U.S. Constitutional Law I(D)

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The *British North America Act, 1867* (now renamed the *Constitution Act, 1867*), was the instrument that brought the federation, the new nation, into existence. It was an Act of theBritish Parliament. But, except for two small points, it was simply the statutory form of resolutions drawn up by delegates from what is now Canada. Not a single representative of the British government was present at the conferences that drew up those resolutions, or took the remotest part in them.

…[W]e must understand that our written Constitution, unlike the American, is not a single document.It is a collection of 25 primary documents outlined in the *Constitution Act, 1982*.

The core of the collection is still the Act of 1867. This, with the amendments added to it down to the end of 1981, did 12 things.

- First, it created the federation, the provinces, the territories, the national Parliament, the provincial legislatures and some provincial cabinets.
- Second, it gave the national Parliament the power to create new provinces out of the territories, and also the power to change provincial boundaries with the consent of theprovinces concerned.
- Third, it set out the power of Parliament and of the provincial legislatures.
- Fourth, it vested the formal executive power in the Queen, and created the Queen's PrivyCouncil for Canada (the legal basis for the federal cabinet).
- Fifth, it gave Parliament power to set up a Supreme Court of Canada (which it did, in 1875).
- Sixth, it guaranteed certain limited rights equally to the English and French languagesin the federal Parliament and courts and in the legislatures and courts of Quebec and Manitoba.
- Seventh, it guaranteed separate schools for the Protestant and Roman Catholic minoritiesin Quebec and Ontario. It also guaranteed separate schools in any other province wherethey existed by law in 1867, or were set up by any provincial law after 1867. …
- Eighth, it guaranteed Quebec's distinctive civil law.
- Ninth, it gave Parliament power to assume the jurisdiction over property and civil rights, or any part of such jurisdiction, in other provinces, provided the provincial legislatures consented. This power has neverbeen used.
- Tenth, it prohibited provincial tariffs.
- Eleventh, it gave the provincial legislatures thepower to amend the provincial constitutions,except as regards the office of lieutenant- governor.
- Twelfth, it gave the national government (the Governor-in-Council: that is, the federalcabinet) certain controls over the provinces:appointment, instruction and dismissal of lieutenant-governors (two have been dismissed); disallowance of provincial acts within one year after their passing (112 have been disallowed …from every province except Prince Edward Island and Newfoundland and Labrador …

… [T]he *British North America Act, 1867* contained no provisions for its own amendment, except a limited power for the provinces to amend their own constitutions. All other amendments had to be made by a fresh Act of the British Parliament. … True, that [British] Parliament usually passed any amendment we asked for. But more and more Canadians felt this was not good enough.

… The final British Act of 1982, the *Canada Act*, provided for the termination of the British Parliament's power over Canada and for the "patriation" of our Constitution. Under the terms of the *Canada Act*, the *Constitution Act, 1982*, was proclaimed in Canada and "patriation"was achieved.

Under the *Constitution Act, 1982*, the *British North America Act, 1867*, and its various amendments … became the *Constitution Acts, 1867* ....

What are the big changes that the *Constitution Act, 1982*, made in our Constitution?

First, it established four legal formulas or processes for amending the Constitution. Until

1982, there had never been any legal amending formula (except for a narrowly limited power given to the national Parliament in 1949, a power now superseded). . . .

The second big change made by the *Constitution Act, 1982*, is that the first three amending formulas "entrench" certain parts of the written Constitution: that is, place them beyond the power of Parliament or any provincial legislature to touch. . . .

Third, the *Constitution Act, 1982*, sets out the *Canadian Charter of Rights and Freedoms* that neither Parliament nor any provincial legislature acting alone can change. Any such changes come under the [constitutional amendment provisions]. . . .

The fourth big change made by the *Constitution Act, 1982*, gives the provinces wide powers over their natural resources. . . .

The Constitution of Canada[1]

The Constitution Acts 1867 to 1982

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 CONSTITUTON 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.

II. UNION

3. Declaration of Union

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

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 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 continue in existence and capable of being exercised after the Union in relation to the Government of Canada, be vested in and exerciseable 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 necessary 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, immunities, and powers shall not confer any privileges, immunities, or powers exceeding those at the passing 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 representing 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 representing Saskatchewan, and six thereof representing Alberta; Newfoundland shall be entitled to be represented 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.

25. [Repealed]

Repealed.

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

51. (1) The number of members of the House of Commons and the representation of the provinces therein shall, on the completion of each decennial census, be readjusted by such authority, in such manner, and from such time as the Parliament of Canada provides from time to time, 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 population of the province by the electoral quotient and rounding up any fractional remainder to one.

2. If the number of members assigned to a province by the application of rule 1 and section 51A is less than the total number assigned to that province Insertion during the 43rd Parliament, there shall be added to the number of members so assigned Insertion starttheInsertion end number of members Insertion that will result in the province having the same number of members as were assigned Insertion during that Parliament.

3. After the application of rules 1 and 2 and section 51A, there shall, in respect of each province that meets the condition set out in rule 4, be added, if necessary, a number of members such that, on the completion of the readjustment, the number obtained by dividing the number of members assigned to that province by the total number of members assigned to all the provinces is as close as possible to, without being below, the number obtained by dividing the population of that province by the total population of all the provinces.

4. Rule 3 applies to a province if, on the completion of the preceding readjustment, the number obtained by dividing the number of members assigned to that province by the total number of members assigned to all the provinces was equal to or greater than the number obtained by dividing the population of that province by the total population of all the prov-inces, the population of each province being its population as at July 1 of the year of the decennial census that preceded that readjustment according to the estimates prepared for the purpose of that readjustment.

5. Unless the context indicates otherwise, in these rules, the population of a province is the estimate of its population as at July 1 of the year of the most recent decennial census.

6. In these rules, “electoral quotient” means

(a) 111,166, in relation to the readjustment following the completion of the 2011 decennial census, and

(b) in relation to the readjustment following the completion of any subsequent decennial census, the number obtained by multiplying the electoral quotient that was applied in the preceding readjustment by the number that is the average of the numbers obtained by dividing the population of each province by the population of the province as at July 1 of the year of the preceding decennial census according to the estimates prepared for the purpose of the preceding readjustment, and rounding up any fractional remainder of that multiplication to one.

(1.1) For the purpose of the rules in subsection (1), there is required to be prepared an estimate of the population of Canada and of each province as at July 1, 2001 and July 1, 2011 — and, in each year following the 2011 decennial census in which a decennial census is taken, as at July 1 of that year — by such authority, in such manner, and from such time as the Parliament of Canada provides from time to time.

(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 de- scribed 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.

An Entry of every such Speech, Message, or Proclamation shall be made in the Journal of each House, and a Duplicate thereof duly attested shall be delivered to the proper Officer to be kept among the Records of Canada.

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 removeable 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 Ad-

dress has been presented by the Legislative Assembly to the Lieutenant Governor stating that it has been so passed.

3. ONTARIO AND QUEBEC

81. [Repealed]

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]

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.

1A. The Public Debt and Property.

2. The Regulation of Trade and Commerce.

2A. Unemployment insurance.

3. The raising of Money by any Mode or System of Taxation.

4. The borrowing of Money on the Public Credit.

5. Postal Service.

6. The Census and Statistics.

7. Militia, Military and Naval Service, and Defence.

8. The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of Canada.

9. Beacons, Buoys, Lighthouses, and Sable Island.

10. Navigation and Shipping.

11. Quarantine and the Establishment and Maintenance of Marine Hospitals.

12. Sea Coast and Inland Fisheries.

13. Ferries between a Province and any British or Foreign Country or between Two Provinces.

14. Currency and Coinage.

15. Banking, Incorporation of Banks, and the Issue of Paper Money.

16. Savings Banks.

17. Weights and Measures.

18. Bills of Exchange and Promissory Notes.

19. Interest.

20. Legal Tender.

21. Bankruptcy and Insolvency.

22. Patents of Invention and Discovery.

23. Copyrights.

24. Indians, and Lands reserved for the Indians.

25. Naturalization and Aliens.

26. 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 Dissentient Schools of the Queen’s Protestant and Roman Catholic Subjects in Quebec:

(3) Where in any Province a System of Separate or Dissentient 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, Solic-

itor 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]

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.
8. Halton.
9. Essex.

Ridings of Counties

10. North Riding of Lanark.
11. South Riding of Lanark.
12. North Riding of Leeds and North Riding of Grenville.
13. South Riding of Leeds.
14. South Riding of Grenville.
15. East Riding of Northumberland.
16. West Riding of Northumberland (excepting therefrom the Township of South Monaghan).
17. East Riding of Durham.
18. West Riding of Durham.
19. North Riding of Ontario.
20. South Riding of Ontario.

21. East Riding of York.
22. West Riding of York.
23. North Riding of York.
24. North Riding of Wentworth.
25. South Riding of Wentworth.
26. East Riding of Elgin.
27. West Riding of Elgin.
28. North Riding of Waterloo.
29. South Riding of Waterloo.
30. North Riding of Brant.
31. South Riding of Brant.
32. North Riding of Oxford.
33. South Riding of Oxford.
34. East Riding of Middlesex.

Cities, Parts of Cities, and Towns

35. West Toronto.
36. East Toronto.
37. Hamilton.
38. Ottawa.
39. Kingston.
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.

48. The South Riding to consist of the Town of Goderich and the Townships of Goderich, Tuckersmith, Stanley, Hay, Usborne, and Stephen.

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.

[The East Riding to consist of the Townships now embraced therein, and be bounded as it is at present.]

51. The County of Lambton to consist of the Townships of Bosanquet, Warwick, Plympton, Sarnia, Moore, Enniskillen, and Brooke, and the Town of Sarnia.

52. The County of Kent to consist of the Townships of Chatham, Dover, East Tilbury, Romney, Raleigh, and Harwich, and the Town of Chatham.

53. 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:

54. The South Riding to consist of the Townships of Bentinck, Glenelg, Artemesia, Osprey, Normanby, Egremont, Proton, and Melancthon.

55. The North Riding to consist of the Townships of Collingwood, Euphrasia, Holland, Saint-Vincent, Sydenham, Sullivan, Derby, and Keppel, Sarawak and Brooke, and the Town of Owen Sound.

The County of Perth divided into Two Ridings, to be called respectively the South and North Ridings:

56. The North Riding to consist of the Townships of Wallace, Elma, Logan, Ellice, Mornington, and North Easthope, and the Town of Stratford.

57. 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:
58. The North Riding to consist of the Townships of Amaranth, Arthur, Luther, Minto, Maryborough, Peel, and the Village of Mount Forest.
59. The Centre Riding to consist of the Townships of Garafraxa, Erin, Eramosa, Nichol, and Pilkington, and the Villages of Fergus and Elora.
60. 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 Charlotteville, 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, Sunnidale, 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.
78. 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, Blithfield, Brougham, Horton, Admaston, Grattan, Matawatchan, Griffith, Lyndoch, Raglan, Radcliffe, Brudenell, Sebastopol, and the Villages of Arnprior 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

Pontiac.	Missisquoi.	Compton.
Ottawa.	Brome.	Wolfe and Richmond.
Argenteuil.	Shefford.	Megantic.
Huntingdon.	Stanstead.	Town of Sherbrooke.

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.
7. Military Roads.
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-alleu 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.

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

Part

. . .

SCHEDULE B
CONSTITUTION ACT, 1982

PART I
CANADIAN CHARTER OF RIGHTS AND FREEDOMS

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

Guarantee of Rights and Freedoms

1. Rights and freedoms in Canada

The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

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.

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

(*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.

(2) 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.

(3) 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.

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

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

Citation

34. 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.

(2) 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.

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(2) 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.

(3) 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.

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

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

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(*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.I
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

Item	Column I Act Affected	Column II Amendment	Column III New Name
1.	British North America Act, 1867, 30-31 Vict., c. 3 (U.K.)	(1) Section 1 is repealed and the following substituted therefor: "1. This Act may be cited as the *Constitution Act, 1867*."	Constitution Act, 1867
		(2) Section 20 is repealed.	
		(3) Class 1 of section 91 is repealed.	
		(4) Class 1 of section 92 is repealed.	
2.	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.)	(1) The long title is repealed and the following substituted therefor: "*Manitoba Act, 1870*."	Manitoba Act, 1870
		(2) Section 20 is repealed.	
3.	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		Rupert's Land and North-Western Territory Order
4.	Order of Her Majesty in Council admitting British Columbia into the Union, dated the 16th day of May, 1871		British Columbia Terms of Union
5.	British North America Act, 1871, 34-35 Vict., c. 28 (U.K.)	Section 1 is repealed and the following substituted therefor: "1. This Act may be cited as the *Constitution Act, 1871*."	Constitution Act, 1871
6.	Order of Her Majesty in Council admitting Prince Edward Island into the Union, dated the 26th day of June, 1873.		Prince Edward Island Terms of Union
7.	Parliament of Canada Act, 1875, 38-39 Vict., c. 38 (U.K.)		Parliament of Canada Act, 1875
8.	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.		Adjacent Territories Order
9.	British North America Act, 1886, 49-50 Vict., c. 35 (U.K.)	Section 3 is repealed and the following substituted therefor: "3. This Act may be cited as the *Constitution Act, 1886*."	Constitution Act, 1886
10.	Canada (Ontario Boundary) Act, 1889, 52-53 Vict., c. 28 (U.K.)		Canada (Ontario Boundary) Act, 1889
11.	Canadian Speaker (Appointment of Deputy) Act, 1895, 2nd Sess., 59 Vict., c. 3 (U.K.)	The Act is repealed.	

12.	The Alberta Act, 1905, 4-5 Edw. VII, c. 3 (Can.)		Alberta Act
13.	The Saskatchewan Act, 1905, 4-5 Edw. VII, c. 42 (Can.)		Saskatchewan Act
14.	British North America Act, 1907, 7 Edw. VII, c. 11 (U.K.)	Section 2 is repealed and the following substituted therefor: "2. This Act may be cited as the *Constitution Act, 1907*."	Constitution Act, 1907
15.	British North America Act, 1915, 5-6 Geo. V, c. 45 (U.K.)	Section 3 is repealed and the following substituted therefor: "3. This Act may be cited as the *Constitution Act, 1915*."	Constitution Act, 1915
16.	British North America Act, 1930, 20-21, Geo. V, c. 26 (U.K.)	Section 3 is repealed and the following substituted therefor: "3. This Act may be cited as the *Constitution Act, 1930*."	Constitution Act, 1930
17.	Statute of Westminster, 1931, 22 Geo. V, c. 4 (U.K.)	In so far as they apply to Canada, (*a*) section 4 is repealed; and (*b*) subsection 7(1) is repealed.	Statute of Westminster, 1931
18.	British North America Act, 1940, 3-4 Geo. VI, c. 36 (U.K.)	Section 2 is repealed and the following substituted therefor: "2. This Act may be cited as the *Constitution Act, 1940*."	Constitution Act, 1940
19.	British North America Act, 1943, 6-7 Geo. VI, c. 30 (U.K.)	The Act is repealed.	
20.	British North America Act, 1946, 9-10 Geo. VI, c. 63 (U.K.)	The Act is repealed.	
21.	British North America Act, 1949, 12-13 Geo. VI, c. 22 (U.K.)	Section 3 is repealed and the following substituted therefor: "3. This Act may be cited as the *Newfoundland Act*."	Newfoundland Act
22.	British North America (No.2) Act, 1949, 13 Geo. VI, c. 81 (U.K.)	The Act is repealed.	
23.	British North America Act, 1951, 14-15 Geo. VI, c. 32 (U.K.)	The Act is repealed.	
24.	British North America Act, 1952, 1 Eliz. II, c. 15 (Can.)	The Act is repealed.	
25.	British North America Act, 1960, 9 Eliz. II, c. 2 (U.K.)	Section 2 is repealed and the following substituted therefor: "2. This Act may be cited as the *Constitution Act, 1960*."	Constitution Act, 1960
26.	British North America Act, 1964, 12-13 Eliz. II, c. 73 (U.K.)	Section 2 is repealed and the following substituted therefor: "2. This Act may be cited as the *Constitution Act, 1964*."	Constitution Act, 1964
27.	British North America Act, 1965, 14 Eliz. II, c. 4, Part I (Can.)	Section 2 is repealed and the following substituted therefor: "2. This Part may be cited as the *Constitution Act, 1965*."	Constitution Act, 1965
28.	British North America Act, 1974, 23 Eliz. II, c. 13, Part I (Can.)	Section 3, as amended by 25-26 Eliz. II, c. 28, s. 38(1) (Can.), is repealed and the following substituted therefor: "3. This Part may be cited as the *Constitution Act, 1974*."	Constitution Act, 1974
29.	British North America Act, 1975, 23-24 Eliz. II, c. 28, Part I (Can.)	Section 3, as amended by 25-26 Eliz. II, c. 28, s. 31 (Can.), is repealed and the following substituted therefor: "3. This Part may be cited as the *Constitution Act (No. 1), 1975*."	Constitution Act (No. 1), 1975
30.	British North America Act (No. 2), 1975, 23-24 Eliz. II, c. 53 (Can.)	Section 3 is repealed and the following substituted therefor: "3. This Act may be cited as the *Constitution Act (No. 2), 1975*."	Constitution Act (No. 2), 1975

The Constitution of the Republic of South Africa, 1996

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

as amended by:
Constitution of the Republic of South Africa, 1996; Constitution First Amendment Act of 1997; Constitution Second Amendment Act of 1998; Constitution Third Amendment Act of 1998; Constitution Fourth Amendment Act of 1999; Constitution Fifth Amendment Act of 1999; Constitution Sixth Amendment Act of 2001; Constitution Seventh Amendment Act of 2001; Constitution Eighth Amendment Act of 2002; Constitution Ninth Amendment Act of 2002; Constitution Tenth Amendment Act of 2003; Constitution Eleventh Amendment Act of 2003; Constitution Twelfth Amendment Act of 2005; Constitution Thirteenth Amendment Act of 2007; Constitution Fourteenth Amendment Act of 2008; Constitution Fifteenth Amendment Act of 2008; and Constitution Sixteenth Amendment Act of 2009

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, pro-

vided 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;

(1) 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

1 Section number	2 Section title	3 Extent to which the right is non-derogable

9	Equality	With respect to unfair discrimination solely on the grounds of race, colour, ethnic or social origin, sex, religion or language
10	Human dignity	Entirely
11	Life	Entirely
12	Freedom and security of the person	With respect to subsections (1) *(d)* and *(e)* and 2 *(c)*
13	Slavery, servitude and forced labour	With respect to slavery and servitude
28	Children	With respect to— - subsection (1) *(d)* and *(e)*; - the rights in subparagraphs (i) and (ii) of subsection (1) *(g)*; and - subsection (1) *(i)* in respect of children of 15 years and younger
35	Arrested, detained and accused persons	With respect to— - subsections (1) *(a)*, *(b)* and *(c)* and (2) *(d)*; - the rights in paragraphs *(a)* to *(o)* of subsection (3), excluding paragraph *(d)*; - subsection (4); and - subsection (5) with respect to the exclusion of evidence if the admission of that evidence would render the trial unfair

(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.

(8) 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 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.

(2) *(a)* 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) . . .,

(3) 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.

(4) 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 committees; 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 National 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) *(b)*, 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) *(b)*, 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—

(a) nine members of the National Assembly elected by the Assembly in accordance with a procedure that is prescribed by the rules and orders of the Assembly and results in the representation of parties in substantially the same proportion that the parties are represented in the Assembly; and

(b) one delegate from each provincial delegation in the National Council of Provinces, designated by the delegation.

(2) The Mediation Committee has agreed on a version of a Bill, or decided a question, when that version, or one side of the question, is supported by—

(a) at least five of the representatives of the National Assembly; and

(b) at least five of the representatives of the National Council of Provinces.

79 Assent to Bills

(1) The President must either assent to and sign a Bill passed in terms of this Chapter or, if the President has reservations about the constitutionality of the Bill, refer it back to the National Assembly for reconsideration.

(2) The joint rules and orders must provide for the procedure for the reconsideration of a Bill by the National Assembly and the participation of the National Council of Provinces in the process.

(3) The National Council of Provinces must participate in the reconsideration of a Bill that the President has referred back to the National Assembly if—

(a) the President's reservations about the constitutionality of the Bill relate to a procedural matter that involves the Council; or

(b) section 74 (1), (2) or (3) *(b)* or 76 was applicable in the passing of the Bill.

(4) If, after reconsideration, a Bill fully accommodates the President's reservations, the President must assent to and sign the Bill; if not, the President must either—

(a) assent to and sign the Bill; or

(b) refer it to the Constitutional Court for a decision on its constitutionality.

