males and buggery whatever the circumstances. It being accepted that some form of legislation is ‘necessary’ to protect particular sections of society as well as the moral ethos of society as a whole, the question in the present case is whether the contested provisions of the law of Northern Ireland and their enforcement remain within the bounds of what, in a democratic society, may be regarded as necessary in order to accomplish those aims.

50. A number of principles relevant to the assessment of the ‘necessity’, in a democratic society’, of a measure taken in furtherance of an aim that is legitimate under the Convention have been stated by the Court in previous judgments.

51. First, ‘necessary’ in this context does not have the flexibility of such expressions as ‘useful’, ‘reasonable’, or ‘desirable’, but implies the existence of a ‘pressing social need’ for the interference in question.

52. In the second place, it is for the national authorities to make the initial assessment of the pressing social need in each case; accordingly, a margin of appreciation is left to them. . .

However, not only the nature of the aim of the restriction but also the nature of the activities involved will affect the scope of the margin of appreciation. The present case concerns a most intimate aspect of private life. Accordingly, there must exist particularly serious reasons before interferences on the part of the public authorities can be legitimate for the purposes of Article 8(2).

53. Finally, in Article 8 as in several other Articles of the Convention, the notion of ‘necessity’ is linked to that of a ‘democratic society’. According to the Court’s case-law, a restriction on a Convention right cannot be regarded as ‘necessary in a democratic society’ (two hallmarks of which are tolerance and broadmindedness) unless, amongst other things, it is proportionate to the legitimate aim pursued. . .

56. . . . [T]he Government drew attention to what they described as profound differences
of attitude and public opinion between Northern Ireland and Great Britain in relation to questions of morality. Northern Ireland society was said to be more conservative and to place greater emphasis on religious factors, as was illustrated by more restrictive laws even in the field of heterosexual conduct. . . .

The fact that similar measures are not considered necessary in other parts of the United Kingdom or in other member-States of the Council of Europe does not mean that they cannot be necessary in Northern Ireland. Where there are disparate cultural communities residing within the same State, it may well be that different requirements, both moral and social, will face the governing authorities.

57. As the Government correctly submitted, it follows that the moral climate in Northern Ireland in sexual matters, in particular as evidenced by the opposition to the proposed legislative change, is one of the matters which the national authorities may legitimately take into account in exercising their discretion. . . .

60. The Convention right affected by the impugned legislation protects an essentially private manifestation of the human personality.

As compared with the era when that legislation was enacted, there is now a better understanding, and in consequence an increased tolerance, of homosexual behaviour to the extent that in the great majority of the member-States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied; the Court cannot overlook the marked changes which have occurred in this regard in the domestic law of the member-States. In Northern Ireland itself, the authorities have refrained in recent years from enforcing the law in respect of private homosexual acts between consenting males over the age of 21 years capable of valid consent. No evidence has been adduced to show that this has been injurious to moral standards in Northern Ireland or that there has been any public demand for stricter enforcement of the law.

It cannot be maintained in these circumstances that there is a ‘pressing social need’ to make such acts criminal offences, there being no sufficient justification provided by the risk of harm to vulnerable sections of society requiring protection or by the effects on the public. On the issue of proportionality, the Court considers that such justifications as there are for retaining the law in force unamended are outweighed by the detrimental effects which the very existence of the legislative provisions in question can have on the life of a person of homosexual orientation like the applicant. Although members of the public who regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts, this cannot on its own warrant the application of penal sanctions when it is consenting adults alone who are involved. . . .

To sum up, the restriction imposed on Mr. Dudgeon under Northern Ireland law, by reason of its breadth and absolute character, is, quite apart from the severity of the possible penalties provided for, disproportionate to the aims sought to be achieved.

For these reasons, THE COURT holds:

1. by 15 votes to four, that there is a breach of Article 8 of the Convention; . . .
The most important step George W. Bush has taken with the presidential pardon power came last month, when he repudiated it.

On Dec. 23, he granted clemency to a sordid Brooklyn developer, Isaac R. Toussie, who had pleaded guilty to real estate fraud, and when details of the case came to light - - Bush had acted on the recommendation of the White House counsel, without the knowledge of the Justice Department’s pardon attorney -- the president washed his hands of the situation and withdrew the pardon one day after signing it.

The about-face has sparked questions about whether there was precedent for Bush’s action and whether it could stand. It’s a debate the courts, which have been weighing in on the supposedly untouchable pardon power for more than 150 years, should be happy to settle. And if judges have any regard for history, they will side with Bush.

Some presidents have revised pardons and issued new ones that were more suitable for recipients. Some have voided other pardons because the conditions attached to them were not met. To be sure, there is scant precedent for Bush’s flat revocation. But one case is strongly in his favor:

It involved Ulysses S. Grant’s revocation of highly suspicious pardons that President Andrew Johnson granted on his last day in office to a double-dealing father and son involved in New York City whiskey scandals in which Johnson himself was, at best, an unwitting ally. Johnson had even welcomed the father, known as “a notorious blackmailer,” to the White House as part of a delegation of crooks who sought to oust the U.S. attorney in New York on grounds of corruption. The New York Times protested: “[I]ndividuals accused of crime are summoned to Washington for the express purpose of making charges against the Government officers whose duty it is to prosecute them.”

Johnson sided with the crooks, granting Jacob and Moses Depuy pardons as “properly authorized agents” of the government. Three days later, in his first exercise of the pardon power, Grant ordered the pardons “canceled” if the Depuys had not yet been released. They had not been, and the pardon papers were returned to the White House. Grant then ordered that since the pardons had “not been delivered to, and accepted by, the said Jacob and Moses Depuy,” the grants were “revoked and withdrawn.”

The Depuys protested in federal court, arguing that Marbury v. Madison showed that the pardon was complete once it had been signed by the president and the seal of the United States affixed. Delivery, in that case, had been held to be a purely ministerial act. That proposition is being echoed now on behalf of Toussie -- but the same chief justice who ruled in Marbury, John Marshall, repudiated the proposition in regard to pardons. In 1833, Marshall held that a pardon was a deed “to the validity of which delivery is essential and delivery is not complete without acceptance.” The judge in the Depuy case recognized that these were “directly antagonistic rulings” by the same justice, but since one came long after the other, he said had no choice but to hold that delivery is essential.

The Depuys did not appeal, and the ruling stood as the only precedent until 1915, when the Supreme Court embraced Marshall’s doctrine in U.S. v. Burdick, ruling that a New York newspaper editor who had been given a pardon to force him to testify before a federal grand jury did not have to accept it. The court held that acceptance of a pardon is an admission of guilt and could not be required of an unwilling recipient. Burdick made Marshall’s widely accepted
pronouncements the law of the land. A subsequent ruling made it inapplicable for commutations, -- which can be forced upon a prisoner -- but delivery is still essential for pardons.

Unfortunately, the Toussie case underscores the clumsy and dangerous ways in which the pardon power has come to be administered. A downhill slide began with President Dwight Eisenhower, who was too busy, or found it too tiresome, to sign individual warrants for each grant of clemency. He instituted the practice of signing “master warrants,” lumping a bunch of names together without offering any reason, as many presidents used to do, for the pardons. The Justice Department offered no objections. So what if Burdick was still the law? The Office of the Pardon Attorney began acting as though it were acceptable to notify a grantee by phone and to follow up weeks later with a letter. Delivery of an individual warrant, even a master warrant with the recipient’s name on it, went out the window. The recipients, of course, were happy to be pardoned. In Toussie’s case, the president was not happy, just as Grant had not been. The pardon was recommended by White House counsel Fred Fielding, who didn’t bother with the customary Justice Department review. The risks should have been plain from the scorn sparked by Bill Clinton’s last-minute pardons. And the usual reviews by the U.S. attorney and the FBI would surely have turned up the enduring resentments of the clients Toussie bilked, if not the financial contributions his family made to Republican causes after his brief prison term.

Evidently startled by the anger the pardon stirred, Bush called it back for review by the pardon attorney. The White House said the president and Fielding were unaware of the political contributions that raised “the appearance of impropriety” in the decision. I, for one, am hoping the revocation sticks and results in a lawsuit. There have been telephones throughout government since Grover Cleveland’s day, but until Ike came along, no one would have dreamed that making a call or reading a bunch of names at a news conference constituted “delivery.” It would be interesting to see whether the courts uphold the law or the slovenly habits that have made it so hollow.