(5) If the Constitutional Court decides that the Bill is constitutional, the President must assent to and sign it.

80 Application by members of National Assembly to Constitutional Court

(1) Members of the National Assembly may apply to the Constitutional Court for an order declaring that all or part of an Act of Parliament is unconstitutional.

(2) An application—

(a) must be supported by at least one third of the members of the National Assembly; and

(b) must be made within 30 days of the date on which the President 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.

81 Publication of Acts

A Bill assented to and signed by the President becomes an Act of Parliament, must be published promptly, and takes effect when published or on a date determined in terms of the Act.

82 Safekeeping of Acts of Parliament

The signed copy of an Act of Parliament is conclusive evidence of the provisions of that Act and, after publication, must be entrusted to the Constitutional Court for safekeeping.

CHAPTER 5
THE PRESIDENT AND NATIONAL EXECUTIVE (ss 83–102)

83 The President

The President—

(a) is the Head of State and head of the national executive;

(b) must uphold, defend and respect the Constitution as the supreme law of the Republic; and

(c) 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 delegate 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 legislation; 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 documents;

(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 represented 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 effectively; 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 committees; 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 Bi11.

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 accessible 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 paragraph *(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 Gazette* and takes effect on publication or on a later date determined in terms of that constitution or amendment.

(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.

(2) 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.

(3) 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.

(4) *(a)* 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.

(b). . . . . ,

(5) A person may vote in a municipality only if that person is registered on that municipality's segment of the national common voters roll.

(6) 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

(1) 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.

(2) 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.

(3) Vacancies in a Municipal Council must be filled in terms of national legislation.

159 Terms of Municipal Councils

(1) The term of a Municipal Council may be no more than five years, as determined by national legislation.

(2) 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.

(3) 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

(1) 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.

(2) 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.

(3) *(a)* 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 Appea1.

(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 Constitutiona l 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 Commission.

(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 funds that the judge suffers from an incapacity, is grossly incompetent 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 profession 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 leaders 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 environment.

(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 Communities (ss 185–186)

185 Functions of Commission

(1) The primary objects of the Commission for the Promotion and Protection of the Rights of Cultural, Religious 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 management 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 co-operation 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 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.

(2) 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-Nata1

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
Map No. 42 of Schedule 2 to Notice 1998 of 2005
Map No. 43 of Schedule 2 to Notice 1998 of 2005
Map No. 44 of Schedule 2 to Notice 1998 of 2005
Map No. 45 of Schedule 2 to Notice 1998 of 2005

The Province of North West

Map No. 5 in Notice 1490 of 2008
Map No. 46 of Schedule 2 to Notice 1998 of 2005
Map No. 47 of Schedule 2 to Notice 1998 of 2005
Map No. 48 of Schedule 2 to Notice 1998 of 2005

The Province of the Western Cape

Map No. 49 of Schedule 2 to Notice 1998 of 2005
Map No. 50 of Schedule 2 to Notice 1998 of 2005
Map No. 51 of Schedule 2 to Notice 1998 of 2005
Map No. 52 of Schedule 2 to Notice 1998 of 2005
Map No. 53 of Schedule 2 to Notice 1998 of 2005
Map No. 54 of Schedule 2 to Notice 1998 of 2005

Schedule 2
OATHS AND SOLEMN AFFIRMATIONS

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.

(In the case of an oath: So help me God.) ,

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 the 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 10 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
Pontoons, 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;

'previous Constitution' means the Constitution of the Republic of South Africa, 1993 (Act 200 of 1993).

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—

Province	Permanent Delegates	Special Delegates
1. Eastern Cape	ANC 5 NP 1	ANC 4
2. Free State	ANC 4 FF1 NP 1	ANC 4
3. Gauteng	ANC 3 DP 1 FF 1 NP 1	ANC 3 NP 1
4. KwaZulu-Natal	ANC 1 DP 1 IFP 3 NP 1	ANC 2 IFP 2
5. Mpumalanga	ANC 4 FF 1 NP 1	ANC 4
6. Northern Cape	ANC 3 FF 1 NP 2	ANC 2 NP 2
7. Northern Province	ANC 6	ANC 4
8. North West	ANC 4 FF 1 NP 1	ANC 4
9. Western Cape	ANC 2 DP 1 NP 3	ANC 1 NP 3

(2) A party represented in a provincial legislature—

(a) must nominate its permanent delegates from among the persons who were senators when the new Constitution took effect and are available to serve as permanent delegates; and

(b) may nominate other persons as permanent delegates only if none or an insufficient number of its former senators are available.

(3) A provincial legislature must appoint its permanent delegates in accordance with the nominations of the parties.

(4) Subitems (2) and (3) apply only to the first appointment of permanent delegates to the National Council of Provinces.

(5) Section 62 (1) of the new Constitution does not apply to the nomination and appointment of former senators as permanent delegates in terms of this item.

(6) The rules and orders of the Senate in force when the new Constitution took effect, must be applied in respect of the business of the National Council to the extent that they can be applied, subject to any amendment or repeal.

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 Annexure 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 Constitution 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 Constitution 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 secondment 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 administering 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 amendment, adaptation or repeal and re-enactment of any legislation and any other action taken under that section, 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).

(5) 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.

(6) 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.

27 Safekeeping of Acts of Parliament and provincial Acts

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;.'

16. The deletion of item 26.

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

(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**
Act 200 of 1993	Constitution of the Republic of South Africa, 1993
Act 2 of 1994	Constitution of the Republic of South Africa Amendment Act, 1994
Act 3 of 1994	Constitution of the Republic of South Africa Second Amendment Act, 1994
Act 13 of 1994	Constitution of the Republic of South Africa Third Amendment Act, 1994
Act 14 of 1994	Constitution of the Republic of South Africa Fourth Amendment Act, 1994
Act 24 of 1994	Constitution of the Republic of South Africa Sixth Amendment Act, 1994
Act 29 of 1994	Constitution of the Republic of South Africa Fifth Amendment Act, 1994
Act 20 of 1995	Constitution of the Republic of South Africa Amendment Act, 1995
Act 44 of 1995	Constitution of the Republic of South Africa Second Amendment Act, 1995
Act 7 of 1996	Constitution of the Republic of South Africa Amendment Act, 1996
Act 26 of 1996	Constitution of the Republic of South Africa Third Amendment Act, 1996

GENERAL EXPLANATORY NOTE:

[ ]	Words in bold type in square brackets indicate omissions from existing enactments.
_____	Words underlined with a solid line indicate insertions in existing enactments.

(English text signed by the President)
(Assented to 1 February 2013)

ACT

To amend the Constitution of the Republic of South Africa, 1996, so as to further define the role of the Chief Justice as the head of the judiciary; to provide for a single High Court of South Africa; to provide that the Constitutional Court is the highest court in all matters; to further regulate the jurisdiction of the Constitutional Court and the Supreme Court of Appeal; to provide for the appointment of an Acting Deputy Chief Justice; and to provide for matters connected therewith.

PARLIAMENT of the Republic of South Africa enacts, as follows:—

Amendment of section 165 of Constitution

1. Section 165 of the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the Constitution), is hereby amended by the addition of the following subsection:

''(6) The Chief Justice is the head of the judiciary and exercises responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts.''.

Amendment of section 166 of Constitution

2. Section 166 of the Constitution is hereby amended—

(a) by the substitution for paragraph (c) of the following paragraph:

''(c) the **[High Courts, including]** High Court of South Africa, and any high court of appeal that may be established by an Act of Parliament to hear appeals from **[High Courts]** any court of a status similar to the High Court of South Africa;''; and

(b) by the substitution for paragraph (e) of the following paragraph:

''(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]** High Court of South Africa or the Magistrates' Courts.''.

Amendment of section 167 of Constitution, as amended by section 11 of Constitution Sixth Amendment Act of 2001

3. Section 167 of the Constitution is hereby amended—

(a) by the substitution for subsection (3) of the following subsection:

''(3) The Constitutional Court—

(a) is the highest court **[in all constitutional matters]** of the Republic; and

(b) may decide **[only]**—

(i) constitutional matters**[, and issues connected with decisions on constitutional matters]**; and

(ii) any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court; 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]** within its jurisdiction.''; and

(b) by the substitution for subsection (5) of the following subsection:

''(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]** the High Court of South Africa, or a court of similar status, before that order has any force.''.

Amendment of section 168 of Constitution, as amended by section 12 of Constitution Sixth Amendment Act of 2001

4. Section 168 of the Constitution is hereby amended by the substitution for subsection (3) of the following subsection:

''(3) (a) The Supreme Court of Appeal may decide appeals in any matter arising from the High Court of South Africa or a court of a status similar to the High Court of South Africa, except in respect of labour or competition matters to such extent as may be determined by an Act of Parliament.

(b) The Supreme Court of Appeal may decide only—

(i) appeals;

(ii) issues connected with appeals; and

(iii) any other matter that may be referred to it in circumstances defined by an Act of Parliament.''.

Substitution of section 169 of Constitution

5. The following section is hereby substituted for section 169 of the Constitution:

''**High [Courts] Court of South Africa**

169. (1) **[A]** The High Court of South Africa may decide—

(a) any constitutional matter except a matter that—

(i) **[only]** the Constitutional Court **[may decide]** has agreed to hear directly in terms of section 167(6)(a); or

(ii) is assigned by an Act of Parliament to another court of a status similar to **[a]** the High Court of South Africa; and

(b) any other matter not assigned to another court by an Act of Parliament.

(2) The High Court of South Africa consists of the Divisions determined by an Act of Parliament, which Act must provide for—
(a) the establishing of Divisions, with one or more seats in a Division; and
(b) the assigning of jurisdiction to a Division or a seat within a Division.
(3) Each Division of the High Court of South Africa—
(a) has a Judge President;
(b) may have one or more Deputy Judges President; and
(c) has the number of other judges determined in terms of national legislation.''.

Substitution of section 170 of Constitution

6. The following section is hereby substituted for section 170 of the Constitution:

''[Magistrates' Courts and other] Other courts

170. [Magistrates' Courts and all other courts] All courts other than those referred to in sections 167, 168 and 169 may decide any matter determined by an Act of Parliament, but a court of a status lower than **[a]** the High Court of South Africa may not enquire into or rule on the constitutionality of any legislation or any conduct of the President.''.

Amendment of section 172 of Constitution

7. Section 172 of the Constitution is hereby amended by the substitution in subsection (2) for paragraph (a) of the following paragraph:

''(a) The Supreme Court of Appeal, **[a]** the High Court of South Africa 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.''.

Substitution of section 173 of Constitution

8. The following section is hereby substituted for section 173 of the Constitution:

''Inherent power

173. The Constitutional Court, the Supreme Court of Appeal and the High **[Courts have]** Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.''.

Substitution of section 175 of Constitution, as amended by section 14 of Constitution Sixth Amendment Act of 2001

9. The following section is hereby substituted for section 175 of the Constitution:

''**[Acting] Appointment of acting judges**

175. (1) The President may appoint a woman or man to **[be]** serve as an acting Deputy Chief Justice or judge of the Constitutional Court if there is a vacancy in any of those offices, or if **[a judge]** the person holding such an office 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, and an appointment as acting Deputy Chief Justice must be made from the ranks of the judges who had been appointed to the Constitutional Court in terms of section 174(4).

(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.''.

Amendment of section 178 of Constitution, as amended by section 2 of Constitution Second Amendment Act of 1998 and section 16 of Constitution Sixth Amendment Act of 2001

10. Section 178 of the Constitution is hereby amended by the substitution in subsection (1) for paragraph (k) of the following paragraph:

''(k) when considering matters relating to a specific Division of the High Court of South Africa, the Judge President of that **[Court]** Division and the Premier of the province concerned, or an alternate designated by each of them.''.

Short title and commencement

11. This Act is called the Constitution Seventeenth Amendment Act of 2012, and takes effect on a date determined by the President by proclamation in the *Gazette*.

The End of Apartheid

Apartheid, the Afrikaans name given by the white-ruled South Africa's Nationalist Party in 1948 to the country's harsh, institutionalized system of racial segregation, came to an end in the early 1990s in a series of steps that led to the formation of a democratic government in 1994. Years of violent internal protest, weakening white commitment, international economic and cultural sanctions, economic struggles, and the end of the Cold War brought down white minority rule in Pretoria. U.S. policy toward the regime underwent a gradual but complete transformation that played an important conflicting role in Apartheid's initial survival and eventual downfall.

F.W. de Klerk shakes hands with Nelson Mandela at the end of the talks between the Government and anti-apartheid groups to end white-minority rule. (AP Photo/ John Parkin)

Although many of the segregationist policies dated back to the early decades of the twentieth century, it was the election of the Nationalist Party in 1948 that marked the beginning of legalized racism's harshest features called Apartheid. The Cold War then was in its early stages. U.S. President Harry Truman's foremost foreign policy goal was to limit Soviet expansion. Despite supporting a domestic civil rights agenda to further the rights of black people in the United States, the Truman Administration chose not to protest the anti-communist South African government's system of Apartheid to maintain an ally against the Soviet Union in southern Africa. This set the stage for successive administrations to quietly support the Apartheid regime as a stalwart ally against the spread of communism.

Inside South Africa, riots, boycotts, and protests by black South Africans against white rule had occurred since the inception of independent white rule in 1910. Opposition intensified when the Nationalist Party, assuming power in 1948, effectively blocked all legal and non-violent means of political protest by non-whites. The African National Congress (ANC) and its offshoot, the Pan Africanist Congress (PAC), both of which envisioned a vastly different form of government based on majority rule, were outlawed in 1960 and many of its leaders imprisoned. The most famous prisoner was a leader of the ANC, Nelson Mandela, who had become a symbol of the anti-Apartheid struggle. While Mandela and many political prisoners remained incarcerated in South Africa, other anti-Apartheid leaders fled South Africa and set up headquarters in a succession of supportive, independent African countries, including Guinea, Tanzania, Zambia, and neighboring Mozambique where they continued the fight to end Apartheid. It was not until the 1980s, however, that this turmoil effectively cost the South African state significant losses in revenue, security, and international reputation.

The international community had begun to take notice of the brutality of the Apartheid regime after white South African police opened fire on unarmed black protesters in the town of Sharpeville in 1960, killing 69 people and wounding 186 others. The United Nations led the call for sanctions against the South African Government. Fearful of losing friends in Africa as de-colonization transformed the continent, powerful members of the Security Council, including Great Britain, France, and the United

States, succeeded in watering down the proposals. However, by the late 1970s, grassroots movements in Europe and the United States succeeded in pressuring their governments into imposing economic and cultural sanctions on Pretoria. After the U.S. Congress passed the Comprehensive Anti-Apartheid Act in 1986, many large multinational companies withdrew from South Africa. By the late 1980s, the South African economy was struggling with the effects of the internal and external boycotts as well as the burden of its military commitment in occupying Namibia.

Defenders of the Apartheid regime, both inside and outside South Africa, had promoted it as a bulwark against communism. However, the end of the Cold War rendered this argument obsolete. South Africa had illegally occupied neighboring Namibia at the end of World War II, and since the mid-1970s, Pretoria had used it as a base to fight the communist party in Angola. The United States had even supported the South African Defense Force's efforts in Angola. In the 1980s, hard-line anti-communists in Washington continued to promote relations with the Apartheid government despite economic sanctions levied by the U.S. Congress. However, the relaxation of Cold War tensions led to negotiations to settle the Cold War conflict in Angola. Pretoria's economic struggles gave the Apartheid leaders strong incentive to participate. When South Africa reached a multilateral agreement in 1988 to end its occupation of Namibia in return for a Cuban withdrawal from Angola, even the most ardent anti-communists in the United States lost their justification for support of the Apartheid regime.

The effects of the internal unrest and international condemnation led to dramatic changes beginning in 1989. South African Prime Minister P.W. Botha resigned after it became clear that he had lost the faith of the ruling National Party (NP) for his failure to bring order to the country. His successor, F W de Klerk, in a move that surprised observers, announced in his opening address to Parliament in February 1990 that he was lifting the ban on the ANC and other black liberation parties, allowing freedom of the press, and releasing political prisoners. The country waited in anticipation for the release of Nelson Mandela who walked out of prison after 27 years on February 11, 1990.

The impact of Mandela's release reverberated throughout South Africa and the world. After speaking to throngs of supporters in Cape Town where he pledged to continue the struggle, but advocated peaceful change, Mandela took his message to the international media. He embarked on a world tour culminating in a visit to the United States where he spoke before a joint session of Congress.

After Prime Minister de Klerk agreed to democratic elections for the country, the United States lifted sanctions and increased foreign aid, and many of the U.S. companies who disinvested in the 1980s returned with new investments and joint ventures. In April 1994, Nelson Mandela was elected as South Africa's first black president.

The Drafting and Acceptance of the Constitution (South African History Online)[1]

On 2 February 1990, the National Party government unbanned political parties, released many political prisoners and detainees, and unbanned many people, including Nelson Mandela.

On 20 and 21 December the first session of CODESA (Convention for a Democratic South Africa) was held. There were 19 political groups at this event. All parties agreed to support the Declaration of Intent, which said that they would begin writing a new Constitution for South Africa.

On 15 May 1992 CODESA 2 met at the World Trade Centre. After three days it was clear that there were many tensions. The ANC and COSATU decided to have a campaign of 'rolling mass action'. The first stayaway was on 16 June. On 17 June people marching in Boipatong were shot and many people were killed. After this the ANC stopped talks.

The Multi-party Negotiating Process

In March 1993 full negotiations began at the World Trade Centre. The parties present decided to use the name MPNP - - instead of CODESA. There were twenty-six parties taking part in the MPNP. The MPNP had to write and adopt an interim Constitution to say how the government would govern after the elections on 27 April 1994. The MPNP drew up the Interim Constitution which was to last for two years. The MPNP also drew up and adopted the 34 Constitutional Principles. These principles would guide the Constitutional Assembly (CA) which had to draw up the final Constitution.

The Constitutional Principles

All the parties at the MPNP agreed on the 34 Constitutional Principles when they were drawing up the interim Constitution. They agreed that the CA had to follow these principles when it was writing the final Constitution. If the final Constitution didn't follow and include all the Constitutional Principles then the Constitutional Court would not be able to certify the Constitution. For example, one of the Constitutional Principles was that the final Constitution had to include a Bill of Rights. If it didn't have a Bill of Rights, then the Constitutional Court would not be able to certify it.

The Constitutional Assembly (CA)

After the elections in 1994 the new Parliament - working as the Constitutional Assembly (CA) - began writing the final Constitution.

After two years, on 8 May 1996, the CA adopted the final Constitution. But this Constitution still had to be certified by the Constitutional Court. This meant that the Constitutional Court had to make sure that the final Constitution followed and included all the 34 Constitutional Principles that the Multi-party Negotiating Process (MPNP) had agreed on.

The Constitutional Court's first hearing

The Constitutional Court had its first hearing about the Constitution in July 1996. In September the judges of the court said the Constitution did not follow all of the 34 Constitutional Principles and it refused to certify the Constitution. This time the Constitutional Court agreed to certify the Constitution.

The final drafting and acceptance of the Constitution

The South African Constitution was drafted in terms of Chapter 5 of the interim Constitution (Act 200 of 1993). On May 8, 1996, the Constitutional Assembly completed two years of work on a draft of a final constitution, intended to replace the interim constitution of 1993 by the year 1999. The draft embodied many of the provisions contained in the interim constitution, but some of the differences between them were controversial. In the final constitution, the Government of National Unity is replaced by a majoritarian government--an arrangement referred to by its critics as "winner-take-all" in national elections. Instead of requiring political

[1] https://www.sahistory.org.za/article/drafting-and-acceptance-constitution

parties to share executive power, the final constitution would enable the majority party to appoint cabinet members and other officials without necessarily consulting the minority parties that would be represented in the National Assembly.

The draft final constitution in 1996 also proposes changes in the country's legislative structure. The National Assembly would continue to be the country's only directly elected house of parliament, but the Senate would be replaced by a National Council of Provinces. Like its predecessor, the new council would consist of legislators chosen to represent each of the country's nine provinces. The new council would include some temporary delegates from each province, however, so some legislators would rotate between the National Council of Provinces and the provincial legislatures from which they were chosen.

Negotiators in the early 1990s had agreed that the 1996 draft constitution would be submitted to the Constitutional Court to ensure that it conformed to agreed-upon constitutional principles, such as the commitment to a multiparty democracy, based on universal franchise without discrimination. In May 1996, however, the Constitutional Court did not immediately approve the draft as received; instead, it referred the document back to the Constitutional Assembly for revision and clarification of specific provisions. Chief among its concerns were the need to clarify references to the powers that would devolve to the provincial legislatures and the rights of organized labor and management in an industrial dispute. The Constitutional Assembly was revising the draft constitution as of mid-1996.

Even before it was approved or implemented, the draft constitution had an immediate impact on the structure of government in 1996. Just one day after the draft had been completed by the Constitutional Assembly, the National Party declared its intention to resign from the Government of National Unity, effective June 30, 1996. In the weeks leading up to the NP's formal departure from the executive branch, NP leaders repeatedly tried to assure voters that the party would play a constructive role in politics as a loyal critic of the ANC-led government. President Mandela, too, accepted the NP departure as a sign of a "maturing democracy." NP legislators continued to serve in the National Assembly and in the Senate. It was signed into law on 10 December 1996.

The objective in this process was to ensure that the final Constitution is legitimate, credible and accepted by all South Africans.

To this extent, the process of drafting the Constitution involved many South Africans in the largest public participation programme ever carried out in South Africa. After nearly two years of intensive consultations, political parties represented in the Constitutional Assembly negotiated the formulations contained in this text, which are an integration of ideas from ordinary citizens, civil society and political parties represented in and outside of the Constitutional Assembly.

My proposition is that We the People of the United States—more specifically, a majority of voters—retain an unenumerated, constitutional right to alter our Government and revise our Constitution in a way not explicitly set out in Article V. Specifically, I believe that Congress would be obliged to call a convention to propose revisions if a majority of American voters so petition; and that an amendment or new Constitution could be lawfully ratified by a simple majority of the American electorate. Let us first consider the words of Article V:

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Begin by noting what Article V does not say. It emphatically does not say that it is the only way to revise the Constitution. Of course, we often read the enumeration of one mode (or in this case four modes, if we multiply the two Article V mechanisms for proposing amendments by the two Article V mechanisms for ratifying them) as impliedly precluding any other modes. Congress cannot generally exercise powers other than those enumerated in Article I, section 8; or generally pass laws other than via bicameralism and presentment; and so on.

But there is an alternative way of understanding the implied exclusivity of Article V: it enumerates the only mode(s) by which ordinary Government—Congress and state legislatures—can change the Constitution, and thereby free themselves from various limits on their power imposed by the Constitution itself. (Without Article V, Government would have no such power.) Under this alternative view, Article V nowhere prevents the People themselves, acting apart from ordinary Government, from exercising their legal right to alter or abolish Government via the proper legal procedures. Article V presupposes this background legal right of the people, and does nothing to interfere with it. It merely specifies how ordinary Government can amend the Constitution without recurring to the People themselves, the true and sovereign source of all lawful power.

This alternative reading taps into Jefferson's self-evident truths. Jefferson sharply distinguishes between Government and the People, and so does this alternative reading. Jefferson explicitly speaks of the right of "the People" to re-Constitute their Government and so do various provisions of the U.S. Constitution—the Preamble and the First, Ninth, and Tenth Amendments—that support the alternative reading of Article V.

There are two plausible interpretations of the implied exclusivity of Article V: (1) the conventional reading that it enumerates the only mode(s) by which the Constitution may be amended, and (2) an alternative reading that it enumerates the only mode(s) by which ordinary Government may amend the Constitution. How shall we decide which is the better reading? By widening our focus beyond the narrow text of Article V to consider other parts of the original Constitution, various glossing provisions of the federal Bill of Rights, and various Article V analogues in state constitutions.

Widening our frame will also help cure an underlying anxiety that, I think, may wrongly tilt

lawyers towards the conventional reading of Article V exclusivity. The Constitution is supreme law, and the legal rules it establishes for its own amendment are of unsurpassed importance, for these rules define the conditions under which all other constitutional norms may be legally displaced. It is comforting to believe that Article V lays down these all-important legal rules with precision. If we stick close to Article V, we are safe: if we go beyond it, we are at sea.

But this picture is an optical illusion. Article V is far less precise than we might expect. What voting rule must an Article V proposing convention follow? What apportionment ratio? Can an amendment modify the rules of amendment themselves? If so, couldn't the "equal suffrage" rules of Article V be easily evaded by two successive "ordinary" amendments, the first of which repealed the equal suffrage rules themselves, and the second of which reapportioned the Senate? Could a legitimate amendment generally purport to make itself (or any other random provision of the Constitution) immune from further amendment? If so, wouldn't that clearly violate the legal right of future generations to alter their Government? Wouldn't the same be true of an amendment that effectively entrenched itself from further revision by, say, outlawing criticism of existing law? But if that would be unconstitutional, haven't we in effect made the narrow and hard core of our First Amendment itself unamendable?

lf determinate answers to these and other questions exist, they lie outside Article V, narrowly construed—in other provisions of the Constitution, in the overall structure and popular sovereignty spirit of the document, in the history of its creation and amendment, and in the history of the creation and amendment of analogous legal documents, such as state constitutions. And once we consult these sources, we will find that we are in fact not at sea. The very sources that render Article V rules determinate also clarify the equally determinate rules for People-driven, majoritarian constitutional change outside Article V. By 1787, at least, the legal rules underlying Jefferson's right of the People to alter or abolish were no murkier or more mysterious than those encoded in Article V.

In 1861, Congress approved in its lame-duck session an amendment, known as the Corwin Amendment, which would have protected slavery in the South by prohibiting any future amendment giving "Congress the power to abolish or interfere, within any State, with the domestic institutions thereof, including that of persons held to labor or service by the laws of said State." The Corwin Amendment failed to attain ratification, but it raised two novel Article V questions that were not resolved then and have not been resolved since: whether an amendment can make itself unamendable, and whether a state can choose to ratify an amendment by convention even if Congress provides for ratification by legislatures. Another oddity of the Corwin Amendment is that, Hollingsworth notwithstanding, it was presented to President James Buchanan, who promptly added his signature.

The next set of amendments to make it out of Congress, aimed at dismantling rather than entrenching slavery, generated still fiercer legal controversy as the nation emerged from the Civil War. Uniquely among the Article V disputes recounted in this Part, the disputes associated with the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments have received prominent attention in the contemporary constitutional literature. The most substantial objections clustered around three issues: the composition of Congress, the legitimacy of the state legislatures that ratified the amendments, and federal coercion of the states.

After the Civil War, Article V was pushed to the breaking point by some stark numerical realities. There were thirty-seven states in the Union in 1868, meaning twenty-eight states were needed to ratify a constitutional amendment. Eleven states had seceded, or purported to secede, and formed the Confederacy. Ten of those states could block an amendment by themselves, assuming no defections from the Northern states--which was not a safe assumption. The former Confederate states would also have enough clout in Congress to block any amendment proposal. Navigating these obstacles demanded a series of bold legal maneuvers.

First, the Congresses that proposed the Reconstruction Amendments excluded many of the representatives and senators sent from states that had been part of the Confederacy, pursuant to each chamber's power to "be the Judge of the Elections, Returns and Qualifications of its own Members." The Reconstruction Amendments were adopted by two-thirds of a quorum composed mostly of Northern Republicans, and it is exceedingly doubtful that all of the amendments could have passed had the Southern representatives and senators been seated.

Second, in proclaiming the Thirteenth Amendment ratified by three-fourths of the states on December 18, 1865, Secretary of State William Henry Seward included several former Confederate states in the count. Two weeks prior, Congress had refused to seat any senators or representatives from those same states. How could state "legislatures" validly ratify constitutional amendments but not elect senators? Moreover, in the First Military Reconstruction Act of 1867, Congress declared that there were "no legal State governments" in the South and that existing "civil governments" were "provisional only." President Andrew Johnson argued in his veto message that, because the bill "denies the legality of the Governments of ten of the States which participated in the ratification of the amendment ... abolishing slavery," the implication is that "the consent of three-fourths of the States ... has not been constitutionally obtained" for the Thirteenth Amendment.

The Southern state governments that ratified the Fourteenth and Fifteenth Amendments, meanwhile, were the products of military reconstruction. The Reconstruction Acts divided the former Confederate states into five military districts and instructed the Union Army to register voters, with universal adult male suffrage, and to hold elections for constitutional conventions. Those conventions yielded ten new governments that promptly ratified the Fourteenth and Fifteenth Amendments. Many argued then

and afterward that these reconstructed governments lacked legal authority to ratify amendments.

In addition, the Southern state legislatures were arguably coerced into ratifying. The Reconstruction Acts provided that these states would be entitled to representation in Congress only when the Fourteenth Amendment "ha[d] become part of the Constitution." This pressure to ratify, according to Ackerman, amounted to a "naked violation[] of Article V." There is little doubt that the unreconstructed Southern states would not have ratified voluntarily, as it "would be difficult to overstate the depth and breadth of opposition to the Fourteenth Amendment" within their white populations. Southern states still under military supervision "faced the same pressure to ratify" the Fifteenth Amendment.

These interrelated legal problems have elicited powerful responses. John Harrison, for instance, has argued that the amendments were "legally effective" (even if not strictly speaking "legal") under the de facto government doctrine, which recognizes that "a government de facto may bind the state for which it acts despite defects in its claim to power." Amar has defended the legality of the Reconstruction Amendments on the basis of Congress's authority to judge its members' qualifications and to guarantee a republican form of government in the states. And, stepping back, it is notable that the Reconstruction Congresses went to such lengths even to try to adhere to the forms of Article V, given the dire circumstances.

But wherever one comes out in these debates, the legal legitimacy of the Reconstruction Amendments at the time of their adoption is at least contestable--as countless scholars have recognized. As Harrison recounts, "[a]ll those who participated in reconstruction, including those who were paying attention to the process of constitutional amendment, knew that something very unusual and legally doubtful was going on." "The Republicans ... got away with something Article V probably was supposed to prevent."

And yet, no one in their right mind would deny that the Reconstruction Amendments are part of the Constitution today (though the Georgia General Assembly denied this as late as 1957)[1], which illustrates our thesis in an especially dramatic fashion. The sociological legitimacy of the Reconstruction Amendments is not a function of their original legal legitimacy; it does not derive from a judgment about whether Article V's rules were followed. Rather, it derives from the fact that these amendments have been accepted by most officials since the 1860s and have become deeply embedded in the nation's laws, practices, and ethos. Their authoritative legal status is quite literally beyond dispute in our political culture, just like the status of the Constitution itself.

* * *

A foundational debate in constitutional theory concerns whether and how the written or big-C Constitution may legitimately be updated outside the procedures specified in Article V. The "outsider" position is most closely associated with Amar and Ackerman. According to Amar, the Constitution is best read to preserve for the people an unenumerated right to amend its terms through something akin to a national referendum. According to Ackerman, the Reconstruction Amendments were adopted in violation of Article V but were nonetheless legally legitimate because their adoption conformed to the true, unwritten criteria for higher lawmaking. Conversely, the Twenty-Seventh Amendment was adopted in conformity with Article V but is nonetheless illegitimate because it violated those unwritten criteria. The "insider" position is the conventional view--the view that Article V supplies the exclusive route to formal constitutional change, that "[n]othing new can be put into the Constitution except through the amendatory process."

Our account collapses some of the space between these two positions. Given the long history of procedural creativity and the pervasive legal uncertainty that we document, there is no clear line demarcating what is "inside" or "outside" Article V. Ackerman labors heroically to

[1] [This was three years after Brown v. Board of Education, 347 U.S. 483 (1954) (holding school segregation to violate the Fourteenth Amendment, in a period when southern states were engaging in a policy of "massive resistance" to the Court's holding.]

show that the Reconstruction Amendments were valid additions to the Constitution even though brought into existence in a manner that is very plausibly inconsistent with Article V. We do not disagree with Ackerman's conclusion; we disagree with the premise that the Reconstruction Amendments were quite so extraordinary in this regard. Within broad boundaries, the degree to which an attempted amendment stays inside the four corners of Article V has not been decisive in determining whether it becomes accepted by Americans as part of the written Constitution. All constitutional amendment, in this sociological sense, takes place "outside" Article V.

That being the case, it is notable how little headway Amar's relatively straightforward proposal has made in convincing Americans that they can amend the Constitution through a national referendum established by and employing a simple majority vote. Especially in light of the constitutional order's steady shift toward greater nationalism and majoritarian democracy ever since the Civil War, his proposal strikes us as no less plausible as a matter of constitutional text, structure, and "spirit" than the notion that an Article V amendment could (like the Twenty-Seventh Amendment) remain pending for more than two centuries before being ratified. Yet, even though the law of Article V is so unsettled and so many amendments have questionable Article V credentials, the assumption that all revisions to the written Constitution must be pursued through the Article V process continues to hold a powerful sway on the U.S. legal and political community, at least among elites. This persistent combination of Article V obscurity and Article V exclusivity suggests that the two may reinforce one another: If determined majorities had not found Article V to have such play in the joints, its status as the exclusive gateway to the constitutional text may well have proved unsustainable long ago.

These observations may also hold a clue as to how Article V exclusivity could unravel in the future. If Amar's proposal is just as constitutionally coherent as numerous amendments that are accepted as part of the document, then the same sort of political mobilization that potentiated those amendments may be sufficient to potentiate amendment-by-referendum as well. At least for those willing to look past its novelty,407 Amar's proposal is not necessarily more legally outlandish than any number of things that have been done in the name of Article V. The constitutional text, accordingly, is not the principal problem for Amar; constitutional culture is.408 Perhaps calling attention to just how fast and loose Americans historically have played with Article V, as this paper has done, will conduce to greater cultural openness to experimenting with other legally plausible (if unavoidably problematic) modes of updating the constitutional text in the service of deepening democracy. But in case Amar's argument is destined to remain off-the-wall in our lifetimes, we close with a more modest reform proposal of our own.

The most fascinating question in the study of modern constitutional change raises something of a paradox: can a constitutional amendment be unconstitutional? We once interpreted the formal rules of change codified in constitutions as establishing the necessary and sufficient procedures for amendments, but we know this is no longer true as a descriptive reality. Today we can be no more certain that an amendment will be valid when it satisfies the procedural strictures set out in the codified constitution than we can be certain that a law passed by a legislature is constitutional.

Courts around the world--from Bangladesh to Belize, India to Peru, Colombia to Taiwan--have either asserted or exercised the power to invalidate a constitutional amendment. Courts have drawn from codified rules and extra-constitutional norms to declare that procedurally-perfect amendments are nonetheless substantively void. Scholars have in recent years taken a keen interest in this phenomenon, producing a burgeoning literature seeking both to explain and justify the judicial doctrine of unconstitutional constitutional amendment. The dominant view in the field is overwhelmingly favorably inclined toward the idea that courts *should* have the power to invalidate a procedurally-perfect amendment they deem unconstitutional, even in cases where the codified constitution does not entrench a formally unamendable rule.

There are relatively few exceptions to the global chorus of voices in support of the extraordinary judicial power to invalidate constitutional amendments. The dearth of contrary views reflects the normalization of the phenomenon Ran Hirschl has identified as the "judicialization of mega-politics," a now-common phrase referring to the most important matters of political significance that constitute, define and divide polities--and that are now often adjudicated by courts. National courts today decide a host of decidedly political questions: the winner of presidential elections, the legitimacy of political parties, and the self-determination of a people. Against this backdrop, invalidating a constitutional amendment is just par for the course.

But we should not take the increasing prevalence of the doctrine of unconstitutional constitutional amendment as evidence of its appropriateness for all constitutional states. It may well be that the doctrine fits in a given constitutional tradition and should be incorporated into its practices of adjudication. But this is a choice for a state and its domestic actors to make according to their own norms of governance. The politics of constitutionalism must remain localized in their particularized social and political circumstances. Otherwise, when combined with the enormous pressure on states in our day to conform to what may appear to be generally accepted standards of global constitutionalism, the trend toward adopting the doctrine of unconstitutional constitutional amendment might overwhelm the capacity of a state to evaluate whether the doctrine is right for itself in light of its own juridical history, political context, and constitutional traditions.

The doctrine of unconstitutional constitutional amendment is most certainly not a necessary feature of modern constitutionalism, nor even of the narrower idea of modern liberal democracy. It is important for all constitutional actors to know that there is another answer to the question whether an amendment can be unconstitutional. Constitutional designers, adjudicators, and amenders should know that it is an altogether reasonable choice to deny the possibility of an unconstitutional constitutional amendment.

We find that there are both democracy-enhancing and democracy-weakening consequences that follow from the choice to deny the doctrine outright. Our larger purpose is inherent in the project itself: to diversify our thinking about what risks becoming seen as a necessary feature of constitutionalism but that design and practice show plainly is not. We therefore speak also to constitutional designers seeking ways to structure the rules of constitutional change so as to foreclose the doctrine of unconstitutional constitutional amendment.

I. Judicial Review of Constitutional Amendments

A. Text and Context

Controversial though it may be, invalidating a constitutional amendment is, on one view, fully consistent with the design of the constitution where the text expressly disallows amendments adopted in violation of a certain procedure or contrary to a specified subject-matter protection. … [In] South Africa …, the constitution creates an escalating framework of three different amendment procedures, each keyed specifically to certain parts and provisions of the constitution and each increasing in its degree of difficulty. The easiest of the three thresholds requires two-thirds support in the National Assembly, and the hardest requires three-quarters support in both the National Assembly and the National Council of Provinces, with a supporting vote of at least six provinces. An amendment to the constitution's hardest amendment procedure requires conformity with the hardest procedure itself. But if an amendment were made to that procedure using the easiest of the three thresholds, a court could be justified to invalidate that amendment because it would run afoul of a specific textual prohibition on the use of the amendment power.

… To the extent there is an easy case to be made in favor of courts possessing the power to evaluate the validity of an amendment, [it] involves a court applying the plain meaning of the constitutional text to violations of the procedures of constitutional amendment. At a minimum, then, a reviewing court's operating manual would reveal the following rule: where the constitutional text is unambiguous about a prohibition or a specific procedure, courts in jurisdictions that recognize the power of judicial review stand on firm ground in policing whether political actors are acting in conformity with those clear rules.

The case for the judicial review of constitutional amendments is at its weakest … where the constitution formally codifies no rule against constitutional amendment. The Indian Constitution is the prime example. Its text confers plenary power on the national and state legislatures to amend the constitution, without any formally unamendable rule standing in the way. Despite this relatively easy formal amendment rule, the Indian Supreme Court's first interpretation of the rule confirmed what the text says in its plain language: that the formal amendment power is subject to no limitations. But the court reversed course sixteen years later when it held that the amendment power could not be employed to violate fundamental constitutional rights. Yet the court moderated its astounding reversal, holding that it would exercise its new role of policing the amendment power only prospectively. Six years later, the court unveiled what is now known as the "basic structure doctrine," which authorizes courts to invalidate amendments that violate the Indian Constitution's basic structure. Precisely what constitutes the constitution's "basic structure" is nowhere expressly identified in its text but instead arises from the court's interpretation of the Indian Constitution's internal coherence, stated values, and norms of liberal constitutionalism, including the supremacy of the constitution, the republican and democratic forms of government, the secular character of the state, the separation of powers, and federalism. The court later exercised its power to strike down amendments when faced with properly-passed amendments that sought to limit the court's authority to review constitutional amendments.

It is difficult to justify the invalidation of constitutional amendments in India. The Indian Constitution does not establish strict procedural limitations on constitutional amendment that could justify a court striking down an amendment that fails to conform to specific rules on the process by which the text is amended. Nor was an escalating structure of amendment the basis of the Indian Supreme Court's construction of the basic structure doctrine or its actual use when it invalidated a procedurally-perfect amendment.

B. The Democratic Justification

Yet there may be a democratic justification for a court to invalidate amendments in the absence of a formally unamendable rule. Even in what

we have described as the weakest scenario within which a court could invalidate a procedurally-perfect amendment--where, as in India, the constitution formally codifies no rule against amendment--one can build an argument in defense of a court relying on the unwritten constitution to invalidate an amendment to its text.

The best argument offered thus far to make sense of a court invalidating a constitutional amendment is anchored in the theory of constituent power, first articulated by Emmanuel Joseph Sieyès, a French political theorist whose principal interest was to build a theory to protect the essential right of the people to choose the meaning of their constitution and how it should change. According to this theory of constituent power, only the people may create and, by its creation, legitimate a new constitution. The people's representatives have the considerably lesser power only to make changes to the constitution provided those changes are consistent with the structure and spirit of the people's constitution. Any change more far-reaching than that--one that alters the core commitments of the constitution--must be authorized by the people themselves, and as a result legitimated by them.