_The writer, a former Post reporter, is an associate at the Center for the Study of the Presidency. He is working on a history of the presidential pardon power._
Brian C. Kalt, Once Pardoned, Always Pardoned, WASH. POST, Jan. 26, 2009

The Jan. 14 op-ed by George Lardner Jr., “A Test of the Power to Unpardon,” lauded President George W. Bush’s attempt to revoke a pardon he granted to New York real estate developer Isaac Toussie last month. Lardner argued that precedent and history back the president’s action and establish that until a pardon has been delivered, a president can pluck it away.

As a law professor who has written on pardons, I have been following and commenting on the Toussie case as well. My conclusion: Lardner is wrong at nearly every turn. There is no precedent sufficient to validate Bush’s revocation of Toussie’s pardon. Delivery and acceptance are not required to make a pardon effective. Even if they were, Toussie’s pardon was delivered and accepted.

Once issued, a pardon is a pardon. That’s that. Using pardons, the president of the United States has the power to lift criminal consequences from people. The president does not, however, have the power to reimpose them unilaterally, which is what a pardon revocation would do. As a result, Bush could not -- and did not -- argue that he could revoke Toussie’s pardon. Rather, he would have had to establish that Toussie was never really pardoned in the first place.

It would be hard to make that case. As president, Bush signed and sealed a master warrant that included Toussie’s name and stated: “After considering the applications for executive clemency . . . I hereby grant full and unconditional pardons to the following named persons.” The Justice Department announced the pardons to the world. The recipients (or their lawyers) were contacted by phone, told that they had been pardoned and accepted the pardons. This sounds quite final.

Lardner wrote that “there is scant precedent for Bush’s flat revocation,” which is true. Although there are several examples (most of them quite old) of presidents revoking pardons, I am unaware of any in which the pardons had been signed, sealed, communicated and accepted, as Toussie’s was. More important, none of them produced any Supreme Court precedent. The legal slate for this kind of pardon revocation is essentially blank.

Lardner does note an 1869 district court case, In re De Puy, in which a judge ruled that a pardon must be delivered before it is effective. But De Puy is easily distinguishable. First, Toussie’s pardon was delivered and accepted. Second, the De Puy pardon was conditional upon the payment of a fine, and that condition had not yet been fulfilled; Toussie’s pardon was unconditional. Third, and most important, the vision of the pardon power in De Puy is inconsistent with later decisions by higher courts. Modern decisions step away from the old notion of pardons as “acts of grace.” The Supreme Court no longer sees pardons as coming from a king-like president, who confers a royal deed (or not) to a loyal subject. Rather, the court has established that pardons are unilateral policy decisions made by politically accountable executives.

In other words, the president issues pardons, and the president takes the heat for them if they are ill-advised. If that’s going to be a problem for him, he should think it through before he signs and seals the thing. The problems with Toussie’s pardon -- that his father had been a generous Republican contributor and the continued resentment of those he defrauded -- were knowable before Bush acted. Though George W. Bush may wish otherwise, the Constitution does not provide a “remorse exception” to the pardon power.

The only argument the White House offered is that Toussie never received a paper copy of an individual warrant from the Office of the Pardon Attorney. All indications are that the administration cooked up this theory for this case. The master warrant that Bush signed and sealed
did not say that he was ordering the pardon attorney to issue individual pardons on his behalf. It said that the people on the list were hereby pardoned. When the office called the recipients, it didn’t tell them that the pardon was in the mail; it told them that they had been pardoned. And they accepted.

There is ample precedent against Bush’s theory here. For instance, when President Jimmy Carter pardoned the Vietnam draft evaders, they did not get individual pieces of paper. But there is a more recent, and more fitting, example:

On his way out of office, President Bill Clinton pardoned more than a hundred people, including his brother, his longtime associate Susan McDougal, former housing secretary Henry Cisneros and, infamously, the financier Marc Rich. Because of the volume of Clinton’s last-minute pardon jamboree, there was no way to deliver all of the individual warrants before George W. Bush took office. Some of them still have not been physically delivered.

But as president, Bush never purported to have the power to revoke any of these pardons. Surely he would have unpardoned Rich if he could have. And if Bush were right about Isaac Toussie, then he could have unpardoned both him and Rich. But he wasn’t, and he couldn’t.

It would be nice if the Supreme Court ruled definitively on this point. Ideally, Toussie will take this matter to court. If and when the Supreme Court takes the case, I am confident that it will declare that President Bush was wrong.

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The Judiciary Act of 1789, § 25, 1 Stat. 73, 85

Sec. 25. *And be it further enacted*, That a final judgment or decree in any suit, in the highest court of law or equity of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favour of such their validity, or where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute or, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party, under such clause of the said Constitution, treaty, statute or commission, may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error, the citation being signed by the chief justice, or judge or chancellor of the court rendering or passing the judgment or decree complained of; or by a justice or the Supreme Court of the United States, in the same manner and under the same regulations, and the writ shall have the same effect, as if the judgment or decree complained or had been rendered or passed in a circuit court, and the proceeding upon the reversal shall also be the same, except that the Supreme Court, instead of remanding the cause for a final decision as before provided, may at their discretion, if the cause shall have been once remanded before, proceed to a final decision of the same, and award execution. But no other error shall be assigned or regarded as a ground of reversal in any such case as aforesaid, than such as appears on the face of the record, and immediately respects the before mentioned questions of validity or construction of the said constitution, treaties, statutes, commissions, or authorities in dispute.
Sec. 25. *And be it further enacted,* That a final judgment or decree in any suit, in the highest court of law or equity of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favour of such their validity, or where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute or, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party, under such clause of the said Constitution, treaty, statute or commission, may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error, the citation being signed by the chief justice, or judge or chancellor of the court rendering or passing the judgment or decree complained of; or by a justice or the Supreme Court of the United States, in the same manner and under the same regulations, and the writ shall have the same effect, as if the judgment or decree complained or had been rendered or passed in a circuit court, and the proceeding upon the reversal shall also be the same, except that the Supreme Court, instead of remanding the cause for a final decision as before provided, may at their discretion, if the cause shall have been once remanded before, proceed to a final decision of the same, and award execution. But no other error shall be assigned or regarded as a ground of reversal in any such case as aforesaid, than such as appears on the face of the record, and immediately respects the before mentioned questions of validity or construction of the said constitution, treaties, statutes, commissions, or authorities in dispute.
Andrew Jackson, Veto Message, July 10, 1832, reprinted in 3 Messages and Papers of the Presidents 1139-54 (1897)

Washington, July 10, 1832

To the Senate:

The bill “to modify and continue” the act entitled “An act to incorporate the subscribers to the Bank of the United States” was presented to me on the 4th July instant. Having considered it with that solemn regard to the principles of the Constitution which the day was calculated to inspire, and come to the conclusion that it ought not to become a law, I herewith return it to the Senate, in which it originated, with my objections.

* * *

The present corporate body, denominated the president, directors, and company of the Bank of the United States, will have existed at the time this act is intended to take effect twenty years. It enjoys an exclusive privilege of banking under the authority of the General Government, a monopoly of its favor and support, and, as a necessary consequence, almost a monopoly of the foreign and domestic exchange. The powers, privileges, and favors bestowed upon it in the origin at charter, by increasing the value of the stock far above its par value, operated as a gratuity of many millions to the stockholders.

* * *

It is maintained by the advocates of the bank that its constitutionality in all its features ought to be considered as settled by precedent and by the decision of the Supreme Court. To this conclusion I can not assent. Mere precedent is a dangerous source of authority, and should not be regarded as deciding questions of constitutional power except where the acquiescence of the people and the States can be considered as well settled. So far from this being the case on this subject, an argument against the bank might be based on precedent. One Congress, in 1791, decided in favor of a bank; another, in 1816, decided in its favor. Prior to the present Congress, therefore, the precedents drawn from that source were equal. If we resort to the States, the expressions of legislative, judicial, and executive opinions against the bank have been probably to those in its favor as 4 to 1. There is nothing in precedent, therefore, which, if its authority were admitted, ought to weigh in favor of the act before me.

If the opinion of the Supreme Court covered the whole ground of this act, it ought not to control the coordinate authorities of this Government. The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others. It is as much the duty of the House of Representatives, of the Senate, and of the President to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval as it is of the supreme judges when it may be brought before them for judicial decision. The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both. The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve.

But in the case relied upon the Supreme Court have not decided that all the features of this corporation are compatible with the Constitution. It is true that the court have said that the law incorporating the bank is a constitutional exercise of power by Congress; but taking into view the whole opinion of the court and the reasoning by which they have come to that
conclusion, I understand them to have decided that inasmuch as a bank is an appropriate means for carrying into effect the enumerated powers of the General Government, therefore the law incorporating it is in accordance with that provision of the Constitution which declares that Congress shall have power “to make all laws which shall he necessary and proper for carrying those powers into execution.” . . .