IV. The Triumph of Popular Sovereignty in France

France illustrates the popular sovereigntist resistance to the doctrine of unconstitutional amendment. Although the French Constitution codifies an unamendability clause, the Constitutional Council has taken the view that amendments to the constitution are manifestations of popular sovereignty that cannot be reviewed on substantive grounds. As the birthplace of the theory of constituent power, France is a noteworthy exception to the trend toward the judicial review of constitutional amendments around the world. Amendments are not reviewable in court--a rule that derives not from constitutional design but from judicial interpretation.

A. Constitutional Amendment in France

Amending the French Constitution is no easy feat. The constitution grants the President (at the request of the Prime Minister) and members of Parliament the authority to initiate a constitutional amendment. Once an amendment bill is introduced in Parliament, it must be passed in identical terms in both the National Assembly and the Senate. If the bill is adopted in both houses, the President can either submit the bill to Parliament for approval or put it to referendum. If it is submitted to Parliament, both houses convene together as a Congress and the bill becomes official it is approved by at least three-fifths of all votes cast. However, if the President chooses to put the bill to a referendum, a simple majority vote is required to make it official.

The constitution does not by its text authorize the Constitutional Council to exercise the power of judicial review over constitutional amendments. But it does formalize explicit limitations on amendment. The constitution prohibits amendments to the republican form of government, and it also expressly disallows any amendment when there is a threat to the integrity of the French national territory or when there is a vacancy in the office of the presidency.

There have been over twenty amendments to the current French Constitution. Neither of the first two amendments complied with the ordinary procedures of constitutional amendment. The first was adopted using special procedures in article for amendments to articles through involving the French Community. That was the only use of article , which has since been repealed along with articles through .

The second was far more significant to the course of modern French constitutional history. Four years after founding of the Fifth Republic in , President Charles de Gaulle became convinced that the president should no longer be elected by an Electoral College but instead by direct popular vote.A change of this magnitude required a constitutional amendment, but it was politically unlikely that the houses of Parliament would propose the amendment on de Gaulle's behalf. De Gaulle found an alternative: he would bypass Parliament and invoke a special procedure in article , which authorizes

the President to submit any bill on "the organization of the public authorities" to a referendum. Until , this provision had not generally been interpreted as a vehicle for constitutional amendment. De Gaulle's tactic was therefore quite controversial at the time and widely regarded as unconstitutional. The Council of State formally reproached the use of article for constitutional amendment as unconstitutional, whereas the Constitutional Council did so informally. The President of the Senate and the opposition saw de Gaulle's move as an "outrageous breach of the Constitution." Undeterred, de Gaulle pressed ahead with his unconventional plan to amend presidential selection using article , and the people went to the polls in referendum. The referendum passed with a nearly two-thirds approval (about . % voting yes).

In the aftermath of the vote, the Senate President challenged the constitutionality of the amendment before the Constitutional Council. He argued that the law was not properly a constitutional act *(loi constitutionnelle)* or an organic law, but rather just an ordinary law. He also argued that its adoption by referendum did not shield it from review by the Council. He contended further that the exercise of national sovereignty, whether by the people or their representatives, should be in accordance with the clear rules set out in the constitution. The Council rejected the Senate President's challenge by a vote of six to four. In its judgment, the Council focused on its own constitutional competence. It stressed that its authority was bound narrowly by the text of the constitution and also by the organic law on the Constitutional Council In its short decision, the Council distinguished "direct expression [s] of national sovereignty" *(referendums)* from "activities of public authorities" *(lois),* the former resting on a higher plane than the latter. The court concluded that neither the constitution nor the organic law gave the Council the power to review the constitutionality of a "bill adopted by the French people by way of referendum."

The Council's judgment stands for the proposition that courts will not review the choice of the people to amend the constitution in a referendum. This presumably applied to constitutional referendums under both articles and , though it remained an open question whether courts would review the constitutionality of an amendment passed by Parliament without recourse to a referendum.

The court finally answered the question in . Sixty senators again challenged the constitutionality of an amendment, this time the Constitutional Law on Decentralized Organization of the Republic. The amendment had been the first to be passed by a joint meeting of the National Assembly and the Senate under the procedure specified in article that was later challenged at the Council. The Senators invoked the formal unamendability of the republican form of government, and argued that this unamendability did not prohibit a return to monarchy alone, but also protected the fundamental characteristics of the French Republic. The Senators argued that decentralizing local government was a violation of the unitary character of the state. In response, the Council echoed its holding of four decades prior. Its judgment focused on its own competence and ultimately held that since no provision of the constitution confers upon it the power to review constitutional amendments, it had no jurisdiction to hear the case. The rule in France, then, seems to be that courts will not review the constitutionality of any amendment at all.

B. Deference to Popular Sovereignty

Despite the formal entrenchment of an unamendable rule in the French Constitution, the Constitutional Council has elected to treat them as judicially unenforceable. The reason why appears to rest on the court's peculiar, though not improper, understanding of the relationship between popular sovereignty and constitutional change. To be specific, the court equates the constitutional amendment power to constituent power, and interprets constitutional amendments as direct expressions of popular sovereignty.

The decision on the constitutionality of the electoral reform referendum reveals that the

court rejected the theory of delegation. According to the court, when the French people speak through a referendum they are exercising not a delegated, constituted power but rather a full proprietary constituent power of their own. The consequence of the court's approach is to equate constitution-making with constitutional amendment, the result being that there can be no limitations on what the people can do if they choose to do so in a referendum. The people could even elect in a referendum to amend or abolish one of the unamendable rules in the French Constitution. Under the Constitutional Council's understanding of the authority of the people, such an unfettered amendment power amounts to an exercise of original constituent power.

The Council regards the constituent power as sovereign, when referring to the people acting as the constitution-amender. For the court, since amendments emanate from the sovereign, they are final and unreviewable. This attribution of sovereign authority to the constitutional amendment power echoes the theory of constituent power in Israel as resting in the Knesset, the national legislature. The Knesset is understood to possess "ongoing" constituent power, always ready to be deployed to make or unmake constitution-level laws without needing to mobilize a separate body clothed in a higher authority. In France, what has occurred is a similar formalization of how to exercise constituent power, only the vehicle for its exercise is not the legislature as in Israel, but rather the people themselves speaking in the referendum. De Gaulle's legacy, then, is at least partly to sever the connection between popular sovereignty and the national legislature, and to validate by practice that the people are simultaneously constitutional and constituent actors.

French theorist Jean-Jacques Rousseau once wrote that "a people is always free to change its laws, even the best of them; for if it chooses to do itself harm, who has the right to stop it?" The jurisprudence of the Constitutional Council to date seems to accord with Rousseau: the people are sovereign and no entity but the people themselves may invalidate a constitutional change. Nonetheless, one could imagine that the Council could justify reviewing an amendment for its procedural correctness, just as the Council could also review the constitutionality of an amendment that violates one of the constitution's temporal limitations--both are nonetheless consistent with its theory equating amending actors with constituent power.

Edward Hartnett, *A "Uniform and Entire" Constitution; Or, What If Madison Had Won?*, 15 CONST. COMM. 251 (1998)

James Madison is widely regarded as the father of both the Constitution and the Bill of Rights. Yet the constitution-plus-bill-of-rights that we know today differs in significant ways from what Madison proposed to the First Congress in June of 1789. . . . [This Article] explores what our Constitution might look like if Madison had won on another issue he lost in that first Congress: Madison argued that amendments should be interlineated into the body of the Constitution, but the House of Representatives decided instead to attach amendments as supplements to the Constitution.

This Article proceeds in three steps. First, it recounts the debate in the first Congress over the form that amendments to the Constitution would take and Madison's loss on that issue. Second, it analyzes each of the twenty-seven amendments to the Constitution to determine the form they would take in the Constitution if Madison had prevailed on the issue in the first Congress. Finally, it presents a complete text of what our Constitution would look like if Madison had prevailed.

I. THE DEBATE IN THE FIRST CONGRESS

When Madison proposed his amendments to the Constitution, he sought to integrate them into the body of the Constitution so as to preserve what he considered the "uniform and entire" system of the Constitution. He proposed that the recognition of popular sovereignty be "prefixed to the constitution," and that a bar on changes in Congressional compensation from taking effect before an intervening election be "added to the end of the first sentence" in Article I, section 6, clause 1. Similarly, he proposed that the bulk of what we now call the Bill of Rights "be inserted" in Article I, section 9, "between clauses 3 and 4," and that his suggested additional restrictions on the states "be inserted" in Article I, section 10, "between clauses 1 and 2." In addition, he proposed "the third clause" in Article III, section 2 "be struck out, and in its place be inserted" a new provision governing jury trials in criminal cases, grand jury indictments, and jury trials in civil cases.

Madison's proposal was referred to a select committee consisting of one representative from each of the eleven states that had, at that point, ratified the Constitution. Although the select committee report differed in some respects from Madison's original proposal, it followed his lead in proposing that the amendments be incorporated into the body of the Constitution. On August 13, 1789, the House of Representatives, sitting as a committee of the whole, began to debate the report of the select committee. Roger Sherman, a "consistent opponent of a Bill of Rights," immediately objected that "this is not the proper mode of amending the constitution." He argued:

> We ought not to interweave our propositions into the work itself, because it will be destructive of the whole fabric. We might as well endeavor to mix brass, iron and clay, as to incorporate such heterogeneous articles; the one contradictory to the other.

Sherman contended that the "absurdity" of amending Madison's way was demonstrated by comparing it to statutory amendments, asking whether "any Legislature [would] endeavor to introduce into a former act, a subsequent amendment, and let them stand so connected." Sherman questioned the legitimacy of Madison's approach, arguing that the constitution is the "act of the people" while the amendments "will be the act of the state governments," and suggesting that Madison's approach would be the equivalent of "destroying the whole and establishing a new constitution," thereby "removing the basis on which we mean to build." He therefore moved that amendments be added as supplements to the Constitution.

Supporters of Sherman's motion expressed fear that submitting amendments to the states in the way proposed by Madison would be an attempt to repeal the Constitution, risking "the destruction of the whole," and argued that Sherman's supplemental approach would permit "the world [to] discover the perfection of the original, and the superfluity of the amendments." Moving from weak arguments to fanciful ones, they even argued that "if the amendments are incorporated in the body of the work, it will appear, unless we refer to the archives of congress, that George Washington, and the other worthy characters who composed the convention, signed an instrument which they never had in contemplation."

Madison responded:

> Form, sir, is always of less importance than the substance; but on this occasion, I admit that form is of some consequence... Now it appears to me, that there is a neatness and propriety in incorporating the amendments into the constitution itself; in that case the system will remain uniform and entire; it will certainly be more simple, when the amendments are interwoven into those parts to which they naturally belong... we shall then be able to determine its meaning without references or comparison; whereas, if they are supplemen tary, its meaning can only be ascertained by a comparison of the two instruments, which will be a very considerable embarrassment, it will be difficult to ascertain to what parts of the instrument the amendments particularly refer; they will create unfavorable comparisons, whereas if they are placed upon the footing here proposed, they will stand upon as good foundation as the original work.

John Vining ridiculed Sherman's proposal, noting he had once seen an "act entitled an act to amend a supplement to an act entitled an act for altering part of act entitled an act for certain purposes therein mentioned" and that if Sherman's mode were adopted, "the system would be distorted, and like a careless written letter, have more matter attached to it in a postscript than was contained in the original composition." Elbridge Gerry confronted directly the suggestion that amendments ratified by state legislatures would not "have the same authority as the original instrument," and challenged Sherman: "if this is his meaning, let him avow it, and if it is well founded, we may save ourselves the trouble of proceeding in the business" of amendments at all. Egbert Benson, supporting Madison's approach, correctly noted that the state conventions that ratified the Constitution "had proposed amendments in this very form." Madison, who had struggled to have the House consider the subject of amendments at all, despaired that if Sherman's motion were adopted, "we shall so far unhinge the business as to occasion alterations in every article and clause of the report."

Madison certainly seems to have had the better of the argument, and Sherman's motion was defeated.

Less than a week later, on August 19, Sherman renewed his motion to add the amendments to the Constitution by way of supplement rather than by incorporating them into the body. The extant record reports only that a debate occurred "similar to what took place" on August 13; no details of that debate are provided. This time, however, Sherman's motion carried, with a two-thirds vote in favor. What explains the change?

During the intervening week, the House of Representatives was a rather unpleasant place to be. On August 15, the House, again sitting as a committee of the whole, discussed a proposed constitutional amendment that neither Madison nor the select committee supported, an amendment providing for instruction of representatives. During this discussion, Thomas Sumter complained of what he considered undue haste in pressing the constitutional amendments proposed by the select committee. He stated that

he was "obliged to notice" this "somewhat improper" conduct. In this same debate, Aedanus Burke described the amendments proposed by Madison and the select committee as "little better than whip-syllabub, frothy and full of wind, formed only to please the palate," and compared them to a "tub thrown out to a whale, to secure the freight of the ship and its peaceable voyage," a common metaphor at the time for a diversionary tactic.

Madison "was not willing to be silent after the charges that had been brought," noting that Sumter and Burke had "insinuated that we are not acting with candor." He stated, "If I was inclined to make no alteration in the constitution I would bring forward such amendments as were of a dubious cast, in order to have the whole rejected," thereby insinuating that his opponents were deliberately proposing amendments that had little prospect of being enacted in order to undermine the constitution.

Writing on August 15, William Smith stated, "there has been more ill-humour & rudeness displayed today than has existed since the meeting of Congress," and "to make it worse, the weather is intensely hot." Later that week, tempers grew so hot that the House saw "the first known instance of congressmen challenging each other to duels."

In the midst of this discord, Madison concluded that it was "absolutely necessary in order to effect any thing to abbreviate debate, and exclude every proposition of a doubtful & unimportant nature." One of the things that Madison gave up was his favored form of amendment. He explained:

> It became an unavoidable sacrifice to a few who knew their concurrence to be necessary, to the despatch if not the success of the business, to give up the form by which the amendts. when ratified would have fallen into the body of the Constitution, in favor of the project of adding them by way of appendix to it.

While Madison sacrificed on this issue, he was not happy with the result, noting that "it is already apparent... that some ambiguities will be produced by this change, as the question will often arise and sometimes be not easily solved, how far the original text is or is not necessarily superceded, by the supplemental act." But suppose Madison had not found it necessary to make this sacrifice to "a few" in the overheated environment of August 1789. What would our Constitution look like?

II. A MADISONIAN APPROACH TO THE TWENTY-SEVEN AMENDMENTS

The First Ten Amendments: Avoiding Ambiguity and Producing a Better Bill of Rights

Integrating the first ten amendments into the body of the Constitution is relatively easy because Madison already did most of the work. The First, Second, Third, Fourth, Eighth, and Ninth Amendments belong in Article I, section 9, along with the other explicit limitations on Congressional power. The Seventh and Tenth Amendments are also easy to integrate into the text in accordance with Madison's plan. Madison proposed that the right to a civil jury trial and the prohibition of reexamination of facts tried to a jury, except in accordance with the principles of common law, be included in Article III, section 2. What became the Tenth Amendment, by contrast, was proposed as a separate article, a new Article VII, with the original Article VII renumbered as Article VIII. Although these provisions emerged from Congress somewhat changed from Madison's original proposal, the language of these amendments as ultimately enacted can readily be inserted just where Madison wanted them.

The Fifth and Sixth Amendments are somewhat more difficult to integrate because of the way they were altered in the legislative process. Indeed, it seems likely that these were the amendments Madison had in mind when he wrote that he already saw ambiguities in the re-

lationship between the main body of the Constitution and the appended amendments. Article III of the original Constitution guaranteed a jury trial of all crimes (except in cases of impeachment), and guaranteed that the trial be held in the state where the crime was committed, leaving to Congress to decide the place of trial for crimes not committed in any state. In response to complaints that this did not adequately protect a right to a local jury, Madison proposed that this provision of the original Constitution be replaced by a new provision that guaranteed both a jury from the vicinage (except in cases of impeachment and cases in the military) and a grand jury indictment (except in certain extraordinary circum stances), but which let crimes not committed within any county be tried where the laws prescribe.

Madison's proposal also contained other provisions that ultimately found their way into the Fifth and Sixth Amendments. He proposed banning multiple punishments or trials for the same offense, compelled self-incrimination, deprivation of life, liberty, or property without due process, and relinquishment of property without just compensation. He also proposed that the accused in criminal prosecutions have the right to a speedy and public trial, to be informed of the cause and nature of the accusation, and to be confronted with his accusers and witnesses, to have compulsory process, and to have the assistance of counsel. All of these protections were to be inserted in Article I, section 9.

Thus, under Madison's approach, the provisions of both the Fifth and Sixth Amendments would be split up. The grand jury right of the Fifth Amendment and the criminal jury trial right of the Sixth Amendment would be placed in Article III, replacing the less detailed jury trial right originally protected in Article III. The other rights of the Fifth and Sixth Amendments would be placed in Article I, section 9, along with the First, Second, Third, Fourth, Eighth, and Ninth Amendments.

Madison's approach would have eliminated ambiguities in the relationship between Article III, the Fifth Amendment, and the Sixth Amendment. For example, Article III requires a jury trial for all crimes, except in cases of impeachment; the Sixth Amendment, by contrast, repeats the requirement of a jury trial in all criminal prosecutions, but has no impeachment exception. Article III requires that trial take place in the state where the crime was committed, unless the crime was not committed in any state, in which case Congress can direct the place of trial; the Sixth Amendment requires a jury of the state and district where the crime was committed, but makes no provision for crimes that do not occur in any state. The Fifth Amendment's grand jury requirement has an exception for military cases; the Sixth Amendment's jury trial requirement does not. Under our Shermanesque constitution, the courts have been left to puzzle out these problems. If Madison's approach had prevailed, these problems would likely have been avoided by clear textual statements in Article III.

The received wisdom is that "Americans owe to Sherman, who was actually an opponent of amending the Constitution, the existence of a separate group of Amendments known as the Bill of Rights." Herbert Storing, for example, wrote:

> Ironically, the result seems to have been exactly the opposite of what Sherman intended, and yet to have gone beyond what Madison wanted. Separate listing of the first ten amendments has elevated rather than weakened their status.

Similarly, Bernard Schwartz has argued that the change from Madison's approach to Sherman's approach "was of the greatest consequence, for it may be doubted that the Bill of Rights itself could have attained its position as the vital center of our constitutional law if its provisions were diluted throughout the Constitution," and that "paradoxically, it is to Sherman (himself a consistent opponent of a Bill of

Rights) that we owe the fact that we have a separate Bill of Rights."

Madison's proposal, however, would not have produced less significant "scattered protections of individual rights." It would have, instead, produced a better bill of rights.

Consider, first, that the bulk of what we now consider the bill of rights would have appeared immediately after the protection of the Great Writ of habeas corpus and immediately before the prohibition on bills of attainder and ex post facto laws. These constitutional provisions surely belong on a bill of rights - and would have been a part of a Madisonian bill of rights - but are not on our Shermanesque bill of rights. Indeed, ""Federal Farmer,' the most influential Antifederal pamphleteer, asserted that the Constitution's ninth and tenth sections of Article I "are no more nor less, than a partial bill of rights.'"

Consider, too, what would not be contained in the Madisonian bill of rights in Article I, section 9, but instead would have been left to Article III: grand jury indictment and jury trial in civil cases. These rights have not been considered sufficiently fundamental to the American scheme of justice by the Supreme Court of the United States to be included in "due process of law."

It is true that jury trial in criminal cases would not have been included in Madison's bill of rights in Article I, section 9. However, Madison thought this right so basic that he wanted to include it (along with "equal rights of conscience" and "freedom of the press") in Article I, section 10, as a right to be protected from state infringement as well as federal infringement. On the other hand, while the Supreme Court has concluded that the right to jury trial in criminal cases is fundamental, it is far from clear that this determination by the Court has strengthened rather than weakened the nature of that right.

In addition, the Tenth Amendment would not have been in the Madisonian bill of rights in Article I, section 9, but instead would have stood on its own as a separate article. With the Ninth Amendment in the bill of rights and the Tenth Amendment as a separate article of the constitution, it would have been harder to forget that there are unenumerated rights and much harder to "treat the ninth amendment as a colossally bad first draft of the tenth."

There is, concededly, one embarrassing drawback to a Madisonian bill of rights in Article I, section 9: Immediately prior to that bill of rights - or perhaps (sadly) the first such right - is the protection of the slave trade until 1808. But as we shall see shortly, even this drawback can be turned to advantage. Madison's approach to constitutional amendment has the redeeming virtue of permitting the elimination of such noxious provisions. . . .

The Thirteenth Amendment: Eliminating Evil Provisions

The Thirteenth Amendment abolished slavery. If it were integrated into the body of the Constitution, it would fit comfortably in the Madisonian bill of rights in Article I, section 9. Indeed, since the Thirteenth Amendment renders irrelevant the limitation on Congressional power over the slave trade contained at the beginning of Article I, section 9, the language abolishing slavery can take the place of that evil provision. The result is that what earlier looked like an embarrassing way to begin a bill of rights would be eliminated, and the most basic right - the right to be free from enslavement - would take its place, joining such rights as habeas corpus, free speech, free exercise of religion, protection against unreasonable searches and seizures, and the prohibition on bills of attainder. Under Madison's approach to amendments, the limitation on the amendment power to protect the slave trade, as well as the hated fugitive slave clause of Article IV, section 2, would likewise be removed from the Constitution.

Madison's approach to constitutional amendment would also have made it less likely that the framers of the Thirteenth Amendment would have overlooked that the abrogation of slavery, by permitting freed slaves to be counted for allocating seats in Congress and the Electoral College, increased the danger of southern dominance of the national government. "This oversight vastly complicated the already difficult task of Reconstruction."

Incorporating section 2 of the Thirteenth Amendment into the body of the constitution would require an addition to Article I, section 8, which gives Congress the power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." The addition would be a rather straightforward phrase at the end of the sentence: "and to enforce the limitations and obligations imposed by this Constitution." This addition would simply state explicitly what the Supreme Court had already held to be implicit in the constitution in Prigg v. Pennsylvania, where the Court held that if "the Constitution guarantees the right... the natural inference certainly is, that the national government is clothed with the appropriate authority and functions to enforce it." The delicious irony is that the right involved in Prigg was the right of a slave owner to the return of his property under the fugitive slave clause. . . .

The Sixteenth Amendment: Loosening a Restraint on Congress

Article I, section 9 prohibited Congress from imposing a direct tax, except in proportion to the population of each state, creating serious impediments to a national income tax. Moreover, Article V prohibited an amendment of this provision prior to 1808. As noted earlier, these provisions were included in the original constitution to provide cover for the three-fifths ruleof representation, and might have been eliminated by the Reconstruction Congress under a Madisonian approach to constitutional amendment. Under our Shermanesque constitution, however, this did not occur. In order to permit a national income tax, the Sixteenth Amendment was enacted in 1913.

Even if these provisions had survived Reconstruction, a Madisonian would not put pages of text between a provision placing a restraint on Congress and another provision loosening that restraint. Instead, the Sixteenth Amendment would be placed in Article I, section 9, as a modification of the restraint on Congressional powers that was being loosened. In addition, under Madison's approach to constitutional amendment, the expired restriction on amending this provision would have been deleted. . . .

The Eighteenth and Twenty-First Amendments: Avoiding the Clutter of Enactment and Repeal

The Eighteenth Amendment prohibited intoxicating liquor; the Twenty-First Amendment repealed the Eighteenth Amendment. While thankfully this is the only such event in our history, it could have happened more frequently, and might still. Madison's approach to constitutional amendment would avoid cluttering the Constitution with amendments and their repeals. Instead, upon repeal, the earlier amendment would simply be stricken out.

The Twenty-First Amendment, however, did one thing in addition to repealing the Eighteenth Amendment. It prohibited bringing intoxicating liquor into a state for delivery or use in violation of the laws of that state. This short provision is the only part of these two amendments that would appear in a Madisonian constitution.

As Laurence Tribe has pointed out, the Twenty-First Amendment "actually forbids the private conduct it identifies, rather than conferring power on the States as such" to forbid that conduct. This feature makes placement of the

provision in a Madisonian constitution a bit unclear, because our Constitution does not have a section devoted to imposing restrictions on individuals. The only other such constitutional provision is the Thirteenth Amendment's ban on slavery, but a ban on bringing alcohol into a state hardly seems to belong alongside the abolition of slavery. The better place for this short provision from the Twenty-First Amendment is in Article IV, section 2, along with the other constitutional provisions dealing with those who cross from the border from one state to another.

THE TWENTY-SEVENTH AMENDMENT: FULL CIRCLE TO MADISON

The Twenty-Seventh Amendment, which prevents Congress from taking advantage of a raise that it gives itself without standing before the people in an intervening election, brings us full circle back to James Madison. For this amendment was one of the original amendments proposed by Madison, approved by Congress, but not ratified by the requisite number of states until 1992. It is easy to decide where it would be inserted into the constitution under Madison's approach, because Madison himself proposed that it be inserted at "the end of the first sentence" in "Article I[], section 6, clause 1."

III. A UNIFORM AND ENTIRE CONSTITUTION

What follows is what our Constitution would look like if Madison's approach to constitutional amendments had prevailed in the first Congress. For ease in finding additions to the original text, the additions are highlighted; for ease in reading, the deletions are not indicated. The result, I believe, is as Madison predicted, "uniform and entire," and "certainly... more simple."

It is true that such a uniform and entire Constitution lacks the "archeological feel," caused by "different historical layers of text." As a result, the scars of history are less immediately visible. But a constitution is not written for historians or archeologists. It is written as a frame of government for the people of today. As Judge Gibbons has explained:

> But who elected the Founders? The answer to that question is plain: we did, if anyone did, and each prior generation has before us, and if the Constitution is to remain a form of higher law, each succeeding generation must do so again - for no one else can.

Because "the status of the Constitution as law depends upon the political will of a present political community," it should be understandable, not only by the priestly class of lawyers and judges, but by the people - today's people - in whose name it is made. The Constitution "was not supposed to be a prolix code. It had been made, and could be unmade at will, by We the People of the United States." Indeed, if Madison had prevailed, perhaps we would have been less likely to have "lost the powerful and prevailing sense of 200 years ago that the Constitution was the people's law." Such popular understanding is particularly important for a bill of rights, considering that for Madison, "The true benefits of a bill of rights were to be found in the realm of public opinion... As greater popular respect for individual and minority rights developed over time... the greater benefit would occur if acceptance of the principles encoded in rights acted to restrain political behavior, tempering improper popular desires before they took the form of unjust legislation."

There is, finally, an elegant symmetry to such a Madisonian constitution: It begins with a statement that it is made by "we the people," and ends with a recognition of the reserved powers of "the people."

MADISON'S "UNIFORM AND ENTIRE" CONSTITUTION

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Article I

Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. The actual Enumeration shall be made within every Term of ten Years, in such Manner as Congress shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative. **But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.**

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section 3. The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Section 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations.

The terms of Senators and Representatives shall end at noon on the 3d day of January and the terms of their successors shall then begin. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

Section 5. Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

Section 6. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. **But no law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.** The members shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Section 7. All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds ofthat House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Section 8. The Congress shall have Power

To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; - And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof, **and to enforce the limitations and obligations imposed by this Constitution.**

Section 9. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

No person shall be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but

upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

No Bill of Attainder or ex post facto Law shall be passed.

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken, but **the Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.**

No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

Section 10. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Im ports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

Article II

Section 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct a number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall meet in the District to perform their duties.

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate; - The President of the Senate shall, in the presence of the Senate and House of Representatives,open all the certificates and the votes shall then be counted; - The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. - The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two- thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom

the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once.

The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of their successors shall then begin. If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide

the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation: - "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

Section 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Section 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Section 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

Article III

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; - to all Cases affecting Ambassadors, other public Ministers and Consuls; - to all Cases of admiralty and maritime Jurisdiction; - to Controversies to which the United States shall be a Party; - to Controversies between two or more States; - between a State and Citizens of another State, **where the State is plaintiff**; - between Citizens of different States; - between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects, **except where a State is sued by a citizen or subject of any foreign state.**

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The trial of all crimes, except in cases of impeachments, and cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, shall be by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; provided that when **the crime is** not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Section 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

Article IV

Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Section 2. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 3. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Section 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on accountof sex.

The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

Article V

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Article VI

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation. **The**

validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Article VII

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.

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 [first] 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 federation 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 iso-

lation 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 collective 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 "[u]nder 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 pro-

vincial 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.

Constitution Act, 1867, Canada, § 101

101. 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

When they arrived, the delegates probably did not think slavery would be a pressing issue. Rivalries between large and small states appeared to pose the greatest obstacle to a stronger Union. The nature of representation in Congress; the power of the national government to levy taxes, regulate commerce, and pay off the nation's debts; the role of the states under a new constitution; and the power of the executive were on the agenda. Yet, as the delegates debated these issues, the importance of slavery—and the sectional differences it caused—became clear. Throughout the summer of 1787 slavery emerged to complicate almost every debate.

The word "slavery" appears in only one place in the Constitution—in the Thirteenth Amendment, where the institution is abolished. Throughout the main body of the Constitution, slaves are referred to as "other persons," "such persons," or in the singular as a "person held to Service or Labour." Why is this the case?

In a debate over representation, William Paterson of New Jersey pointed out that the Congress under the Articles of Confederation "had been ashamed to use the term 'Slaves' & had substituted a description." This shame over the word "slave" came up at the convention during the debate over the African slave trade. The delegates from the Carolinas and Georgia vigorously demanded that the African trade remain open under the new Constitution. Gouverneur Morris of Pennsylvania, unable to contain his anger over this immoral compromise, suggested that the proposed clause read: the "Importation of slaves into N. Carolina, S— Carolina & Georgia" shall not be prohibited. Connecticut's Roger Sherman objected, not only to the singling out of specific states but also to the term slave. He declared he "liked a description better than the terms proposed, which had been declined by the old Congs & were not pleasing to some people."

The new wording of the fugitive slave clause was characteristic. Fugitive slaves were called "persons owing service or Labour," and the word "legally" was omitted so as not to offend northern sensibilities. Northern delegates could return home asserting that the Constitution did not recognize the legality of slavery. In the most technical linguistic sense they were perhaps right. Southerners, on the other hand, could tell their neighbors, as Charles Cotesworth Pinckney told his, "We have obtained a right to recover our slaves in whatever part of America they may take refuge, which is a right we had not before"

Five provisions dealt directly with slavery:

Art. I, sec. 2, par. 3. The three-fifths clause provided for counting three-fifths of all slaves for purposes of representation in Congress. This clause also provided that any "direct tax" levied on the states could be imposed only proportionately, according to population, and that only three-fifths of all slaves would be counted in assessing each state's contribution.

Art. I, sec. 9, par. 1. This clause prohibited Congress from banning the "Migration or Importation of such Persons as any of the States now existing shall think proper to admit" before the year 1808. Awkwardly phrased and designed to confuse readers, the clause prevented Congress from ending the African slave trade before 1808 but did not require Congress to ban the trade after that date [tho

Art. I, sec. 9, par. 4. This clause declared that any "capitation" or other "direct tax" had to take into account the three-fifths clause. It ensured that, if a head tax were ever levied, slaves would be taxed at three-fifths the rate of whites. The "direct tax" portion of this clause was redundant, because that was provided for in the three-fifths clause.

Art. IV, sec. 2, par. 3. The fugitive slave clause prohibited the states from emancipating fugitive slaves and required that runaways be returned to their owners "on demand."

Art. V. This article prohibited any amendment of the slave importation or capitation clauses before 1808.

Taken together, these five provisions gave the South a strong claim to "special treatment" for its peculiar institution. The three-fifths clause also gave the South extra political muscle—in the House of Representatives and in the electoral college—to support that claim.

Numerous other clauses of the Constitution supplemented the five clauses that directly protected slavery. Some, such as the prohibition on taxing exports, were included primarily to protect the interests of slaveholders. Others, such as the guarantee of federal support to "suppress Insurrections" and the creation of the electoral college, were written with slavery in mind, although delegates also supported them for other reasons as well. The most prominent indirect protections of slavery were:

Art. I, sec. 8, par. 15. The domestic insurrections clause empowered Congress to call "forth the Militia" to "suppress Insurrections," including slave rebellions.[5]

Art. I, sec. 9, par. 5, and **Art. I, sec. 10, par. 2.** These clauses prohibited federal or state taxes on exports and thus prevented an indirect tax on slavery by taxing the staple products of slave labor, such as tobacco, rice, and eventually cotton.[6]

Art. II, sec. 1, par. 2. This clause provided for the indirect election of the President through an electoral college based on congressional representation. This provision incorporated the three-fifths clause into the electoral college and gave whites in slave states a disproportionate influence in the election of the President.

Art. IV, sec. 4. In the domestic violence provision of the guarantee clause, the United State government promised to protect states from "domestic Violence," including slave rebellions.

Art. V. By requiring a three-fourths majority of the states to ratify any amendment to the Constitution, this article ensured that the slaveholding states would have a perpetual veto over any constitutional changes.[7]

Besides specific clauses of the Constitution dealing with slavery, the structure of the entire document ensured against emancipation by the new federal government. Because the Constitution created a government of limited powers, Congress lacked the power to interfere in the domestic institutions of the states. Thus, during the ratification debates, only the most fearful southern antifederalists opposed the Constitution on the grounds that it threatened slavery. Most southerners, even those who opposed the Constitution for other reasons, agreed with Gen. Charles Cotesworth Pinckney of South Carolina, who crowed to his state's house of representatives:

> We have a security that the general government can never emancipate them, for no such authority is granted and it is admitted, on all hands, that the general government has no powers but what are expressly granted by the Constitution, and that all rights not expressed were reserved by the several states.

The final Constitution provided enormous protections for the peculiar institution of the South at very little cost to that region.

The Constitution was hardly an antislavery document. Through fierce debates and by means of backroom deals, the lower South slaveholders managed to win compromises that offered some protection to slavery in the states ….

But neither did the Constitution establish slavery as necessary to the Union. It's true that a few proslavery delegates threatened that their states would refuse to join the Union unless their demands were met. This occurred with particular force with regard to the Atlantic slave trade. A majority of convention delegates wanted to empower the national government to abolish the horrific trade, striking the first blow against it anywhere in the Atlantic world in the name of a sovereign state. Appalled, the lower South delegates, led by South Carolina's oligarchs, threatened to bolt if the convention touched the slave trade in any way, but the majority called their bluff.

In the end, the proslavery delegates carved out the compromise that prevented abolishing the trade until 1808, salvaging a significant concession, though there could be little doubt that the trade was doomed. Even with this compromise, the leading Pennsylvania abolitionist Benjamin Rush hailed the slave trade clause as "a great point obtained from the Southern States." His fellow Pennsylvanian and a delegate to convention, James Wilson, went so far as to say that the Constitution laid "the foundation for banishing slavery out of this country."

History, of course, proved Wilson wrong—but not completely wrong. With the rise of the cotton economy, based on the invention of the cotton gin, which Wilson could not have foreseen, American slavery was far from stymied, but grew to become the mightiest and most expansive slavery regime on earth, engulfing further territories—including Cotton's own Arkansas.

The Framers' compromises over slavery had little to do with it, however. The problem was not primarily constitutional but political: so long as a substantial number of Northerners remained either complacent about slavery's future, indifferent to the institution's oppression, or complicit in the growth of the new cotton kingdom, the Constitution would permit the spread of human bondage.

Even so, in fact, the Constitution contained powerful antislavery potential. By refusing to recognize slavery in national law, the Framers gave the national government the power to regulate or ban slavery in areas under its purview, notably the national territories not yet constituted as separate states. The same year that the Framers met, the existing Congress banned slavery from the existing territories north of the Ohio River under the Northwest Ordinance, a measure reflected in the Constitution, which the new Congress quickly affirmed when it met in 1789. Later antislavery champions, including Abraham Lincoln, always considered the Northwest Ordinance to be organic to the Constitution; proslavery advocates came to regard it as an illegitimate nullity.

In time, as antislavery sentiment built in the North, the condition of slavery in the territories and in connection with the admission of new states became the major flashpoint of conflict, from the Missouri crisis of 1819–1821 to the guerrilla warfare of "Bleeding Kansas." Proslavery champions like John C. Calhoun of South Carolina invented an argument that denied the Congress any power over slavery in the territories; Lincoln and his fellow Republicans refuted that argument. And upon Lincoln's election as president in 1860, this constitutional issue was enough to spark the secession that led to the Civil War and Emancipation.

Although Lincoln sometimes suggested that the Framers had purposefully designed slavery's abolition—even Lincoln could wishfully exaggerate—the Constitution hardly ensured slavery's doom. It took Lincoln's and the antislavery Republicans' concerted political efforts to vindicate the Constitution's antislavery elements that set the stage for what Lincoln in his "House Divided" speech of 1858 called "ultimate extinction."

"A Covenant with Death and an Agreement with Hell," Massachusetts Historical Society, July 2005

[William Lloyd Garrison, a prominent abolitionist spoke at a Massachusetts Anti-Slavery Society Rally in Framingham's Grove, Massachusetts on July 4, 1854.] The rally began with a prayer and a hymn. Then Garrison launched into one of the most controversial performances of his career. "To-day, we are called to celebrate the seventy-eighth anniversary of American Independence. In what spirit?" he asked, "with what purpose? to what end?" The Declaration of Independence had declared "that all men are created equal ... It is not a declaration of equality of property, bodily strength or beauty, intellectually or moral development, industrial or inventive powers, but equality of RIGHTS--not of one race, but of all races."

Since the early 1830s, Garrisonian anti-slavery advocates had adopted the message of black abolitionists in denouncing the sin of slavery and of racial prejudice. In words familiar to his audience, Garrison repeated the decades-old warnings that freedom did not exist in the South; who there, he declared, could "avow his belief in the inalienable rights of man, irrespective of complexional caste?" The church in the South, a frequent target of abolitionists, lay outside of Christendom, and was nothing but a "cage of unclean birds, and the synagogue of Satan." Garrison ventured into new territory with his warning that slavery had strengthened--not weakened--since he had begun his antislavery career. Slavery and its minions jeopardized freedom everywhere and its advocates, he warned, intended to tighten their grasp over the Caribbean, expand into Central and South America, and even extend the cursed institution into the Pacific. Freedom was disappearing. What could there be to celebrate on July 4? he asked.

Garrison then produced a copy of the 1850 Fugitive Slave Law and put a match to it. Amid cries of "Amen" the hated document burned to a cinder. Then he produced copies of Judge Edward G. Loring's decision to send Anthony Burns back to slavery and Judge Benjamin R. Curtis's comments to the U.S. grand jury considering charges of constructive treason against those who had participated in the failed attempt to free Burns. As Martin Luther had burned copies of canon law and the papal bull excommunicating him from the Catholic Church for heresy, Garrison consigned each to the flames. Holding up a copy of the U.S. Constitution, he branded it as "the source and parent of all the other atrocities--'a covenant with death, and an agreement with hell.'" As the nation's founding document burned to ashes, he cried out: "So perish all compromises with tyranny!"

https://www.masshist.org/object-of-the-month/objects/a-covenant-with-death-and-an-agreement-with-hell-2005-07-01

The abolitionist William Lloyd Garrison thought the U.S. Constitution was the result of a terrible bargain between freedom and slavery. Calling the Constitution a "covenant with death" and "an agreement with Hell," he refused to participate in American electoral politics because to do so meant supporting "the pro-slavery, war sanctioning Constitution of the United States." Instead, under the slogan "No Union with Slaveholders," the Garrisonians repeatedly argued for a dissolution of the Union.

This position was also at least theoretically pragmatic. The Garrisonians were convinced that the legal protection of slavery in the Constitution made political activity futile, while support for the Constitution merely strengthened the stranglehold slavery had on America. In 1845 Wendell Phillips pointed out that in the years since the adoption of the Constitution, Americans had witnessed "the slaves trebling in numbers—slaveholders monopolizing the offices and dictating the policy of the Government-prostituting the strength and influence of the Nation to the support of slavery here and elsewhere—trampling on the rights of the free States, and making the courts of the country their tools." Phillips argued that this experience proved "that it is impossible for free and slave States to unite on any terms, without all becoming partners in the guilt and responsible for the sin of slavery."

The Garrisonians believed that if they worked within the political system they were merely spinning their wheels, spending their money and time on a cause that was doomed. The Constitution was proslavery, the national government was controlled by slaveowners, and politics was a waste of time. A quick look at the presidency underscored their view. From 1788 until 1860, only two opponents of slavery, John Adams and John Quincy Adams, held the nation's highest office, and for only a total of eight years. On the other hand, slaveowners held the office for fifty of these seventy-two years, and doughfaces-northern men with southern principles—like James Buchanan and Franklin Pierce—held it the rest of the time.

This did not surprise the Garrisonians, who understood that the Constitution was heavily influenced by slaveowners. The Garrisonians did not necessarily see the Constitution as the result of a deliberate conspiracy of evil men; rather, they understood it to be the consequence of political give-and-take at the Convention of 1787.