. . . A bank is constitutional, but it is the province of the Legislature to determine whether this or that particular power, privilege, or exemption is “necessary and proper” to enable the bank to discharge its duties to the Government, and from their decision there is no appeal to the courts of justice. Under the decision of the Supreme Court, therefore, it is the exclusive province of Congress and the President to decide whether the particular features of this act are necessary and proper in order to enable the bank to perform conveniently and efficiently the public duties assigned to it as a fiscal agent, and therefore constitutional, or unnecessary and improper, and therefore unconstitutional.

Without commenting on the general principle affirmed by the Supreme Court, let us examine the details of this act in accordance with the rule of legislative action which they have laid down. It will be found that many of the powers and privileges conferred on it can not be supposed necessary for the purpose for which it is proposed to be created, and are not, therefore, means necessary to attain the end in view, and consequently not justified by the Constitution.

* * *

It is to be regretted that the rich and powerful too often bend the acts of government to their selfish purposes. Distinctions in society will always exist under every just government. Equality of talents, of education, or of wealth can not be produced by human institutions. In the full enjoyment of the gifts of Heaven and the fruits of superior industry, economy, and virtue, every man is equally entitled to protection by law; but when the laws undertake to add to these natural and just advantages artificial distinctions, to grant titles, gratuities, and exclusive privileges, to make the rich richer and the potent more powerful, the humble members of society - the farmers, mechanics, and laborer - who have neither the time nor the means of securing like favors to themselves, have a right to complain of the injustice of their Government. There are no necessary evils in government. Its evils exist only in its abuses. If it would confine itself to equal protection, and, as Heaven does its rains, shower its favors alike on the high and the low, the rich and the poor, it would be an unqualified blessing. In the act before me there seems to be a wide and unnecessary departure from these just principles.

Nor is our Government to be maintained or our Union preserved by invasions of the rights and powers of the several States. In thus attempting to make our General Government strong we make it weak. Its true strength consists in leaving individuals and States as much as possible to themselves - in making itself felt, not in its power, but in its beneficence; not in its control, but in its protection; not in binding the States more closely to the center, but leaving each to move unobstructed in its proper orbit. . . .

ANDREW JACKSON.
President Obama and the Supreme Court have waded again into unfamiliar and strikingly personal territory.

When Chief Justice John G. Roberts Jr. told law students in Alabama on Tuesday that the timing of Obama’s criticism of the court during the State of the Union address was “very troubling,” the White House pounced. It shot back with a new denouncement of the court’s ruling that allowed a more active campaign role for corporations and unions.

On Wednesday, Senate Democrats followed up with pointed criticism of Roberts, and at a hearing on the decision, a leading Democrat said the American public had “rightfully recoiled” from the ruling.

The heated rhetoric has cast the normally cloistered workings of the court into a very public spotlight. Democrats hope to make the decision in *Citizens United v. Federal Election Commission* part of their strategy to portray the conservative justices as more protective of corporate interests than of average Americans.

A Democratic strategist who works with the White House said the fight is a good one for Obama, helping lay the groundwork for the next Supreme Court opening. “Most Americans have no idea what the Supreme Court does or how it impacts their lives,” the strategist said. “This decision makes it crystal clear.”

Senate Judiciary Committee Chairman Patrick J. Leahy (D-Vt.) opened the hearing on the ruling Wednesday by declaring that “the *Citizens United* decision turns the idea of government of, by and for the people on its head.” The committee’s ranking Republican, Jeff Sessions ( Ala.), countered that Obama and Democrats are mischaracterizing the ruling for political gain.

“There has been too much alarmist rhetoric that has been flying around since this decision,” Sessions said, advising his colleagues not to “misrepresent the nature of the decision or impugn the integrity of the justices.”

The court ruled 5 to 4 in January that corporations and unions have a First Amendment right to use their general treasuries and profits to spend freely on political ads for and against specific candidates. The court overturned its own precedents and federal law in the decision, which was hailed by conservatives and a few liberals as a victory for free political speech, and was denounced by Obama, who said in his State of the Union address that it would lead to elections being “bankrolled by America’s most powerful interests.”

Obama’s blunt criticism, while six black-robed justices sat at the front of the House chamber, set off a round of public debate about whether he was both wrong and rude, or whether Justice Samuel A. Alito Jr. violated judicial custom by silently mouthing “not true” while the president was speaking.

Presidential historians said that while other presidents have criticized Supreme Court decisions or called upon Congress to remedy them, Obama’s was the most pointed and direct criticism in a State of the Union address since President Franklin D. Roosevelt took on the court for blocking his programs.

**An issue of ‘decorum’**

Round 2 began Tuesday, when Roberts spoke at the University of Alabama law school. He did not mention *Citizens United* in his speech and declined to answer a question about criticism of the ruling.

But when asked whether the State of the Union address was the “proper venue” in which to “chide” the Supreme Court, Roberts did not hesitate.

“First of all, anybody can criticize the Supreme Court without any qualm,” he said, adding that “some people, I think, have an obligation to criticize what we do, given their office, if they think we’ve done something wrong.”

He continued: “On the other hand, there is the issue of the setting, the circumstances and the decorum. The image of having the members of one branch of government standing up, literally
surrounding the Supreme Court, cheering and hollering while the court -- according to the requirements of protocol -- has to sit there expressionless, I think is very troubling.”

The White House struck back quickly -- not at Roberts’s point, but at the decision. “What is troubling is that this decision opened the floodgates for corporations and special interests to pour money into elections -- drowning out the voices of average Americans,” White House press secretary Robert Gibbs said in a statement. “The president has long been committed to reducing the undue influence of special interests and their lobbyists over government. That is why he spoke out to condemn the decision.”

‘People disagree’

White House officials said the debate helps underscore differences between the president and the conservative court and puts into relief what will be at stake when there is another opening on the bench. There is speculation that Justice John Paul Stevens, who turns 90 next month, will retire at the end of this term.

At a time when the administration is struggling to prove that it can work across political lines on a health-care overhaul and other matters, Obama officials insisted they were not seeking a partisan fight with the court. Yet they acknowledged that a debate over campaign finance fed into Obama’s central campaign promise of transparency and reform. “This is really about the president’s change agenda,” a White House official said.

“This is the functioning of democracy at its highest,” the official said. “People disagree, they discuss, they debate.”

Administration officials did not question whether Roberts’s comments were appropriate, noting that he had replied to a question.

But the fracas is the kind the justices usually like to avoid. Justice Clarence Thomas told a Florida law school audience last month that the controversy reinforced his decision to skip the State of the Union address. “One of the consequences is now the court becomes part of the conversation, if you want to call it that,” he said. “. . . It’s just an example of why I don’t go.”

Roberts, who has attended the event since joining the court in 2005, indicated at the Alabama event that he may now agree with Thomas.

“To the extent the State of the Union has degenerated into a political pep rally, I’m not sure why we’re there,” he said.
Senate Majority Leader Mitch McConnell vowed again Wednesday to block President Obama’s Supreme Court nomination, saying the American people should have a “voice” in the process.

“It is a president’s constitutional right to nominate a Supreme Court justice, and it is the Senate’s constitutional right to act as a check on a president and withhold its consent,” McConnell said on the Senate floor following the president’s nomination of U.S. Court of Appeals Judge Merrick Garland.

In his remarks earlier in the day, President Obama had called for the Senate to put politics aside and confirm Garland. Obama praised Garland’s collegiality and ability to build consensus, saying “he’s shown a rare ability to bring together odd couples.”

A Supreme Court nomination, Obama said, is “supposed to be above politics, it has to be, and should stay that way.”

McConnell’s comments came after a pledge he made last month that the Senate would take no action on the nomination, setting the stage for a political fight. McConnell said Wednesday that the “the decision the Senate made weeks ago remains about a principle, not a person.”

“It seems clear President Obama made this nomination not, not with the intent of seeing the nominee confirmed, but in order to politicize it for purposes of the election,” McConnell said.

“I believe the overwhelming view of the Republican Conference in the Senate is that this nomination should not be filled, this vacancy should not be filled by this lame duck president,” McConnell said.

“The American people are perfectly capable of having their say on this issue, so let’s give them a voice. Let’s let the American peo-
Soon after his inauguration next month, President-elect Donald Trump will nominate someone to the Supreme Court, which has been hamstrung by a vacancy since the death of Justice Antonin Scalia in February. There will be public debates about the nominee’s credentials, past record, judicial philosophy and temperament. There will be Senate hearings and a vote.

No matter how it plays out, Americans must remember one thing above all: The person who gets confirmed will sit in a stolen seat.

It was stolen from Barack Obama, a twice-elected president who fulfilled his constitutional duty more than nine months ago by nominating Merrick Garland, a highly qualified and widely respected federal appellate judge.

It was stolen by top Senate Republicans, who broke with longstanding tradition and refused to consider any nominee Mr. Obama might send them, because they wanted to preserve the court’s conservative majority. The main perpetrators of the theft were Mitch McConnell, the majority leader, and Charles Grassley, chairman of the Judiciary Committee. But virtually all Republican senators were accomplices; only two supported holding hearings.

The Republican party line — that it was an election year, so the American people should have a “voice” in the selection of the next justice — was a patent lie. The people spoke when they re-elected Mr. Obama in 2012, entrusting him to choose new members for the court. And the Senate has had no problem considering, and usually confirming, election-year nominees in the past.

Of course, Supreme Court appointments have always been political, and the court’s ideological center has shifted back and forth over time. But the Senate has given nominees full consideration and a vote even when the party in power has opposed a president’s choice. That is, until this year, when Republicans claimed that though the Constitution calls for the Senate’s “advice and consent,” senators aren’t obligated to do anything. This is a bad-faith reading of that clause, even if there is no clear way to force a vote. It certainly obliterates a well-established political norm that makes a functioning judicial branch possible. . . .

This particular norm is of paramount importance because the court’s institutional legitimacy depends on its perceived separation from the elected branches — a fragile concept in the best of times. By tying the latest appointment directly to the outcome of the election, Mr. McConnell and his allies took a torch to that idea — an outrageous gambit that, to nearly everyone’s shock, has paid off. But while Republicans may be celebrating now, the damage they have inflicted on the confirmation process, and on the court as an institution, may be irreversible.
When Sen. John McCain said last week that he would work to block any Supreme Court nominee a president Hillary Clinton would name, it raised some eyebrows. Republican senators pledged not to take up any nominee to fill the late Justice Antonin Scalia’s seat until after the election, but that stance expires January 20 (regardless of any lame-duck machinations).

When Senate Majority Leader Mitch McConnell announced the #NoHearingNoVote position, he argued that, given the nation’s polarization and that the next justice could swing the balance of the Supreme Court, this election-year vacancy should be filled by the people’s choice.

It was a principled position, but a controversial and risky one. Yet McConnell’s calculus has been borne out. Not only has his caucus stuck with it, but it seems the voters concerned about Republican “obstruction” wouldn’t vote GOP anyway. Senate Judiciary Committee Chairman Charles Grassley of Iowa has faced the brunt of the “do your job” attack and is pulling away in the polls—regardless of the negative Donald Trump effect.

But the McCain volley, launched while campaigning for embattled Pennsylvania Sen. Pat Toomey, is something new: are Republicans really planning to keep that seat empty for four (even eight) years if Clinton wins? (Presumably this would be in a scenario where they keep the Senate; Democrats would surely get rid of the filibuster if it came to that.) Doesn’t that expose their motivations as purely partisan regardless of their high-minded rhetoric?

**The Constitution Allows It**

Well, let’s get one thing out of the way first: the Constitution is completely silent on all this. It’s the president’s job to nominate and the Senate’s to provide “advice and consent,” but there’s no further textual explication.
ident Kennedy in 1962] has voted independently,” he detailed, which is why he’s been skeptical of President Obama’s nominees.

People Elect Senators to Represent Them, Too

Indeed, Hillary Clinton herself said at the last presidential debate that the Supreme Court is meant to answer questions like “What kind of country are we going to be? What kind of opportunities will we provide for our citizens?” Well, gee, if those are the questions you ask, of course you’ll end up with super-legislators, presumably in ideological agreement with the president appointing them. If you want the judiciary determining public policy, of course you’d think that Supreme Court justices should “represent all of us.”

But that goes against the rule of law and the idea of a judge as neutral arbiter, doing his or her best to apply the law to the facts at issue. As Supreme Court Chief Justice John Roberts explained at his confirmation hearings, the little guy should win when the law favors him, and the big corporation should win when the law goes that way.

Clinton’s admission that her nominees would “be in the grand tradition of standing up to the powerful”—like some black-robed community organizers—is far more damning than her nonsensical positions on Heller (Second Amendment) or Citizens United (declining to punish producers of a movie criticizing Hillary Clinton).

Should senators rubber-stamp judicial nominees of that ilk, who care not about the law but rather hew to particular policies, out of a sense of tradition or deference to the executive? I simply can’t blame politicians who follow their convictions. If you truly believe that a particular nominee would wreak havoc on America, why not do everything you can to stop him?

I imagine this is what senators Obama and Clinton were doing when they voted to filibuster Judge Samuel Alito. While I think they were hopelessly misguided in their assessment of Justice Alito and his legal views, I don’t fault them for pursuing an agenda they believed in.

So when you get past the gotcha headlines, breathless reportage, and Inauguration Day, if Hillary Clinton is president it would be completely decent, honorable, and in keeping with the Senate’s constitutional duty to vote against essentially every judicial nominee she names.

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Kim Janssen, Posner Says ‘Highly Politicized’ Supreme Court Should Grow to 19 Justices, CHICAGO TRIBUNE, Aug. 1, 2017

Chicago’s favorite smarty pants judge says the Supreme Court should have 19 members, not 9.

Whoever could U.S. Appellate Court Judge Richard Posner have in mind to fill the extra spots?

Probably not himself – he thinks all judges should retire at 80.

"Mediocre and highly politicized," was the opinion the 78-year-old jurist gave of the justices who sit in D.C. during a recent talk at the University of Chicago.

"We have a very crappy judicial system."

Posner — the most highly cited legal scholar of the 20th century, according to the Journal of Legal Studies — repeated his complaint that politicians are more concerned with appointing "tokens" such as women or Hispanic justices, and with would-be justices’ politics than they are with merit.

"If you had 19 members you would inevitably have more diversity," he told Prof. Luigi Zin-
A handful of Republican senators did something unusual on Wednesday: With the Senate not even in session, and no Democrats in sight, they convened the Judiciary Committee to advance a half-dozen of Donald Trump’s judicial nominees.

For Republicans, there’s nothing that matters more. They aren’t pitching a big visionary agenda to persuade voters to return them to power next year — there’s only passing mention in the midterms of repealing Obamacare, and little talk of making Trump’s border wall a reality. It’s all about the judiciary.

Senate Majority Leader Mitch McConnell has given every indication that his primary focus — through Election Day and, assuming Republicans still control the Senate, in the two years to follow, will be the ongoing reshaping of the courts.

“I love the tax bill and a lot of the other things we did. But I think lifetime appointments — not only to the Supreme Court but to the circuit courts — are the way you have the longest lasting impact on the country,” McConnell said in an interview this month. “The president and his team have sent up, in my view, excellent judges, and we’ve had the unity we’ve needed … to get them confirmed.”

That could mean a 2019 that looks a lot like the scene Wednesday: Reporters asking senators about unrelated issues outside the Senate Judiciary Committee, while inside the GOP continues barreling ahead with confirming a parade of younger conservative judges like 36-year-old Allison Rushing, who could serve on the Fourth Circuit for perhaps 40 or 50 years given her youth.

McConnell’s pace of filling federal court seats has been eye-popping, especially on the powerful appellate circuits. Addressing the conservative Heritage Foundation on Tuesday night, McConnell touted 29 circuit court judges confirmed since Trump took office, which he described as a record pace “in any administration in history.” That’s 16 percent of the 179 appeals court seats. …

The Kentucky Republican pledged Tuesday night to continue two more years of work on his confirmation agenda if the GOP keeps the Senate. It’s a mission, set in motion by his 2016 decision to bottle up Merrick Garland’s Supreme Court nomination, that is looking easy to carry out.

To transform the courts, Republicans need the presidency and 50 GOP votes in the Senate given the recent evisceration of the filibuster on nominees. With 51 seats and a generous Senate map laid out before them, there’s an easy roadmap for the GOP to continue clawing back the more than 300 lifetime confirmations that Democrats oversaw during Barack Obama’s presidency.