Frederick Douglass, The Constitution of the United States: Is It Pro-Slavery or Anti-Slavery?, Speech before the Scottish Anti-Slavery Society in Glasgow, Scotland, March 26, 1860 (excerpts)

The speech was a response to Garrison and to British abolitionist George Thompson, whose views were similar to William Lloyd Garrison's.

[T]he American Government and the American Constitution are spoken of in a manner which would naturally lead the hearer to believe that one is identical with the other; when the truth is, they are distinct in character as is a ship and a compass. The one may point right and the other steer wrong. A chart is one thing, the course of the vessel is another. The Constitution may be right, the Government is wrong. If the Government has been governed by mean, sordid, and wicked passions, it does not follow that the Constitution is mean, sordid, and wicked.

What, then, is the question? I will state it. But first let me state what is not the question. It is not whether slavery existed in the United States at the time of the adoption of the Constitution; it is not whether slaveholders took part in the framing of the Constitution; it is not whether those slaveholders, in their hearts, intended to secure certain advantages in that instrument for slavery; it is not whether the American Government has been wielded during seventy-two years in favour of the propagation and permanence of slavery; it is not whether a pro-slavery interpretation has been put upon the Constitution by the American Courts — all these points may be true or they may be false, they may be accepted or they may be rejected, without in any wise affecting the real question in debate.

The real and exact question between myself and the class of persons represented by the speech at the City Hall may be fairly stated thus: — 1st, Does the United States Constitution guarantee to any class or description of people in that country the right to enslave, or hold as property, any other class or description of people in that country? 2nd, Is the dissolution of the union between the slave and free States required by fidelity to the slaves, or by the just demands of conscience? Or, in other words, is the refusal to exercise the elective franchise, and to hold office in America, the surest, wisest, and best way to abolish slavery in America?

To these questions the Garrisonians say Yes. They hold the Constitution to be a slaveholding instrument, and will not cast a vote or hold office, and denounce all who vote or hold office, no matter how faithfully such persons labour to promote the abolition of slavery. I, on the other hand, deny that the Constitution guarantees the right to hold property in man, and believe that the way to abolish slavery in America is to vote such men into power as well use their powers for the abolition of slavery. This is the issue plainly stated, and you shall judge between us.

Before we examine into the disposition, tendency, and character of the Constitution, I think we had better ascertain what the Constitution itself is. The American Constitution is a written instrument full and complete in itself. No Court in America, no Congress, no President, can add a single word thereto, or take a single word thereto. It is a great national enactment done by the people, and can only be altered, amended, or added to by the people.

It should also be borne in mind that the intentions of those who framed the Constitution, be they good or bad, for slavery or against slavery, are so respected so far, and so far only, as we find those intentions plainly stated in the Constitution. It would be the wildest of absurdities, and lead to endless confusion and mischiefs, if, instead of looking to the written paper itself, for its meaning, it were attempted to make us search it out, in the secret motives, and dishonest intentions, of some of the men who took part in writing it. It was what they said that was adopted by the people, not what they were ashamed or afraid to say, and really omitted to say.

Bear in mind, also, and the fact is an important one, that the framers of the Constitution sat with doors closed. These debates were purposely kept out of view, in order that the people should adopt, not the secret motives or unexpressed intentions of any body, but the simple text of the paper itself. Those debates form no part of the original agreement. I repeat, the paper

itself, and only the paper itself, with its own plainly written purposes, is the Constitution. It must stand or fall, flourish or fade, on its own individual and self-declared character and objects.

Again, where would be the advantage of a written Constitution, if, instead of seeking its meaning in its words, we had to seek them in the secret intentions of individuals who may have had something to do with writing the paper? What will the people of America a hundred years hence care about the intentions of the scriveners who wrote the Constitution? These men are already gone from us, and in the course of nature were expected to go from us. They were for a generation, but the Constitution is for ages. Whatever we may owe to them, we certainly owe it to ourselves, and to mankind, and to God, to maintain the truth of our own language, and to allow no villainy, not even the villainy of holding men as slaves — which Wesley says is the sum of all villainies — to shelter itself under a fair-seeming and virtuous language.

A wise man has said that few people have been found better than their laws, but many have been found worse. To this last rule America is no exception. Her laws are one thing, her practice is another thing. What then? Shall we condemn the righteous law because wicked men twist it to the support of wickedness? Is that the way to deal with good and evil?

[Mr. Thompson] sums up what he calls the slaveholding provisions of the Constitution. I quote his own words: — "Article 1, section 9, provides for the continuance of the African slave trade for the 20 years, after the adoption of the Constitution. Art. 4, section 9, provides for the recovery from the other States of fugitive slaves. Art. 1, section 2, gives the slave States a representation of the three-fifths of all the slave population; and Art. 1, section 8, requires the President to use the military, naval, ordnance, and militia resources of the entire country for the suppression of slave insurrection, in the same manner as he would employ them to repel invasion."

Now any man reading this statement, or hearing it made with such a show of exactness, would unquestionably suppose that he speaker or writer had given the plain written text of the Constitution itself. [Yet] it so happens that no such words as "African slave trade," no such words as "slave insurrections," are anywhere used in that instrument.

[Mr. Thompson] doubtless felt some embarrassment from the fact that he had literally to *give* the Constitution a pro-slavery interpretation; because upon its face it of itself conveys no such meaning, but a very opposite meaning. He pretended to be giving chapter and verse, section and clause, paragraph and provision. Why then did he not give you the plain words of the Constitution?

Let us look at them just as they stand, one by one. Let us grant, for the sake of the argument, that [Art. I § 2 cl. 3],[1] referring to the basis of representation and taxation, does refer to slaves. We are not compelled to make that admission, for it might fairly apply to aliens— persons living in the country, but not naturalized. But giving the provisions the very worse construction, what does it amount to? I answer—It is a downright disability laid upon the slaveholding States; one which deprives those States of two-fifths of their natural basis of representation. A black man in a free State is worth just two-fifths more than a black man in a slave State, as a basis of political power under the Constitution. Therefore, instead of encouraging slavery, the Constitution encourages freedom by giving an increase of "two-fifths" of political power to free over slave States. So much for the three-fifths clause; taking it at is worst, it still leans to freedom, not slavery; for, be it remembered that the Constitution nowhere forbids a coloured man to vote.

I come to the next, [Art. I § 9 cl. 1] which it

[1] "Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons."

is said guaranteed the continuance of the African slave trade for twenty years.[2] I will also take that for just what my opponent alleges it to have been, although the Constitution does not warrant any such conclusion. But, to be liberal, let us suppose it did, and what follows? Why, this — that this part of the Constitution, so far as the slave trade is concerned, became a dead letter more than 50 years ago, and now binds no man's conscience for the continuance of any slave trade whatsoever. Mr. Thompson is just 52 years too late in dissolving the Union on account of this clause.

The American statesmen, in providing for the abolition of the slave trade, thought they were providing for the abolition of the slavery. This view is quite consistent with the history of the times. All regarded slavery as an expiring and doomed system, destined to speedily disappear from the country. But, again, it should be remembered that this very provision, if made to refer to the African slave trade at all, makes the Constitution anti-slavery rather than for slavery; for it says to the slave States, the price you will have to pay for coming into the American Union is, that the slave trade, which you would carry on indefinitely out of the Union, shall be put an end to in twenty years if you come into the Union. It is anti-slavery, because it looked to the abolition of slavery rather than to its perpetuity. It showed that the intentions of the framers of the Constitution were good, not bad.

I think this is quite enough for this point. I go to the "slave insurrection" clause [Art. I § 8 cl. 15],[3] though, in truth, there is no such clause. The one which is called so has nothing whatever to do with slaves or slaveholders any more than your laws for suppression of popular outbreaks has to do with making slaves of you and your children. It is only a law for suppression of riots or insurrections. But I will be generous here, as well as elsewhere, and grant that it applies to slave insurrections. Let us suppose that an anti-slavery man is President of the United States (and the day that shall see this the case is not distant) and this very power of suppressing slave insurrections would put an end to slavery. The right to put down an insurrection carries with it the right to determine the means by which it shall be put down. If it should turn out that slavery is a source of insurrection, that there is no security from insurrection while slavery lasts, why, the Constitution would be best obeyed by putting an end to slavery, and an anti-slavery Congress would do the very same thing. Thus, you see, the so-called slave-holding provisions of the American Constitution, which a little while ago looked so formidable, are, after all, no defence or guarantee for slavery whatever.

There is one other provision. This is called the "Fugitive Slave Provision" [Art. IV § 2 cl. 3].[4] Mr. Madison (afterwards President), when recommending the Constitution to his [Virginia] constituents [considering ratification], told them that the clause would secure them their property in slaves." I declare unto you, knowing as I do the facts in the case, my utter amazement at the downright untruth conveyed under the fair seeming words now quoted. The man who could make such a statement may have all the craftiness of a lawyer, but who can accord to him the candour of an honest debater? He have would have spoiled the whole effect of his statement had he told you the whole truth.

Now, what are the facts connected with this provision of the Constitution? It is quite true that Mr. Butler and Mr. Pinckney introduced a provision expressly with a view to the recapture of fugitive slaves: it is quite true also that

[2] "The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person."

[3] "The Congress shall have Power … To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions."

[4] "No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due."

there was some discussion on the subject. These illustrious kidnappers were told promptly in that discussion that no such idea as property in man should be admitted into the Constitution. The proposition of Mr. Butler and Mr. Pinckney was, in fact, promptly and indignantly rejected by that convention. He might have told you, had it suited his purpose to do so, that the words employed in the first draft of the fugitive slave clause were such as applied to the condition of slaves, and expressly declared that persons held to "servitude" should be given up; but that the word "servitude" was struck from the provision, for the very reason that it applied to slaves. The same Mr. Madison declared that the word was struck out because the convention would not consent that the idea of property in men should be admitted into the Constitution.

But it may be asked — if this clause does not apply to slaves, to whom does it apply? I answer, that when adopted, it applies to a very large class of persons — namely, redemptioners — persons who had come to America from Holland, from Ireland, and other quarters of the globe — like the Coolies to the West Indies — and had, for a consideration duly paid, become bound to "serve and labour" for the parties two whom their service and labour was due. It applies to indentured apprentices and others who have become bound for a consideration, under contract duly made, to serve and labour, to such persons this provision applies, and only to such persons. The plain reading of this provision shows that it applies, and that it can only properly and legally apply, to persons "bound to service." Its object plainly is, to secure the fulfillment of contracts for "service and labour." It applies to indentured apprentices, and any other persons from whom service and labour may be due.

The legal condition of the slave puts him beyond the operation of this provision. He is not described in it. He is a simple article of property. He does not owe and cannot owe service. He cannot even make a contract. It is impossible for him to do so. He can no more make such a contract than a horse or an ox can make one. This provision, then, only respects persons who owe service, and they only can owe service who can receive an equivalent and make a bargain. The slave cannot do that, and is therefore exempted from the operation of this fugitive provision

In all matters where laws are taught to be made the means of oppression, cruelty, and wickedness, I am for strict construction. I will concede nothing. It must be shown that it is so nominated in the bond. The pound of flesh, but not one drop of blood. The very nature of law is opposed to all such wickedness, and makes it difficult to accomplish such objects under the forms of law.

The Supreme Court of the United States lays down this rule, and it meets the case exactly — "Where rights are infringed — where the fundamental principles of the law are overthrown — where the general system of the law is departed from, the legislative intention must be expressed with irresistible clearness." The same court says that the language of the law must be construed strictly in favour of justice and liberty.

Again, there is another rule of law. It is — Where a law is susceptible of two meanings, the one making it accomplish an innocent purpose, and the other making it accomplish a wicked purpose, we must in all cases adopt that which makes it accomplish an innocent purpose. Again, the details of a law are to be interpreted in the light of the declared objects sought by the law.

I only ask you to look at the American Constitution in the light of them, and you will see with me that no man is guaranteed a right of property in man, under the provisions of that instrument. If there are two ideas more distinct in their character and essence than another, those ideas are "persons" and "property," "men" and "things." Now, when it is proposed to transform persons into "property" and men into beasts of burden, I demand that the law that completes such a purpose shall be expressed with irresistible clearness. The thing must not be left to inference, but must be done in plain English.

I know how this view of the subject is treated by the class represented at the City Hall

[i.e., white abolitionists]. They are in the habit of treating the Negro as an exception to general rules. When their own liberty is in question they will avail themselves of all rules of law which protect and defend their freedom; but when the black man's rights are in question they concede everything, admit everything for slavery, and put liberty to the proof. They reserve the common law usage, and presume the Negro a slave unless he can prove himself free. I, on the other hand, presume him free unless he is proved to be otherwise.

Let us look at the objects for which the Constitution was framed and adopted, and see if slavery is one of them. Here are its own objects as set forth by itself: — "We, the people of these United States, in order to form a more perfect union, establish justice, ensure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution of the United States of America." The objects here set forth are six in number: union, defence, welfare, tranquility, justice, and liberty. These are all good objects, and slavery, so far from being among them, is a foe of them all.

But it has been said that Negroes are not included within the benefits sought under this declaration. This is said by the slaveholders in America — it is said by the City Hall orator — but it is not said by the Constitution itself. Its language is "we the people;" not we the white people, not even we the citizens, not we the privileged class, not we the high, not we the low, but we the people; not we the horses, sheep, and swine, and wheel-barrows, but we the people, we the human inhabitants; and, if Negroes are people, they are included in the benefits for which the Constitution of America was ordained and established. But how dare any man who pretends to be a friend to the Negro thus gratuitously concede away what the Negro has a right to claim under the Constitution? Why should such friends invent new arguments to increase the hopelessness of his bondage?

The constitutionality of slavery can be made out only by disregarding the plain and common-sense reading of the Constitution itself; by discrediting and casting away as worthless the most beneficent rules of legal interpretation; by ruling the Negro outside of these beneficent rules; by claiming that the Constitution does not mean what it says, and that it says what it does not mean; by disregarding the written Constitution, and interpreting it in the light of a secret understanding. It is in this mean, contemptible, and underhand method that the American Constitution is pressed into the service of slavery. They go everywhere else for proof that the Constitution declares that no person shall be deprived of life, liberty, or property without due process of law; it secures to every man the right of trial by jury, the privilege of the writ of habeas corpus — the great writ that put an end to slavery and slave-hunting in England — and it secures to every State a republican form of government. Every slave law in America might be repealed on this very ground.

But to all this it is said that the practice of the American people is against my view. I admit it. They have given the Constitution a slaveholding interpretation. I admit it. They have committed innumerable wrongs against the Negro in the name of the Constitution. Yes, I admit it all; and I go with him who goes farthest in denouncing these wrongs.

But it does not follow that the Constitution is in favour of these wrongs because the slaveholders have given it that interpretation. To be consistent in his logic, the City Hall speaker must follow the example of some of his brothers in America — he must not only fling away the Constitution, but the Bible. The Bible must follow the Constitution, for that, too, has been interpreted for slavery by American divines.

My argument against the dissolution of the American Union is this: It would place the slave system more exclusively under the control of the slaveholding States, and withdraw it from the power in the Northern States which is opposed to slavery. Slavery is essentially barbarous in its character. It, above all things else, dreads the presence of an advanced civilisation. It flourishes best where it meets no reproving frowns, and hears no condemning voices.

While in the Union it will meet with both. Its hope of life, in the last resort, is to get out of the Union. I am, therefore, for drawing the bond of the Union more completely under the power of the Free States. What they most dread, that I most desire.

I have much confidence in the instincts of the slaveholders. They see that the Constitution will afford slavery no protection when it shall cease to be administered by slaveholders. They see, moreover, that if there is once a will in the people of America to abolish slavery, this is no word, no syllable in the Constitution to forbid that result. They see that the Constitution has not saved slavery in Rhode Island, in Connecticut, in New York, or Pennsylvania; that the Free States have only added three to their original number. There were twelve Slave States at the beginning of the Government: there are fifteen now.

Within the Union we have a firm basis of opposition to slavery. It is opposed to all the great objects of the Constitution. The dissolution of the Union is not only an unwise but a cowardly measure — 15 millions running away from three hundred and fifty thousand slaveholders. I admit our responsibility for slavery while in the Union but I deny that going out of the Union would free us from that responsibility. There now clearly is no freedom from responsibility for slavery to any American citizen short to the abolition of slavery. The American people have gone quite too far in this slaveholding business now to sum up their whole business of slavery by singing out the cant phrase, "No union with slaveholders."

The American people in the Northern States have helped to enslave the black people. Their duty will not have been done till they give them back their plundered rights. If slaveholders have ruled the American Government for the last fifty years, let the anti-slavery men rule the nation for the next fifty years. If the South has made the Constitution bend to the purposes of slavery, let the North now make that instrument bend to the cause of freedom and justice. If 350,000 slaveholders have, by devoting their energies to that single end, been able to make slavery the vital and animating spirit of the American Confederacy for the last 72 years, now let the freemen of the North, who have the power in their own hands, and who can make the American Government just what they think fit, resolve to blot out for ever the foul and haggard crime, which is the blight and mildew, the curse and the disgrace of the whole United States.

In the summer of 1854, the Massachusetts Anti-Slavery Society sent out word of a large gathering to be held at Harmony Grove in Framingham—sixteen miles from Boston—on the Fourth of July.[1] For fifty cents, picnickers were offered "Special Trains" to and from the grounds. Handbills blared the theme of the meeting—"NO SLAVERY!"—and promised addresses by "Eminent Speakers," among them Sojourner Truth and Henry David Thoreau.[2] But the speech that attracted the most attention and left the most lasting impression was delivered by the great abolitionist William Lloyd Garrison.

Much of what Garrison said was familiar to all opponents of slavery. July 4 is, of course, the anniversary of the Declaration of Independence. Even the most mainstream of mainstream antislavery politicians would have nodded in agreement as Garrison insisted that the famous phrase—"all men are created equal"[3]—meant that every human being was equally entitled to the natural right of freedom and that slavery was a violation of that sacred principle. When Garrison held up a copy of the Fugitive Slave Act of 1850 and set it on fire, those same mainstream politicians might have winced, but they would not have disagreed with the sentiment. They all hated the law. Some wanted it revised, some thought it should be repealed outright, and some thought it was unconstitutional.

But that is where most antislavery folks parted company with Garrison. He did not think the Fugitive Slave Act was unconstitutional. He thought the law was perfectly consistent with the Constitution. He felt the same way about the Kansas-Nebraska Act, passed a few months before, which reopened the Nebraska territory to slavery. And he felt the same way about the rendition of Anthony Burns, a fugitive slave who had recently been marched through the streets of Boston by federal troops returning him to slavery in the face of fifty thousand protestors opposed to the extradition. Most of slavery's opponents thought the Kansas-Nebraska Act was inconsistent with the Constitution. Most believed that Anthony Burns had been deprived of his constitutional rights.[4]

But not William Lloyd Garrison. None of the recent victories of the so-called "Slave Power"—the Fugitive Slave Act, the Kansas-Nebraska Act, the rendition of Anthony Burns—none of these were *violations* of the Constitution, Garrison insisted. If anything, they were *caused* by the Constitution. "The source and parent of all the other atrocities," Garrison declared that day, was the Constitution itself—which he then denounced as "*a covenant with death, and an agreement with hell*."[5] Striking another match, Garrison held up a copy of the U.S. Constitution and set it to flames as well.

Six years later, in Glasgow, Scotland, another great abolitionist, Frederick Douglass, gave a very different speech—different not only from Garrison's but also from speeches Douglass himself had once given. After escaping from slavery in 1838, Douglass had moved to New England, where he joined the Garrisonian branch of the abolitionist movement and argued that the Constitution was a proslavery document. The slave insurrections clause, he said, "converts every [W]hite American into an enemy of the [B]lack man in that land of professed liberty."[6] The Fugitive Slave Clause ensured that any enslaved person escaping to freedom was liable "to be hunted down like a felon and dragged back to the hopeless bondage from which he was endeavoring to escape."[7] "I really cannot be very patriotic," Douglass declared in 1847, when he would hear Americans speak of their "boasted constitution."[8]

Just a few years later, however, Douglass did a complete about-face and argued exactly the opposite—that the Constitution was a radical abolitionist document.[9] His migration to this position can be traced in the pages of his own newspaper; he ended that voyage blaring his change of heart in bold headlines. By the early 1850s, he had leapt, as it were, from one soapbox to another, over and past the mainstream view of the Constitution that had long shaped

antislavery politics—the politics of Abraham Lincoln and the Republican Party.

Once upon a time, I thought this dramatic reversal of opinion was an example of what might be called "soapbox syndrome." But the soapbox metaphor is misleading, because where Douglass ended up turns out to have been closer to mainstream antislavery constitutionalism than I had previously thought. He said so himself. "My position now is one of reform," he explained in 1860, "not of revolution."[10] A proslavery Constitution foreclosed the possibility of any meaningful antislavery politics, which is why Garrison eventually adopted a policy of not voting. But an antislavery Constitution opened Douglass to the possibilities of antislavery politics. It meant that the federal government could adopt policies designed to undermine and ultimately extinguish slavery. Douglass explored those possibilities in brilliant biblical cadences. The beliefs of abolitionists would flow "through their fingers into the ballot-box," he wrote, and through their ballots, they would elect men of "Christian principle and Christian intelligence" to Congress.[11] "[T]hat congress shall crystallise those sentiments into law, and that law shall be in favour of freedom. And that is the way we hope to accomplish the abolition of slavery."[12]

These quotes from Douglass's Glasgow speech of March 26, 1860, were given in reply to another speech delivered a month earlier by prominent British abolitionist George Thompson. Thompson had defended Garrison's view of the Constitution and, in true Garrisonian form, personally attacked Douglass's apostasy in terms Douglass considered personally abusive and vindictive. Early in his address, Douglass spelled out as clearly as anyone could—and few could state things as clearly as Douglass—his fundamental disagreement with the Garrisonians.

> They hold that the constitution is a slave-holding instrument, and will not cast a vote, or hold office under it, and *denounce all who do vote or hold office under it as pro-slavery men*, though they may be in their hearts and in their actions as far from being slaveholders as are the poles of the moral universe apart. I, on the other hand, deny that the constitution guarantees the right to hold property in men, and believe that the way, the true way, to abolish slavery in America is to vote such men into power as will exert their moral and political influence for the abolition of slavery.[13]

What followed was the most complete statement of Douglass's interpretation of the U.S. Constitution as an abolitionist document. Although this went beyond mainstream antislavery constitutionalism, most of what Douglass had to say could have been said by Abraham Lincoln.

To be sure, there were differences. Mainstream antislavery constitutionalists like Salmon P. Chase interpreted the Constitution in light of the Founders' expectation that slavery would eventually be abolished everywhere in the United States. Lincoln, for example, repeatedly called upon Congress to adopt policies that would put the United States back where the Founders intended, on a course toward slavery's ultimate extinction.[14] By contrast, Douglass had aligned himself with abolitionist constitutionalists, men like Alvan Stewart and William Goodell, who were textual literalists.[15] The Founders' intentions were irrelevant, they argued. All that mattered was the text of the Constitution. "[I]t should be borne in mind," Douglass argued,

> that the mere text of that constitution—the text and only the text, and not any commentaries or creeds written upon the text—is the constitution of the United States. It should also be borne in mind that the intentions of those who framed the constitution, be they good or bad, be they for slavery or against slavery, are to be respected so far, and so far only, as they have succeeded in getting these intentions expressed in the written instrument itself.[16]

This led abolitionists like Douglass to the unusual conclusion that Congress had the power to immediately abolish slavery in the states, a position even Lincoln, the most radical antislavery politician, rejected.

Nevertheless, both antislavery and abolitionist constitutionalists advocated the same federal policies and referred to the same clauses of the Constitution to justify their politics. There are two ways to think about this: either Douglass was closer to mainstream antislavery thought than we once believed, or mainstream antislavery thought was more radical than we have generally recognized. My sense is that both interpretations are true. Both traditions were antithetical to the Garrisonian denunciation of the Constitution as a proslavery document.

Before examining Douglass's abolitionist interpretation of the Constitution, it is worth summarizing his critique of proslavery constitutionalism. The biggest problem with the Garrisonian attack on the Constitution, Douglass argued, was that it conflated the policies of the existing U.S. government, which were indeed proslavery, with the Constitution itself. Douglass saw this as a tacit admission of the weakness of the Garrisonian argument: it frequently stepped outside the Constitution to make its case. To the extent that Thompson and the Garrisonians did rely on the text, they focused on four specific clauses. Article I, Section 9, clause 1 (also known as the Slave Trade Clause) protected the African slave trade from a federal ban for twenty years.[17] Article IV, Section 2, clause 3 (also known as the Fugitive Slave Clause) provided for the recovery of fugitive slaves.[18] Article I, Section 2, clause 3 (also known as the Three-Fifths Clause) counted three-fifths of the enslaved population for purposes of representation in the House.[19] And Article I, Section 8, clause 15 (also known as the Domestic Insurrections Clause) empowered the President to use military force to suppress slave insurrections.[20]

Douglass claimed that when Thompson referred to these clauses, apparently quoting the Constitution, Thompson was in fact paraphrasing the text tendentiously and giving a proslavery twist to clauses that—read precisely—could not bear such a reading. The so-called Fugitive Slave Clause, for example, makes no mention of "fugitive slaves." Nor does the Domestic Insurrections Clause refer to "slave insurrections," as Thompson's paraphrase led listeners to believe. Read the text of the Constitution, Douglass urged his listeners, and "[y]ou will notice there is not a word said there about 'slave trade,' not a word said there about 'slave insurrections;' not a word there about 'three-fifths representation of slaves.'"[21]

Douglass himself, however, was not entirely averse to stepping outside the text to interpret the Constitution. Much of his own analysis of the Slave Trade Clause referred to its original meaning—what it was understood to mean when it was written.[22] "At the time the constitution was adopted," Douglass explained, "the slave trade was regarded as the jugular vein of slavery itself, and it was thought that slavery would die with the death of the slave trade."[23] This is what the pioneering abolitionists of the time believed. "Their theory was—cut off the stream, and of course the pond or lake would dry up."[24] So, too, with the men who framed the Constitution. In "making provision for the abolition of the African slave-trade they were making provision for the abolition of slavery itself, and they incorporated this clause in the constitution."[25] Thus the Slave Trade Clause made the Constitution "anti-slavery, because it looked to the abolition of slavery rather than to its perpetuity."[26] For anyone interested in what the Founders *thought* they were doing, Douglass argued, the Slave Trade Clause "showed that the intentions of the framers were good, not bad."[27]

But in considering the Framers' intent, Douglass was not necessarily violating his textualist principles. He had allowed that the Founders' intentions could be referenced "only so far" as they were supported by the text, and so Douglass returned to the text. Read literally, the Slave Trade Clause "*said to the states,*—If you would purchase the privileges of this Union, you must consent that the humanity of this nation shall lay its hand upon this traffic."[28] He might have added that this was the first time in the history of the world that any nation had laid its hand upon that nefarious traffic by establishing a legal mechanism for ending the importation of enslaved people.

Douglass turned next to what was alleged to be a slave insurrections clause. In truth, he began, "there is no such clause in the constitution."[29] No doubt the Constitution empowered Congress to "suppress insurrections" or repel invasion,[30] but it did not specify "slave" insurrections. On the contrary, the clause authorized the federal government to *emancipate* slaves in the very process of suppressing insurrections. Echoing an interpretation of the Constitution made famous by John Quincy Adams in 1836, Douglass explained that "the right to suppress an insurrection carries with it also the right to determine by what means the insurrection shall be suppressed."[31] If a rebellion erupted in the slave states and the President concluded that the cause was slavery—"a constant source of danger"—it would be his duty "*not only to put down the insurrection, but to put down the cause of the insurrection*."[32] These were, by 1860, familiar arguments among antislavery politicians, and indeed the war powers were to become the constitutional basis of military emancipation. Barely a year after Douglass gave his speech in Glasgow, Republican policy-makers were claiming that the war powers authorized the federal government not only to emancipate slaves, but also to destroy the institution that caused the rebellion.[33]

Douglass's reading of the Fugitive Slave Clause was less convincing. He gave a misleading account of its origins at the Constitutional Convention, and in so doing violated his own rule against referring to the convention debates. Douglass was responding to Thompson's own misleading rendering of the debate at the Constitutional Convention. According to Thompson, two South Carolina delegates, Charles Pinkney and Pierce Butler, "moved that the constitution should require fugitive slaves and servants to be delivered up like criminals."[34] Their proposal was to be appended to the Criminal Extradition Clause.[35] By treating enslaved people like criminals, the Constitution would obligate the states to enforce fugitive slave renditions. Thompson claimed that "the clause, as it stands in the constitution, was adopted."[36] Douglass denounced this rendering of the debate as a "*downright* UNTRUTH"[37]—and, in truth, Thompson's account left out several crucial details.

Thompson had quoted the Pinkney-Butler motion accurately, but he did not mention that James Wilson of Pennsylvania immediately objected that it "would oblige the Executive of the State to [return slaves] as a public expense."[38] This was a crucial objection, because the Criminal Extradition Clause to which Pinkney and Butler would attach their motion contained an enforcement provision requiring state authorities to cooperate.[39] Wilson did not want the Constitution to obligate states to enforce fugitive slave renditions. Roger Sherman of Connecticut objected on similar grounds. He "saw no more propriety in the public seizing and surrendering a slave or servant, than a horse."[40] States were obliged to return criminals, but neither Wilson nor Sherman thought states should be obliged to return fugitive slaves. Sherman added the suggestion that the northern public should not have to treat slaves like property.

The South Carolinians immediately withdrew the motion and returned the next day with what became a separate fugitive slave clause. This clause replaced the explicit enforcement provision of the Criminal Extradition Clause with the more ambiguous stipulation that fugitives "shall be delivered up."[41] (*Delivered by whom?* would become a major source of contention.) Thompson's account was misleading. It made no reference to the objections raised by Wilson and Sherman. It also implied, incorrectly, that the clause was adopted unchanged when, in fact, the Fugitive Slave Clause was divorced from the Criminal Extradition Clause, and the unambiguous requirement that states enforce fugitive slave renditions was removed from the final version.[42]

Douglass pounced on Thomson's defective account and offered instead his own misleading narrative of what happened in the convention. He exaggerated the reaction to the Pinkney-Butler motion, claiming it "was met by a storm of opposition in the convention; members rose

up in all directions."[43] He said the motion was sent back to committee with explicit instructions to use "the word *'servitude,' so that it might apply* NOT *to slaves,* but to freemen."[44] This is absurd. There was no committee and no such instruction. Pinkney withdrew his own motion, amended it, and returned the next day with the clause that became part of the Constitution. Douglass insisted that the Fugitive Slave Clause did not refer to slaves at all, a claim that would strike most people, then and now, as eccentric at best.

But it may also have been clever. By deliberately reading the Constitution in the most literal possible way, Douglass was making a serious legal point about the implications of ambiguous constitutional language. The Fugitive Slave Clause does not refer explicitly to "fugitive slaves."[45] This matters because, according to Douglass, the standard rules of legal or constitutional interpretation prohibit ambiguous language from being read as proslavery. Rather, if the language is unclear, "the law must be construed strictly in favor of justice and liberty." He did not make that doctrine up; he quoted Chief Justice John Marshall in support of it.[46] Even so, Douglass's claim that the Fugitive Slave Clause had nothing to do with fugitive slaves was quite a stretch. Even if the text itself was ambiguous, the original meaning of the clause was clear. If nothing else, Douglass's approach suggests the limits of a purely textualist approach to constitutional interpretation.

What, then, did Douglass make of the notorious Three-Fifths Clause? Most antislavery folks resented it because they read it as giving the slave states extra power in the House of Representatives and the electoral college. Lincoln, for example, argued that because the Three-Fifths Clause favored the slave states in a way that was humiliating to the free states, the latter had a direct interest in preventing the admission of any new slave states by banning slavery from the territories. On the other hand, proslavery southerners sometimes claimed that the Three-Fifths Clause discriminated against the slave states. At the constitutional convention itself in 1787, the slave states demanded that all the slaves, five-fifths, be counted. They didn't get what they wanted, and by the 1850s, some proslavery southerners were calling for the *repeal* of the Three-Fifths Clause. Repeal would enhance the South's power because, in a constitution that otherwise based representation on population, removing the clause would mean that all the slaves—five-fifths—would be counted.

Douglass, as usual, started from the premise that the Three-Fifths Clause had nothing to do with slavery because it referred not to "slaves" but to "other persons."[47] But even assuming "the very worst construction," that the Three-Fifths Clause *did* refer to slavery, the question remained: "what does it amount to?"[48] It was, Douglass argued, a standing rebuke to the slave states, a punishment for the enslavement of millions—and a built-in constitutional incentive for the slave states to increase their political power by abolishing slavery. According to Douglass, "A [B]lack man in a free State is worth just two-fifths more than a [B]lack man in a slave State . . . . Therefore, instead of encouraging slavery, the constitution encourages freedom, by *holding out to every slaveholding State the inducement of an increase of two-fifths of political power by becoming a free State*."[49]

In truth, hardly anyone in the larger antislavery movement agreed with Douglass's interpretation of the Three-Fifths Clause or the Fugitive Slave Clause. Clearly there was (and is) no such thing as *the* "abolitionist" interpretation of the Constitution. Douglass's abolitionist reading clearly differed from that of George Thompson and the Garrisonians, but it differed from the antislavery constitutionalism of the Republican Party as well. Douglass himself acknowledged that hardly any of slavery's opponents had accepted the abolitionist—as opposed to the antislavery—interpretation of the Constitution. And yet . . .

In Glasgow, Douglass trained nearly all his ammunition at Garrison's proslavery interpretation of the Constitution. By contrast, he was surprisingly receptive to mainstream antislav-

ery constitutionalism. He referred to the Republicans as "the anti-slavery party" and looked forward to their imminent victory at the polls.[50] "The slaveholders have ruled the American government for the last fifty years," he declared; "let the anti-slavery party rule the nation for the next fifty years."[51] Proslavery men in control of the Supreme Court have "given the constitution a pro-slavery interpretation," he argued; "let us by our votes put men into the Supreme Court who will decide, and who will concede, that the constitution is not [pro-]slavery."[52] Douglass understood that for all the differences between abolitionist and antislavery constitutionalism, the two approaches had a great deal in common.[53]

Nowhere was this overlap clearer than in the rejection of the proslavery claim that the Constitution protected slave ownership as a right of property. Here, even Douglass's anomalous reading of the Fugitive Slave Clause was based on a premise shared by virtually all antislavery politicians. They emphasized that the clause referred to enslaved individuals as "persons" rather than "property." This had major implications for antislavery politics. If the Constitution recognized enslaved individuals as persons, the Fugitive Slave Clause could not be enforced without disregarding the due process rights to which all "persons" were constitutionally entitled. The Fifth Amendment decrees that "No person shall be deprived of life, liberty, or property without due process of law."[54] The 1860 Republican Party platform quoted the Fifth Amendment, and so did Frederick Douglass.

Abraham Lincoln called for a revision of the despised Fugitive Slave Law of 1850 to ensure that no person would be deprived of the privileges and immunities to which all citizens were entitled. He specifically called for jury trials for accused fugitives. Douglass said the same thing in Glasgow. "The constitution declares that no person shall be deprived of life, liberty, or property without due process of law; it secures to every man the right of trial by jury; it also declares that the writ of *habeas corpus* shall never be suppressed."[55] The Fifth Amendment would have been irrelevant if the Constitution referred to enslaved people as property rather than persons.

The constitutional personhood of enslaved people was a core precept of antislavery constitutionalism. It was a major theme of Abraham Lincoln's famous Cooper Union address, delivered in New York a month before Douglass's Glasgow speech. Douglass thus stood firmly within the antislavery mainstream in his denunciation of the supposed right of "property in man." Despite his garbled interpretation of the origins of the Fugitive Slave Clause at the Constitutional Convention, he was correct to point out that Charles Pinckney seemed to be trying to get something into the Constitution that would recognize enslaved persons as property. He cited James Madison's objection to "*the idea that there could be property in men*" described anywhere in the document.[56] Douglass's reading is supported by recent scholarship highlighting that the references to enslaved individuals as "persons" throughout the Constitution were more than a euphemistic evasion by the Founders who were embarrassed by their own compromises.

What *was* in the constitutional text was a preamble that seemed to rule out the legitimacy of slavery. The purpose of the government, it declared, was to "secure the blessings of liberty" to everyone.[57] Republicans quoted it all the time, although less often than they quoted the promise of fundamental human equality in the Declaration of Independence. But Douglass had a powerful reading of the Preamble. He pointed out that it listed six different objects, or purposes, of the nation: union, defense, welfare, tranquility, justice, and liberty. "Slavery is not among them."[58] Proslavery southerners, Douglass noted, denied that the promise of liberty applied to enslaved people. "Who says this?" he asked.

The constitution does not say they are not included . . . . The constitution says "We the people;" the language is "we the people;" not we the [W]hite people, not we the citizens, not we the privileged class, not we the high, not we the low . . . but "we the people;" not we the horses,

sheep, and swine, and wheelbarrows, but we the human inhabitants; and unless you deny that negroes are people, they are included within the purposes of this government.[59]

In this refrain, Douglass echoed themes long familiar to slavery's critics. They began with a simple question: in the constitutional debate over slavery and freedom, why don't the clauses protecting freedom carry at least as much weight as the clauses referring to slavery? After all, there are far more clauses protecting freedom. It came down to a simple precept, repeated often among antislavery politicians: within the plain text of the Constitution, freedom is the rule; slavery is the exception.[60] Unlike Douglass, most antislavery politicians accepted that the Fugitive Slave and Three-Fifths Clauses referred to slavery.[61] But they agreed with Douglass that the Slave Trade Clause was an antislavery victory and that the Insurrections Clause empowered the government to emancipate slaves.[62] They agreed that the Preamble made liberty, not slavery, a fundamental purpose of the nation. They agreed that the Constitution recognized slaves as persons, not as property, and they agreed that all persons were entitled to the due process rights guaranteed by the Fifth Amendment. From these constitutional premises, abolitionists and antislavery politicians committed themselves to a set of federal policies designed to put slavery on a course toward its ultimate extinction.[63] As far back as the 1780s, northern states passed laws protecting the due process rights of accused fugitives and withheld state support for fugitive slave renditions. Most northern congressmen held that the Constitution empowered Congress to ban slavery from the territories, to require a territory to abolish slavery as a condition of admission to the Union, and to abolish slavery in Washington, D.C. Many argued that the Constitution empowered Congress to ban the Atlantic slave trade and the domestic coastwise slave trade. The Republican Party was the ideological heir to this antislavery constitutional and political tradition. Knowing this, Douglass was right to describe it as an antislavery party. He had good reason to look forward to its ascendancy.

I once thought that William Lloyd Garrison read the Constitution right when he burned it in public. It is now clear to me that when he stepped up onto that soapbox, Garrison made himself an outlier rather than a representative of the abolitionist movement. Abolitionist constitutionalism—the genuinely radical reading of the Constitution by men like William Goodell, Lysander Spooner, and Gerrit Smith—was at least as popular among antislavery radicals as Garrison's reading of the Constitution as a proslavery document. Abolitionist constitutionalism was certainly more influential and, as such, much closer to mainstream antislavery constitutionalism. Many of the constitutional arguments developed by radicals in the 1830s and 1840s were later adopted by antislavery politicians in the 1850s.[64]

To be sure, when Frederick Douglass claimed that the Three-Fifths Clause punished rather than rewarded the South, and when he denied that the Fugitive Slave Clause referred to fugitive slaves, he was saying things that virtually no antislavery politician would have said. But when Douglass denied that the Constitution protected a right of "property in man," when he invoked the Fifth Amendment's right of due process, and when he cited the "blessings of liberty" promised by the Preamble, Douglass stood squarely in the mainstream of antislavery politics (which by then had become far more radical). All of this is to say that when Frederick Douglass switched sides, he was not jumping from one extreme to another. Rather, he was moving closer to the vast army of antislavery men and women who, even as he spoke at Glasgow in 1860, were poised to take control of the federal government and put slavery, once and for all, on a course of ultimate extinction.

James Oakes is the author of several books on slavery, antislavery, and emancipation, including *The Radical and the Republican: Frederick Douglass, Abraham Lincoln, and the Triumph of Antislavery Politics* and, most recently, *The Crooked Path to Abolition: Abraham Lincoln and the Antislavery Constitution*.