“A president is entitled to nominate people,” Sen. John Kennedy (R-La.) said on Wednesday, adding that he “would support legislation that says if the president, no matter who the president is, nominates somebody in the executive branch or judicial branch, the Senate’s got 90 days to vote yea or nay. That’s what we’re paid to do.”
By engineering the confirmation of Brett Kavanaugh to the Supreme Court, Senate Majority Leader Mitch McConnell has won a tremendous partisan victory — but at the cost of tremendous damage to the Court itself.

The Supreme Court’s legitimacy depends on most Americans viewing it as above the partisan fray, an institution whose decisions are driven by legal reasoning, not by the justices’ partisan leanings.

In confirming Kavanaugh, with a razor-thin partisan majority no less, the Republican Senate may well end up eroding that public faith. Kavanaugh’s fiery and nakedly partisan testimony in front of the Senate Judiciary Committee during the September 27 hearing revealed a justice who was less an “impartial arbiter” of the law and more a partisan creature who would take his political grudges to the Supreme Court.

In that hearing, he blamed the sexual assault allegations against him on a left-wing conspiracy: a “calculated and orchestrated political hit, fueled with apparent pent-up anger about President Trump and the 2016 election.” He claimed, without evidence, that Democrats were going after him to get “revenge on behalf of the Clintons,” with the support of “millions of dollars in money from outside, left-wing opposition groups.” He was defiant, even downright rude, toward the Democratic senators who asked him questions — interrupting Sen. Amy Klobuchar, whose father is in recovery from alcohol addiction, to ask if she had ever blacked out from overconsumption.

His performance was so alarming that the American Bar Association, which had given him its stamp of approval, on Friday announced that it was reopening its evaluation of Kavanaugh in light of his “temperament.” Retired Justice John Paul Stevens was also taken aback, saying Kavanaugh’s performance revealed a “potential bias” that could be a problem. And more than 2,400 law professors signed a letter expressing their view that Kavanaugh “did not display the impartiality and judicial temperament” to sit on the Court.

Kavanaugh seems to have sensed that his performance may have been damaging: He wrote an op-ed that appeared Thursday in the Wall Street Journal acknowledging that he was “too emotional at times” during the hearing, and asserting that he “will keep an open mind in every case.”

But his partisan testimony was consistent with a career spent in the Republican trenches against Democrats: He worked for Ken Starr’s investigation into the Monica Lewinsky scandal, and then for President George W. Bush after that. Now he becomes the conservative majority’s fifth vote after a bitter confirmation battle and an FBI investigation that Democrats believe was a whitewash. He joins the Supreme Court trailed by allegations of sexual assault (which he has denied) and accusations from some liberals that he lied under oath.

The system depends on everyone having faith in the Supreme Court adjudicating partisan disputes; confirming Kavanaugh, who is the most unpopular Supreme Court nominee ever to be approved by the Senate, could theoretically collapse this consensus.

The Kavanaugh confirmation fight “directly links the Court to the direct political process,” says Michael Nelson, a professor at Penn State. “That’s the sort of thing that’s kryptonite for the Court.”

The Court’s legitimacy problem

When scholars talk about the Supreme Court’s “legitimacy,” they are talking about something more fundamental than job approval or whether the public agrees with the Court’s ruling in a specific case. They’re talking about the people’s faith in the very idea of the Supreme
Court: the notion that it should be the final arbiter on political questions, the ultimate interpreter of the Constitution, insulated from partisanship and politics.

This kind of basic faith in the Court’s mission is essential to its functioning. Liberal democracy is, in theory, premised on the idea that you can only govern with the consent of the governed. There’s an inherent tension between this vision and unelected judges setting law through rulings, one resolved only if the public believes that the Court is a legitimate decision-making body.

A 2005 Annenberg survey found that the Supreme Court is significantly more trusted than the other two branches of the federal government, and that 75 percent of Americans believe “the Supreme Court can usually be trusted to make decisions that are right for the country as a whole.”

Much of that faith in the Court still endures. A 2018 Annenberg poll, for example, found that 73 percent of Americans disagreed with the idea that “if the Supreme Court started making a lot of rulings that most Americans disagreed with, it might be better to do away with the Court altogether.”

On other measures, however, public faith in the courts is in modest decline. An annual Gallup poll of public confidence in American institutions shows that the percentage of Americans who have a “great deal” or “quite a lot” of confidence in the Court has been mired in the 30s for much of the past decade; in the 1990s, that figure routinely reached the 40s and 50s [see chart, “Confidence in the Supreme Court,” at right column].

Political scientists generally do not see this as evidence that the Court is losing fundamental legitimacy. While the public may be less happy with the Court’s performance, or possibly less likely to trust it to do the right thing, they still generally do not think its role in the system has been cast into immediate jeopardy.

The way the literature sees it now, it would take a lot to shake people’s faith in the Court,” says Sara Benesh, an expert on the Court at the University of Wisconsin Milwaukee.

There’s a debate among scholars about whether a series of unpopular rulings alone could damage the Court’s legitimacy in the public’s eyes, and genuine uncertainty about just how insulated the Court is from public opinion. It could be the case that the Court’s legitimacy is relatively secure — or that it’s a few bad decisions away from collapsing, potentially precipitating a crisis in which political actors start to ignore Court decisions.

But whether or not academics think controversial decisions are enough to destroy faith in the Court, they agree that the ultimate issue in determining the Court’s legitimacy is whether it appears to be above politics. This appears to be part of the calculation behind Chief Justice John Roberts’ decision to uphold the Affordable Care Act: He was deeply worried about the Court being perceived as simply a partisan Republican actor.

“This is the real risk to the Court’s legitimacy,” Rebecca Gill, a political scientist at the University of Nevada Las Vegas, says of Kavanaugh’s confirmation. “It’s not the idea that the Court
makes political decisions — it’s the idea that the Court is just another partisan institution.”

When the Court loses its legitimacy, it has concrete consequences. The Supreme Court has no way to actually enforce its edicts. It relies on compliance and enforcement from the other branches and local governments. If the public doesn’t broadly believe in the Court’s role in the system at a very basic level, political actors might be tempted to ignore it.

This has happened before. In 1832, President Andrew Jackson refused to implement Supreme Court rulings upholding the rights of the Cherokee tribe; after Brown v. Board of Education, Southern states employed “massive resistance” tactics to block Court-mandated desegregation. We could now be entering yet another period of crisis.

The liberal turn against the Court

Since 2016, Senate Majority Leader Mitch McConnell has used scorched-earth tactics to seize control of the Supreme Court. When Antonin Scalia died in 2016, McConnell infamously refused to even consider President Obama’s replacement nominee, Merrick Garland, until after the 2016 election. There was no principled rationale for this: The reason was that Garland is a moderate liberal and would have tipped the Court from a 5-4 conservative majority to a 5-4 liberal one.

McConnell got his way, of course, and then President Donald Trump appointed staunch conservative Neil Gorsuch to the Court instead of Garland. Now, longtime Republican operative Kavanaugh has been confirmed over heated liberal objections, which have not subsided (to say the least): 76 percent of Democrats believe Christine Blasey Ford’s allegations that Kavanaugh sexually assaulted her, according to a Marist poll released on October 3.

The sexual assault allegations were bad enough for the Court’s legitimacy on their own. But the tack Kavanaugh chose to employ defending them — blasting Democrats in an unprecedentedly partisan speech — will likely mar his reputation, and thus the Court.

“[The hearing] was ugly and partisan, which is exactly what could do damage to the institution,” Benesh tells me. “Pushing this nomination through after that cannot be positive for the Court.”

The increased polarization of American politics will make the hit to the Court’s legitimacy worse than even past events, like the Clarence Thomas-Anita Hill hearings or Bush v. Gore. Over the past several decades, the political parties have sorted into more unified liberal and conservative blocs. The decline of conservative Democrats and liberal Republicans, and the linking of partisan identity with social identities like race and religion, has made partisanship the most powerful force in American democracy.

The result has been an across-the-board decline in faith in neutral institutions. Everything is being seen through a polarized lens — not just the political branches but executive agencies and even federal law enforcement as well. There’s a growing trend in Americans identifying the quality of institutions with how well those institutions serve their partisan ends — a trend the Court has been (relatively) insulated from, but one that it’s likely to get looped into now.

Experimental evidence suggests this is a fairly plausible outcome. Boston University’s Dino Christenson and David Glick conducted an experiment that showed some people evidence that the Court’s ruling upholding Obamacare was politically motivated while withholding the same material from another group. The result: Conservatives who were given material showing that the ruling was political viewed the Court as significantly less legitimate compared to even other conservatives in the control group.

The more the Court becomes the center of partisan conflict, in short, the more people are
likely to see it through a partisan lens. And that process is already happening, albeit in a somewhat unequal fashion: Democrats seem to be more likely to be skeptical of the Court than Republicans.

This stems from what legal scholars Joseph Fishkin and David Pozen call “asymmetric constitutional hardball”: the fact that Republicans have broken the informal rules of politics and constitutional practice far more than Democrats have in the past several decades.

The Merrick Garland saga is the most prominent example of this. It’s not the only one, but from my conversations with liberals, it appears to have been something of a breaking point. Republican senators blocking an Obama appointee, for obviously partisan reasons, convinced many Democrats that there are no impartial norms surrounding the Court.

Now you have Kavanaugh rammed through despite the cloud of sexual assault allegations, after an FBI investigation that Democrats (correctly) believe was too limited to help adjudicate the truth of the allegations against the now-justice.

The Supreme Court’s newest justice is a man who remains accused of sexual assault, nominated by a president who himself has been accused of several sexual assaults, to serve on a Court that already has a justice (Clarence Thomas) who has been accused of sexual harassment and, more recently, groping a female attorney at a dinner party. This, in and of itself, would likely damage the perception of the Court in the #MeToo era (at least among Democrats and people on the broader left).

But when you combine that with the fact that this Court could plausibly overturn Roe v. Wade in the coming years — the most cherished victory of the American feminist movement — you have yet another reason to worry about a Supreme Court legitimacy crisis.

Almost immediately after Kennedy announced his retirement, prominent liberals and leftists started calling for the next Democratic Congress to pack the Court — meaning expanding its membership from nine to 11 (or more) to create a new liberal majority. Kavanaugh on the Court, and the 5-4 rulings on charged topics that might ensue, will likely intensify such calls.

We are about to enter a new era in the Supreme Court’s life, one in which a significant portion of the population will view its decisions as fundamentally illegitimate. It’s part of the baleful legacy that Donald Trump and Mitch McConnell will leave us with us long after they’re gone.
Chief Justice John Roberts is vowing to keep the Supreme Court out of the political fray despite the intense and divisive fight over the nomination of the court’s newest member, Justice Brett Kavanaugh.

At the outset of an appearance at the University of Minnesota on Tuesday, Roberts said he wanted to make some comments prompted by what he euphemistically called “the contentious events in Washington in recent weeks.”

“I will not criticize the political branches. We do that often enough in our opinions,” the chief justice said. “What I would like to do is emphasize how the judicial branch is and must be very different.”

Roberts professed “great respect” for public officials, presumably including the senators who conducted the two rounds of hearings for Kavanaugh.

“After all, they speak for the people,” the chief justice said. “We do not speak for the people, but we speak for the Constitution. Our role is very clear.”

In the wake of Kavanaugh’s confirmation and the Senate’s controversial handling of sexual assault allegations against him, polls have shown an increased number of Americans convinced that the court is becoming more political. A recent Washington Post-ABC News poll found that 43 percent of Americans think the court’s rulings will be more politically motivated with Kavanaugh on the bench, compared with 10 percent who said they will be less political.

Roberts stressed that many of the Supreme Court’s most significant decisions had been unpopular and at odds with what elected officials of the time probably would have wanted.

“The story of the Supreme Court would be very different without that kind of independence. Without independence, there is no Brown v. Board of Education,” the chief justice said, referring to the landmark, unanimous high-court decision that barred segregated public schools. He also pointed to a 1943 ruling upholding the right of public school students not to salute the flag or say the Pledge of Allegiance, and a 1952 decision reining in presidential power in a case over President Harry Truman’s attempt to seize steel mills.

Roberts did offer a rhetorical tip of the hat to Kavanaugh, quoting his remarks at his White House swearing-in, where he noted that the justices don’t arrange themselves on opposite sides of an aisle by political party.

“We do not serve one party or one interest, but we serve one nation,” the chief justice said, still citing his newest colleague. “I want to assure all of you that we will continue to do that to the best of our abilities, whether times are calm or contentious.”

Roberts said having a new member on the court prompted many of the justices to sharpen up arguments that may have gotten a bit shopworn with colleagues they’ve known for years.

“It is like having a new in-law at Thanksgiving dinner. Uncle Fred will put on a clean shirt,” the chief justice joked.

Despite some politically polarized and polarizing decisions from the high court in recent years, Roberts described collegiality between the justices as “very, very good.”

“We do think we are in this important enterprise together,” he said. “In many ways, it’s unlike any other job … that does cause a real bond to develop between you.”

Roberts hinted that the justices do sometimes discuss issues like politics with one another behind closed doors, largely because it’s not wise for them to do so with others. He said he tries to direct the court to a degree and to achieve his
stated goal to seek consensus where feasible, but that this doesn’t always work.

“I’d have to say it’s a project in progress, still … I still think it’s an important objective,” he said.

Roberts also said he has to be careful not to be too bossy with his eight colleagues, who all essentially have the same vote as well as lifetime appointments to the court.

“As a chief justice, you hold the reins of power, but if you tug on them too tightly, you’ll learn they’re not attached to anything,” he quipped.

Under questioning from Robert Stein, a University of Minnesota law professor, the chief justice affirmed his long-standing opposition to allowing TV cameras into the high court. However, he did concede that video coverage of the court’s arguments would have some benefits.

“I think it’d be very helpful in getting more people familiar with how the court operates, but that’s not our job — to educate people,” Roberts said. “Our job is to carry out our job under the Constitution to interpret the Constitution and laws according to the rule of law, and I think that having cameras in the courtroom would impede that process.

“We think the process works pretty well. I think that if there were cameras, that lawyers would act differently. I think, frankly, some of my colleagues would act differently. … I don’t think that there are a lot of public institutions, frankly, that have been improved in how they do business by cameras.”
Justice Clarence Thomas on Friday stressed the need for judges to remain independent from the political branches of government.

Thomas spoke about the importance of the rule of law at a dedication ceremony for a justice center expansion in Covington, Georgia, report the Associated Press and the Rockdale Citizen & Newton Citizen.

“Judicial independence is critical to liberty and to justice,” Thomas said. “In our great country, the judiciary is not a puppet of those in power, nor is it the engine for pioneering social change. Rather, it is a safeguard against tyranny and an assurance of neutral arbiters for those seeking the protection of the law.”

Thomas said it is increasingly common for public opinion to galvanize behind particular outcomes. “Advancing a narrative all too often becomes more important than the rule of law,” Thomas said. “And it can be tempting for us as judges to want to fit into that narrative or to confuse what we perceive as a just outcome with the justice that the law requires and that flows from being fair and impartial. As judges we have a sacred duty to resist that temptation.”
Ian Samuel, Kavanaugh will be on the US supreme court for life. Here’s how we fight back, The Guardian, Oct. 9, 2018

Brett Kavanaugh has been confirmed, and he will serve as a justice on the supreme court for the rest of his life. This event assures rightwing dominance of the court for a generation – or so we are told. After all, at 53, he is not even the youngest conservative: Justice Neil Gorsuch is 51. The chief justice, who has been there for more than a decade, is only 63. Justice Ruth Bader Ginsburg, by contrast, is 85, and Justice Stephen Breyer is 80. We are in, it seems, for decades of misery for labor unions, voting rights, regulation of businesses and all the rest.

Or are we? The logic behind this “lost for a generation” stuff is simple enough. There are nine seats on the supreme court. All of its members serve for life. The five-justice conservative majority is quite young and seems healthy. Given all that, Kavanaugh’s confirmation is the final nail in the coffin, isn’t it?

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The ray of hope, if there is one, lies in contradiction of the first of those premises. Nothing in the constitution fixes the number of supreme court seats at nine. The size of the court is set by legislation, and has varied over time. We started with six. We’ve gone as high as 10 (when Abraham Lincoln was president, and Congress worried about a reactionary supreme court invalidating his wartime measures). Only recently, Republicans held the court to eight members for a year in the wake of Antonin Scalia’s death.

So, then, the next time the left has some political power, why not just expand the size of the supreme court and add another handful of justices? Make Brett Kavanaugh a gifted and energetic member of a 10-to-5 minority. Don’t get mad, in other words: get even.

This is called “court-packing”. And although it enjoys a long and distinguished history in America, anyone who suggests it today will be met – swiftly – by serious and sober realists, all of whom who are eager to explain the reasons that this cannot possibly work. Their arguments tend to take one of a few forms.

First, they say, this idea is counterproductive. If the Democrats pack the courts, Republicans will retaliate by packing the courts even more when next they are in power. (“It’s time,” these people assure you, “for some game theory.”) That is, if the left expands the court’s membership to 15, then the Republicans will expand it to 17, or 19, when they are in power next. And that makes sense until you remember: didn’t the Republicans already adjust the size of the court (shrinking it to eight, by refusing to consider Judge Merrick Garland’s nomination) when they had the power to do it?

And if, in a decade, the right did further expand the court and take back control of it … how would that leave the left in any position that’s worse than now? This objection (“what if they retaliate?!”) feels, in present circumstances, a bit like worrying that if the Allies invade Normandy, the Nazis will shoot at them. It’s not wrong, exactly, but it seems bereft of some of the essential context.

Another objection is more romantic. Court-packing, some worry, would destroy the legitimacy of the supreme court as a non-partisan institution – it would say farewell to the court as a forum where neutral principles, rather than ideology, governs. Whereas the game theorists of the prior objection are mostly annoying, this objection is almost sad: what can one say to it but “Oh, honey?”

Every well-socialized adult must decide for him- or herself the decision that represents, for them, the definitive refutation of this Schoolhouse Rock vision of the American judiciary. Young socialists just coming of age will probably choose Janus v AFSCME – the culmination of a calculated, six-year political hit on public-sector labor unions. Elder Democrats
can rally around their disdain for Shelby county (which invalidated a major portion of the Voting Rights Act) or Citizens United (which paved the way for unlimited corporate spending in elections). The truly wizened might remind us all of Bush v Gore (which … well, you know that one).

But this is not a coming-of-age experience limited to the left: even conservatives are eager to explain how Obergefell v Hodges (which recognized a constitutional right to same-sex marriage) or Roe v Wade (which … well, again, you know) or a dozen other decisions prove the court is an institution dedicated to the advancement of elite liberal victories in the culture wars. The point is: if the legitimacy of the supreme court depends on it being an institution above politics, then the Rubicon was crossed – however one counts – quite some time ago. *Alea iacta est.*

At bottom, though, opponents of court-packing have a burden to supply a superior alternative. The court is firmly in the grips of young conservatives who will serve for decades. What is to be done? Writing more persuasive briefs is not a hopeful strategy. Term limits don’t even begin to solve the problem. Accepting defeat is a non-starter. And so although court-packing is deservedly controversial, its skeptics on the left must nonetheless answer a question to which they have yet to supply a convincing answer:

Do you have a better idea?

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Brett Kavanaugh’s appointment to the Supreme Court has sparked a firestorm of outrage and recrimination on the left. Some attacks seem aimed at intimidating the justices into supporting progressive causes. “The Court must now prove—through its work—that it is worthy of the nation’s trust,” Eric Holder, President Obama’s attorney general, tweeted Oct. 6.

Yet the attacks go beyond ideology. Detractors of Justice Kavanaugh and President Trump are denouncing the Constitution itself and the core elements of America’s governmental structure:

- **The Electoral College.** Mr. Trump’s opponents claim he is an illegitimate president because Hillary Clinton “won the popular vote.” One commentator even asked “what kind of nation allows the loser of a national election to become president.” The complaint that the Electoral College is undemocratic is nothing new. The Framers designed it that way. They created a republican form of government, not a pure democracy, and adopted various antiamajoritarian measures to keep the “demos” in check.

The Electoral College could be eliminated by amending the Constitution. But proposing an amendment requires two-thirds votes in both houses of Congress, and the legislatures of three-fourths, or 38, of the states would have to ratify it.

- **The Senate.** The complaint here is that the 50 senators who voted in Justice Kavanaugh’s favor “represent” fewer people than the 48 who voted against him. But senators represent states, not people.

Equal Senate representation for the states was a key part of the Connecticut Compromise, along with House seats apportioned by population. The compromise persuaded large and small states alike to accept the new Constitution. It was so fundamental that Article V of the Constitution—which spells out the amendment procedure—provides that “no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.” That means an amendment changing the structure of the Senate would require ratification by all 50 states.

- **Judicial independence.** Commentators who disapprove of the Supreme Court’s composition have urged, as one law professor put it, “shrinking the power of the courts to overrun our citizens’ democratic decisions.” Some suggest limiting and staggering the justices’ terms so that a vacancy would come up every other year, ensuring that the court follows the election returns. That could be achieved via constitutional amendment, but it would go against the Framers’ wisdom. As Hamilton wrote in Federalist No. 78, life tenure for judges is “the best expedient which can be devised in any government, to secure a steady, upright and impartial administration of the laws.”

Some of Justice Kavanaugh’s detractors have demanded that if Democrats take the House next month, they open an investigation into the sex-crime allegations Senate Democrats failed to substantiate. But although Congress has wide oversight powers with respect to the executive branch, it has no such oversight authority over the judiciary. The only way the House can legitimately investigate a sitting judge is in an impeachment proceeding.

And Justice Kavanaugh cannot be impeached for conduct before his promotion to the Supreme Court. Article III provides that judges “hold their Offices during good Behavior,” so that a judge can be removed only for “high Crimes and Misdemeanors” committed during his term in office.

That puts inquiry into allegations about Justice Kavanaugh’s conduct as a teenager and young adult well outside Congress’s investigative authority, along with any claims that he misled the Judiciary Committee. Such claims could be
reviewed only as part of a criminal investigation by federal prosecutors based on a referral from the Senate, the only body that may decide whether his testimony contained “material” misrepresentations. For the House to inquire into this matter would impermissibly encroach on the Senate’s advice-and-consent power.

Michael Barone has observed that “all procedural arguments are insincere.” Those who now complain about the undemocratic nature of the Electoral College and the Senate were quite content when their party seemed to have a lock on the former and held a large majority in the latter. And it is the Supreme Court’s countermajoritarian character that made possible the decisions, such as Roe v. Wade and Obergefell v. Hodges, that progressives now fear are at risk of being overturned or pared back.

There’s one thing the left could do to make the Supreme Court more liberal without amending the Constitution. Some have suggested a return to Franklin D. Roosevelt’s “court packing” plan, which sought to expand the court to as many as 15 justices. Nothing in the Constitution prevents Congress from expanding the Supreme Court’s membership. Article III merely establishes a Supreme Court; it does not say how many justices it should have. Congress has altered the number of justices by statute several times, most recently in the Circuit Judges Act of 1869, which expanded the court from seven members to nine. But this would require a president and House and Senate majorities willing to go down this path, likely at considerable political cost. In other words, progressives would have to win elections. And if they did that, they’d be able to change the court without making it bigger.

The anger and disappointment of Justice Kavanaugh’s opponents is understandable, as would be that of his supporters if the vote had gone the other way. They are perfectly entitled to pursue political remedies, including using his appointment as a campaign issue. They also are entitled to pursue amendments to the Constitution that would make our system of government more responsive to the popular will. What they cannot do is overturn the Connecticut Compromise guaranteeing each state equal representation in the Senate, or launch unconstitutional investigations or impeachment of a sitting Supreme Court justice. The Constitution protects all of us, even Supreme Court justices.

Messrs. Rivkin and Casey practice appellate and constitutional law in Washington. They served in the White House Counsel’s Office and Justice Department under Presidents Reagan and George H.W. Bush.
In recent months, prominent legal scholars on both sides of the political spectrum have proposed court-packing plans, or at least urged reconsideration of the longstanding political norm against court-packing. If such ideas take hold, it will be a very dangerous development.

In a controversial new paper styled as a memo to Congress, famed conservative legal scholar Steven Calabresi and attorney Shams Hirji argue for a massive expansion of the federal judiciary. They advocate that, at a minimum, Congress should add 61 new federal appellate circuit court judges (36% more than the current number), and 200 new district court (trial) judges (almost 30% more than the current figure). They also argue that Congress should replace 158 administrative law judges currently selected by executive branch administrative agencies with standard life-tenured judges appointed by the President and confirmed by the Senate.

This would be a massive expansion of the federal judiciary, the largest in decades. While most of the Calabresi-Hirji paper is devoted to nonpartisan justifications for expanding the size of the federal courts (such as the growth in case loads), the authors also clearly state that one of their goals is “Undoing President Barack Obama’s Judicial Legacy.” Thus, it is not unfair to conclude that court-packing is a major objective of their proposal, even if it is not the only one.

As Calabresi and Hirji recognize, implementing their proposal while the GOP controls the White House and the Senate would transform a Democratic majority among lower court federal judges into a Republican one. Moreover, they clearly hope to have the proposal enacted as quickly as possible, before Democrats get a chance to retake control of Congress in the 2018 election. For that reason, they argue that their plan can be adopted by means of the “reconciliation” process, which is not susceptible to filibuster by Senate Democrats (David Super argues that they are wrong about this).

Because of this court-packing aspect, the Calabresi-Hirji plan has drawn predictable outrage from liberal critics such as Linda Greenhouse, Dahlia Lithwick, and (more insightfully), University of Michigan law Professor Richard Primus.

Steve Calabresi is not, however, the first prominent legal scholar to challenge the norm against court-packing this year. Back in July, Harvard Law Professor Mark Tushnet (who stands at the opposite end of the political spectrum from Calabresi) urged Democrats to consider “expanding the Supreme Court to eleven (or more)” when they get the chance. Tushnet has doubled down on this idea in a recent blog post commenting on the Calabresi-Hirji plan. The ostensible rationale for Tushnet’s proposal is retaliation for the GOP’s “theft” of the Supreme Court seat to which Barack Obama nominated Merrick Garland, but which eventually went to Neil Gorsuch after the GOP-controlled Senate refused to hold hearings on the nomination. But in his most recent post on this subject, Tushnet notes – with admirable candor – that “[t]he rationale is not (on the surface) to ‘seize control of the judiciary’” (emphasis added). That, of course, suggests that “seizing control” is a major part of the rationale beneath the surface.

So far, Tushnet’s idea has not attracted as much attention as the Calabresi-Hirji plan. But that could easily change – and likely will if the latter gains significant political traction.

All of this newfound interest in court-packing raises the question of whether there is any reason to oppose the idea, other than short-term political self-interest. It is likely no accident that nearly all of the criticism of Calabresi’s proposal has come from liberal Democrats who dislike the idea of vastly expanding the percentage of Republicans in the judiciary.
As Richard Primus recognizes in the most thoughtful critique of the Calabresi-Hirji paper, court-packing does not violate the text of the Constitution. He points out that Congress successfully packed the Supreme Court several times in the nineteenth century.

But since the late 1800s, a strong political norm against court-packing has emerged. And both political parties have largely followed it. In 1937, the highly popular Democratic President Franklin D. Roosevelt famously sought to pack the Supreme Court in order to reverse judicial decisions invalidating many of his New Deal programs. That effort was blocked in Congress, in part through the efforts of senators of his own party, led by Montana Senator Burton Wheeler.

The mere fact that a political norm exists doesn’t mean it should be continued. Some norms cause more harm than good. But the norm against court-packing justified by more than just tradition. Court-packing is a menace to the role of judicial review as a check on the power of political majorities. If either the Republicans (per the Calabresi-Hirji plan) or the Democrats (following Tushnet’s ideas) succeed in packing the courts, the opposing party is sure to do exactly the same thing the next time they control the White House and both Houses of Congress. This is even more likely if court-packing can be enacted through the reconciliation process (as Calabresi and Hirji argue), and thus requires only a narrow Senate majority to pass.

Ending the norm against court-packing ensures that the judiciary will not serve as an effective check on the other branches of government at the very time when it is most likely to be needed: when one party holds both Congress and the presidency, and can thereby push through its agenda with relatively little opposition. Especially in a highly polarized era like our own, it is precisely at such times that the ruling party is especially likely to violate constitutional constraints on its power in order to score victories against the hated opposition.

This is precisely the outcome we should strive to avoid. As Burton Wheeler put it in a speech attacking FDR’s court-packing plan:

Create now a political court to echo the ideas of the Executive and you have created a weapon. A weapon which, in the hands of another President in times of war or other hysteria, could well be an instrument of destruction. A weapon that can cut down those guaranties of liberty written into your great document by the blood of your forefathers and that can extinguish your right of liberty, of speech, of thought, of action, and of religion. A weapon whose use is only dictated by the conscience of the wielder.

Our own time obviously features both war and hysteria. And, to put it mildly, few of our current political leaders are notable for their high-minded consciences.

Calabresi and Hirji argue that their plan is not a true break with political precedent, because it would merely expand the federal judiciary to the same extent as a 1978 bill enacted by a Democratic congressional majority under Democratic President Jimmy Carter. I think this 1978 analogy founders for reasons well summarized by Richard Primus:

[T]he 1978 bill was different from the current proposal in some notable ways. Twenty-one of the 35 new circuit judgeships were created in just two circuits: the Fifth and the Ninth. Population growth in those circuits had been especially steep in the preceding decades, and the Fifth Circuit expansion was a precursor to the division of that Circuit into two separate Circuits under a statute passed two years later…. In both Houses of Congress, most Republicans supported its passage. (Or, strictly speaking, we know for sure that that was true in the House, where there was a roll-call vote. In the Senate, the measure passed by voice vote, which suggests that it wasn’t a highly contested
question.) The point here is just that although it’s true that a prior bill passed by a majority-Democratic Congress and signed by a Democratic President expanded the number of circuit judgeships by 36%, it would be a mistake to infer that that bill, like the one Calabresi and Hirji propose, was an effort to seize ideological control of the lower courts.

I would add that, in 1978, Democratic and Republican appointees were not nearly as polarized on constitutional issues as they are today. Republicans had much less to fear and Democrats less to gain from passage of the 1978 bill than Republicans would likely gain from passing the Calabresi-Hirji plan today, or Democrats from pushing through the Tushnet proposal after an electoral victory in 2020.

Unlike most of the other opponents of the Calabresi-Hirji proposal, I think Trump’s judicial nominees so far have been pretty good. Despite a few clunkers, they have, on the whole, been much better than I expected, and some are even outstanding. Judicial nominees are among the few bright spots, from my standpoint, of an otherwise terrible administration. I still fear that Trump may, over time, begin to make appointments on the basis of his own horrendous agenda on constitutional issues, instead of farming out judicial selection to the conservative legal establishment, as he has mostly done so far. But it is also quite possible that Trump will stay the course, even if presented with the temptation of the massive court-packing opportunity created by the Calabresi-Hirji proposal.

Regardless, the case against court-packing does not depend on the proclivities of any one president. As James Madison famously warned us: “Enlightened statesmen will not always be at the helm.” Indeed, dangerously unenlightened politicians are all too common. The norm against court-packing is an important bulwark against their depredations – and those of the political majorities who put them in power.

UPDATE: Calabresi and Hirji have responded to some of their critics here and here. I continue to find their case unpersuasive. They rely heavily on the 1978 analogy, but without dealing adequately with its flaws (especially the point that the 1978 bill had broad bipartisan support and occurred at a time when the ideological gap between GOP and Democratic judicial nominees was much smaller than it is today). Also unavailing is their effort to justify their proposal as a response to the Democrats’ filibustering and otherwise blocking various GOP judicial nominees. The Democrats’ sins in that regard have already been “punished” by the GOP Senate’s similar actions under Obama, most notably blocking the Merrick Garland Supreme Court appointment.

Moreover, there is no meaningful comparison between blocking individual nominees and large-scale court-packing. Only the latter can massively reshape the federal judiciary at one fell swoop, and neuter judicial checks on the policies of the party in power. And while there is no established political norm against blocking individual nominees (both parties use such tactics routinely), there is one against court-packing.

UPDATE #2: Legal scholar Josh Blackman offers a detailed critique of the Calabresi-Hirji plan in the National Review. As Josh points out, one of the reasons why Calabresi’s proposal has gotten so much attention is that – in addition to being a famous legal scholar, he is also a co-founder of the Federalist Society. But, Blackman notes, reporters and commentators should not assume that the proposal has “monolithic” support from the Society or right of center legal circles generally. Blackman himself is also a prominent Federalist Society member. For what it is worth, I too am a member of both the Society and two of its executive committees (including, most relevantly, the Executive Committee on Federalism and Separation of Powers). This is not to say that my views somehow represent an official Federalist Society viewpoint (the organization does not in
fact have official positions on such issues), or even that I am anywhere near as prominent a member of the organization as Calabresi is. Like Blackman, I merely wish to note that Calabresi’s proposal is far from universally supported by Federalist Society members or by conservative and libertarian lawyers and legal scholars.

UPDATE #3: The original version of this post identified Shams Hirji as a law student (which is how he is listed on the SSRN site for the Calabresi-Hirji article). However, I have since learned that he graduated in May 2017, and is now a practicing lawyer. I apologize for the mistake, which has now been corrected.

UPDATE #4 (December 5, 2017): The Calabresi-Hirji paper discussed in this post has been removed from SSRN. The authors indicate that they have taken it down in order to in order to “make some revisions in light of the extensive comments generated by the paper.” They expect that “[a] revised version should be back up within a few weeks.”