[1]. Henry Mayer, All on Fire: William Lloyd Garrison and the Abolition of Slavery 443–45 (1998).
[2]. *Id.*
[3]. The Declaration of Independence para. 2 (U.S. 1776).
[4]. *See generally* James Oakes, The Crooked Path to Abolition: Abraham Lincoln and the Antislavery Constitution (2020).
[5]. Mayer, *supra* note 1, at 443–45.
[6]. Frederick Douglass, Farewell to the British People, An Address Delivered in London, England (Mar. 30, 1847), *reprinted in Farewell to the British People*, Yale MacMillan Ctr., https://glc.yale.edu/farewell-british-people [https://perma.cc/YWC2-GU7Q].
[7]. *Id.*
[8]. *Id*.
[9]. *See* James Oakes, The Radical and the Republican: Frederick Douglass, Abraham Lincoln, and the Triumph of Antislavery Politics 14–21 (2007); David W. Blight, Frederick Douglass: Prophet of Freedom 214–17 (2018).
[10]. 2 Frederick Douglass, The Life and Writings of Frederick Douglass: Pre-Civil War Decade, 1850–1860, at 480 (Philip S. Foner ed., 1950).
[11]. Frederick Douglass, The American Constitution and the Slave, Speech in Glasgow, Scotland (Mar. 26, 1860) [hereinafter Douglass, Speech in Glasgow, Scotland], *in* 3 The Frederick Douglass Papers, Series One: Speeches, Debates, and Interviews: 1855–1863, at 340, 366 (John W. Blassingame, Gerald Fulkerson, Richard G. Carlson, John R. McKivigan & Jason H. Silverman eds., 1985).
[12]. *Id.*
[13]. *Id.* at 346.
[14]. *See* William M. Wiecek, The Sources of Antislavery Constitutionalism in America, 1760–1848, at 249–75 (1977).
[15]. Here, I borrow the distinction between *antislavery* constitutionalism and *abolitionist* constitutionalism developed in Manisha Sinha, The Slave's Cause: A History of Abolition 202–27 (2016).
[16]. Douglass, Speech in Glasgow, Scotland, *supra* note 11, at 347.
[17]. U.S. Const. art. I, § 9, cl. 1 (expired in 1808).
[18]. *Id.* art. IV, § 2, cl. 3, *repealed by id.* amend. XIII.
[19]. *Id.* art. I, § 2, cl. 3, *repealed by id.* amend. XIV.
[20]. Douglass, Speech in Glasgow, Scotland, *supra* note 11, at 350; U.S. Const. art. I, § 8, cl. 15.
[21]. Douglass, Speech in Glasgow, Scotland, *supra* note 11, at 351–52.
[22]. *Id.*
[23]. *Id.*
[24]. *See id.* at 353–54.
[25]. *Id.* at 354.
[26]. *Id.*
[27]. *Id.*
[28]. *Id.* at 354.
[29]. *Id.* at 354–55.
[30]. U.S. Const. art. I, § 8, cl. 15.
[31]. Douglass, Speech in Glasgow, Scotland, *supra* note 11, at 354.
[32]. *Id.*
[33]. *See generally* James Oakes, Freedom National: The Destruction of Slavery in the United States, 1861–1865 (2012).
[34]. Thompson's speech is mentioned in Frederick Douglass, *The Constitution of the United States: Is It Pro-Slavery or Anti-Slavery* [hereinafter Douglass, *The Constitution of the United States*], *in* 2 The Life and Writings of Frederick Douglass 467 (Philip S. Foner ed., 1950).
[35]. U.S. Const. art. IV, § 2, cl. 2.
[36]. Douglass, *The Constitution of the United States*, *supra* note 34, at 467.
[37]. *Id.*
[38]. James Madison, Notes of Debates in the Federal Convention of 1787 Reported by James Madison 545 (1787).
[39]. *See* U.S. Const. art. IV, § 2, cl. 2.
[40]. Madison, *supra* note 38, at 545–46.
[41]. U.S. Const. art. IV, § 2, cl. 3 (Fugitive Slave Clause), *repealed by* U.S. Const. amend. XIII.
[42]. Madison, *supra* note 38, at 545.
[43]. *See* Douglass, Speech in Glasgow, Scotland, *supra* note 11, at 357.
[44]. *Id.*
[45]. *See* U.S. Const. art. IV, § 2, cl. 3, *repealed by* U.S. Const. amend. XIII.
[46]. Douglass, Speech in Glasgow, Scotland, *supra* note 11, at 359.
[47]. *Id.* at 352.
[48]. *Id.*; *see id.* at 365–66.
[49]. *Id.* at 352.
[50]. *Id.* at 365.
[51]. *Id.*
[52]. *Id.*
[53]. *See id.* at 365–66.
[54]. U.S. Const. amend. V.
[55]. Douglass, Speech in Glasgow, Scotland, *supra* note 11, at 362.
[56]. *Id.* at 357.
[57]. U.S. Const. pmbl.
[58]. *See* Oakes, *supra* note 4, at 26–53.
[59]. Douglass, Speech in Glasgow, Scotland, *supra* note 11, at 361.
[60]. *See* Oakes, *supra* note 4, at 26–53.
[61]. *Id.*
[62]. *See id.*
[63]. Oakes, *supra* note 4, at xix.
[64]. Various scholars have traced the origins of the Fourteenth Amendment to abolitionist constitutionalism. *See generally* Jacobus tenBroek, Equal Under Law (1965); Kate Masur, Until Justice Be Done: America's First Civil Rights Movement, from the Revolution to Reconstruction (2021); Randy E. Barnett & Evan D. Bernick, The Original Meaning of the Fourteenth Amendment: Its Letter and Spirit (2021).

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SOTOMAYOR, KAGAN, KAVANAUGH, BARRETT, and JACKSON, JJ., joined. KAGAN, J., filed a concurring opinion, in which SOTOMAYOR, KAVANAUGH, and BARRETT, JJ., joined. JACKSON, J., filed a concurring opinion. ALITO, J., filed a dissenting opinion, in which GORSUCH, J., joined.

I

Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act in response to the 2008 financial crisis. The Act created an independent financial regulator within the Federal Reserve System known as the Bureau of Consumer Financial Protection. Congress charged the Bureau with enforcing consumer financial protection laws to ensure "that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive." The Act consolidated in the Bureau the authority to administer 18 existing consumer protection statutes, among them the Fair Debt Collection Practices Act, the Fair Credit Reporting Act, and the Home Mortgage Disclosure Act of 1975. Additionally, the Act made it unlawful for those offering consumer financial products and services "to engage in any unfair, deceptive, or abusive act or practice." Congress vested the Bureau with rulemaking, enforcement, and adjudicatory authority over the statutes that it administers.

In addition to vesting the Bureau with sweeping authority, Congress shielded the Bureau from the influence of the political branches. To insulate the Bureau from the President's control, Congress put a single Director with a 5-year term at the Bureau's helm and made the Director removable only for inefficiency, neglect, or malfeasance. This Court held in *Seila Law* that the combination of single-Director leadership and for-cause removal protection unconstitutionally circumscribed the President's ability to oversee the Executive Branch.

This case involves another one of the Bureau's novel structural features, one that limits Congress' control. Congress supplies most federal agencies with the funds necessary for their operations only on an annual basis, so those agencies must ask Congress for renewed funding each year. For the Bureau, however, Congress diminished this accountability by providing the Bureau a standing source of funding outside the ordinary annual appropriations process. Each year, the Bureau may requisition from the earnings of the Federal Reserve System "the amount determined by the [Bureau's] Director to be reasonably necessary to carry out" its duties, subject only to a statutory cap. The Bureau cannot request more than 12 percent of the Federal Reserve System's total operating expenses as reported in fiscal year 2009 (adjusted for inflation). In fiscal year 2022, that cap was about $734 million. The Bureau can also retain and invest unused funds from year to year, though the Director must take into account any surplus when requesting additional funds.

In 2017, the Bureau promulgated a regulation focused on high-interest consumer loans. See Payday, Vehicle Title, and Certain High-Cost Installment Loans. Among other things, the regulation restricts lenders' ability to obtain loan payments through preauthorized account access after two unsuccessful withdrawal attempts. The Community Financial Services Association of America and Consumer Service Alliance of Texas, trade associations that represent payday lenders and credit-access businesses, challenged the Payday Lending Rule on statutory and constitutional grounds. In the operative complaint, the associations argued, among other things, that the Bureau "takes federal government money without an appropriations act" in violation of the Appropriations

Clause.

The District Court granted summary judgment to the Bureau. The Court of Appeals reversed. We granted certiorari to address the narrow question whether the statute that provides funding to the Bureau violates the Appropriations Clause. We now reverse.

II

Under the Appropriations Clause, an appropriation is simply a law that authorizes expenditures from a specified source of public money for designated purposes. The statute that provides the Bureau's funding meets these requirements. We therefore conclude that the Bureau's funding mechanism does not violate the Appropriations Clause.

A

The Appropriations Clause provides that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." Art. I, § 9, cl. 7. Textually, the command is unmistakable—"no money can be paid out of the Treasury unless it has been appropriated by an act of Congress." *Cincinnati Soap Co. v. United States*.

As a threshold matter, the parties agree that the Bureau's funding must comply with the Appropriations Clause. The Appropriations Clause applies to money "drawn from the Treasury." Art. I, § 9, cl. 7. The Bureau draws money from the Federal Reserve System. And, surplus funds in the Federal Reserve System would otherwise be deposited into the general fund of the Treasury. Whatever the scope of the term "Treasury" in the Appropriations Clause, money otherwise destined for the general fund of the Treasury qualifies. The Bureau's funding is therefore subject to the requirements of the Appropriations Clause.

The associations' challenge turns solely on whether the Bureau's funding mechanism constitutes an "Appropriatio[n] made by Law." Based on the Constitution's text, the history against which that text was enacted, and congressional practice immediately following ratification, we conclude that appropriations need only identify a source of public funds and authorize the expenditure of those funds for designated purposes to satisfy the Appropriations Clause.

1

The Constitution's text requires an "Appropriatio[n] made by Law." Art. I, § 9, cl. 7. Our concern is principally with the meaning of the word "appropriation." The Constitution's use of the term "appropriation" in the Appropriations Clause and in other Clauses provides important contextual clues about its meaning. To state the obvious, the Appropriations Clause itself makes clear that an appropriation must authorize withdrawals from a particular source—the public treasury. It provides that money may be "drawn from the Treasury" only "in Consequence of Appropriations made by Law." Cl. 7. The section preceding the Appropriations Clause further suggests that appropriations assign funds for specific uses: Congress has the power to "raise and support Armies," but subject to the limitation that "no Appropriation of Money to that Use shall be for a longer Term than two Years." § 8, cl. 12.

At the time the Constitution was ratified, "appropriation" meant "[t]he act of sequestering, or assigning to a particular use or person, in exclusion of all others." 1 N. Webster, An American Dictionary of the English Language (1828); see also 1 J. Ash, The New and Complete Dictionary of the English Language (2d ed. 1795) ("[t]he application of something to a particular use"); 1 S. Johnson, A Dictionary of the English Language (6th ed. 1785) ("[t]he application of something to a particular purpose"); T. Dyche & W. Pardon, A New General English Dictionary (14th ed. 1771) ("the appointing a thing to a particular use"). In ordinary usage, then, an appropriation of public money would be a law authorizing the expenditure of particular funds for specified ends.

Taken as a whole, this evidence suggests that, at a minimum, appropriations were understood as a legislative means of authorizing expenditure from a source of public funds for designated purposes.

2

Pre-founding history supports the conclusion that an identified source and purpose are all that is required for a valid appropriation. The concept of legislative "appropriations" grew out of the broader struggle for popular control of the purse in England. Throughout the Middle Ages, the King enjoyed near total fiscal independence. At that time, the King's revenues came largely from hereditary sources, sometimes called "ordinary" revenues. 1 W. Blackstone, Commentaries on the Laws of England 281 (1771) (Commentaries). These ordinary revenues flowed from many sources, including the "rents and profits of the demesne lands of the crown," and the fines, forfeitures, and fees "arising from the king's ordinary courts of justice." Because this revenue inhered in the King himself, Parliament had little claim to direct how it was spent. See F. Maitland, The Constitutional History of England 430 (1908) (Maitland).

But, when these unencumbered ordinary revenues did not satisfy the demands of royal governance, most often during wartime, the King had to seek what Blackstone called "*extraordinary* revenue." Extraordinary revenues were financed through various forms of taxation and therefore required parliamentary authorization. See Magna Charta, ch. 12 (1215). In granting extraordinary revenues, Parliament began exercising an attendant power to specify how the Crown used these funds. Maitland 183–184; see also T. Taswell-Langmead, English Constitutional History: From the Teutonic Conquest to the Present Time 219, 229 (6th ed. 1905) (Taswell). That is, Parliament "claimed the power to appropriate the supplies granted to the king." Maitland 183–184.

Conditions in the 17th century shifted the balance of power toward Parliament. A combination of rising prices and increasing demands made it so that the King's ordinary revenues could not satisfy the costs of royal governance, even in times of peace. The King's financial weakness, and Parliament's increasing assertiveness in appropriating extraordinary revenues, led to intragovernmental strife. The ensuing power struggle culminated in the Glorious Revolution, in which Parliament stripped away the remnants of the King's hereditary revenues and thereby secured supremacy in fiscal matters. Commentaries 306, 333; Maitland 434.

Following the Glorious Revolution, Parliament's usual practice was to appropriate government revenue "to particular purposes more or less narrowly defined." Additionally, Parliament began limiting the duration of its revenue grants. For example, the duties on tonnage and poundage were no longer granted to the King for life, but only for a term of years. Limiting the duration of these and other revenue grants ensured that the King could not rule without Parliament. As one historian described it, Parliament made sure "the Crown should be altogether unable to pay its way without an annual meeting of Parliament.... Every year he and his Ministers had to come, cap in hand, to the House of Commons, and more often than not the Commons drove a bargain and exacted a *quid pro quo* in return for supply."

Even with this newfound fiscal supremacy, Parliament did not micromanage every aspect of the King's finances. Not all post-Glorious Revolution grants of supplies were time limited. A notable exception involved what came to be known as the civil list. Despite its established power to limit the duration of revenue grants, Parliament deemed it proper to cover the expenses of the King's household and the civil government by appropriating revenue to that purpose for life. And, parliamentary grants of supplies ordinarily gave the Crown broad discretion regarding how much to spend within an appropriated sum. Statutes granting money

often stated that the Crown could spend "any Sum not exceeding" a particular amount. These grants were permissive. As Maitland explained, "Money is granted to the queen; it is placed at the disposal of her and her ministers. But she and they are not bound by law to spend it, at least not bound by the Appropriation Act." Other parliamentary appropriations acts, however, *required* that money be spent for particular purposes.

The appropriations practice in the Colonies and early state legislatures was much the same. "When called upon to grant supplies," the lower houses in the colonial assemblies "insisted upon appropriating them in detail." Many early state constitutions vested the legislative body with power over appropriations. And, in exercising that authority, state legislative bodies often opted for open-ended, discretionary appropriations.

By the time of the Constitutional Convention, the principle of legislative supremacy over fiscal matters engendered little debate and created no disagreement. It was uncontroversial that the powers to raise and disburse public money would reside in the Legislative Branch. The only disagreement was about whether the right to originate taxation and appropriations bills should rest in a legislative body with proportionate representation. Having reached a tentative agreement on that difference, the Committee of Detail reported a draft constitution giving the House of Representatives the power to originate all revenue and appropriations laws. This proposed draft contained the prototype of what later became the Appropriations Clause. It provided that "[a]ll bills for raising or appropriating money ... shall originate in the House of Representatives, and shall not be altered or amended by the Senate. No money shall be drawn from the public Treasury, but in pursuance of appropriations that shall originate in the House of Representatives." Ultimately, the Convention agreed to grant the House an exclusive power to originate revenue laws but not for appropriations laws. Compare Art. I, § 7, cl. 1, with § 9, cl. 7.

In short, the origins of the Appropriations Clause confirm that appropriations needed to designate particular revenues for identified purposes. Beyond that, however, early legislative bodies exercised a wide range of discretion. Some appropriations required expenditure of a particular amount, while others allowed the recipient of the appropriated money to spend up to a cap. Some appropriations were time limited, others were not. And, the specificity with which appropriations designated the objects of the expenditures varied greatly.

3

The practice of the First Congress also illustrates the source-and-purpose understanding of appropriations. This practice "provides contemporaneous and weighty evidence of the Constitution's meaning."

Many early appropriations laws made annual lump-sum grants for the Government's expenses. Congress' first annual appropriations law, for instance, divided Government expenditures into four broad categories and authorized disbursements up to certain amounts for those purposes. For example, the law appropriated a "sum not exceeding two hundred and sixteen thousand dollars for defraying the expenses of the civil list," which covered most nonmilitary executive officers' salaries and expenses. And, it appropriated "a sum not exceeding one hundred and thirty-seven thousand dollars for defraying the expenses of the department of war." 1 Stat. 95. The law specified that the disbursements would "be paid out of the monies which arise, either from the requisitions heretofore made upon the several states, or from the duties on impost and tonnage." Subsequent annual appropriations laws followed a similar pattern.

The appropriation of "sums not exceeding" a specified amount did not by itself mandate that the Executive spend that amount; as was the case in England, such appropriations instead provided the Executive discretion over how

much to spend up to a cap. In 1803, for instance, Congress appropriated "a sum not exceeding fifty thousand dollars" to build up to "fifteen gun boats." President Jefferson subsequently reported, however, that "[t]he sum of fifty thousand dollars appropriated by Congress for providing gun boats remains unexpended. The favorable and peaceable turn of affairs on the Mississippi rendered an immediate execution of that law unnecessary."

Congress took even more flexible approaches to appropriations for several early executive agencies and allowed the agencies to indefinitely fund themselves directly from revenue collected. Soon after convening, Congress enacted laws that imposed a detailed schedule of duties on imported goods and tonnage. It then divided the Nation into customs districts and established a vast federal bureaucracy to oversee the collection of those duties. Rather than fund those customs officials through annual appropriations, Congress opted for a fee-based model. Customs collectors were compensated through tonnage- and transaction-based fees specified by law, and through a commission on the amount of duties raised within their districts. For example, customs collectors were entitled to collect from merchants two-and-a-half dollars "for every entrance of any ship or vessel of one hundred tons burthen or upwards" and 20 cents "for every permit to land goods." And, collectors in the largest ports were paid "half a per centum on the amount of all monies by them respectively received and paid into the treasury of the United States." Other customs functionaries were also compensated on a fee basis. For instance, customs collectors paid weighers 18 cents "out of the revenue" collected "for the measurement of every one hundred bushels of salt or grain."

Congress adopted a similarly open-ended funding scheme for the Post Office. Instead of appropriating funds on an annual basis, Congress authorized the Postmaster General to "defray the expense" of carrying the mail of the United States with the revenues generated through postage assessments. The postal statute also provided the Postmaster General a $2,000 annual salary "to be paid ... out of the revenues of the post-office." And, it authorized the Postmaster General to pay deputy postmasters "such commission on the monies arising from the postage of letters and packets, as he shall think adequate to their respective services," subject to an upper limit. These fee-based funding schemes continued year after year without Congress passing an annual appropriation for these agencies.

These fee- and commission-based funding schemes were not an American innovation; they emulated the colonial precursors to the Customs Service and Post Office. Colonial customs officers, for instance, "were paid a percentage of total receipts in their area, the proportion varying from colony to colony depending on the estimated potential yield." Although the customs service in the Colonies later transitioned to a salary system, each customs "official was allowed certain fees for almost every transaction." And, as to the postal service, the Continental Congress allowed postmaster deputies 20 percent "on the sums they collect and pay into the General post office annually," up to $1,000, and 10 percent on sums over that amount. 2 Journals of the Continental Congress.

Postratification practice therefore confirms our interpretation of the Appropriations Clause. Early appropriations displayed significant variety in their structure. Each, however, adhered to the minimum requirements of an identifiable source of public funds and purpose.

B

The Bureau's funding statute contains the requisite features of a congressional appropriation. The statute authorizes the Bureau to draw public funds from a particular source—"the combined earnings of the Federal Reserve System," in an amount not exceeding an inflation-adjusted cap. And, it specifies the objects for which the Bureau can use those funds—to "pay

the expenses of the Bureau in carrying out its duties and responsibilities."

Further, the Bureau's funding mechanism fits comfortably with the First Congress' appropriations practice. In design, the Bureau's authorization to draw an amount that the Director deems reasonably necessary to carry out the agency's responsibilities, subject to a cap, is similar to the First Congress' lump-sum appropriations. And, the commission- and fee-based appropriations that supplied the Customs Service and Post Office provided standing authorizations to expend public money in the same way that the Bureau's funding mechanism does.

For these reasons, we conclude that the statute that authorizes the Bureau to draw funds from the combined earnings of the Federal Reserve System is an "Appropriatio[n] made by Law." We therefore hold that the requirements of the Appropriations Clause are satisfied.

III

The associations make three principal arguments for why the Bureau's funding mechanism violates the Appropriations Clause, each of which attempts to build additional requirements into the meaning of an "Appropriatio[n] made by Law." None is persuasive.

A

At the outset, the associations argue that the Bureau's funding is not "drawn ... in Consequence of Appropriations made by Law" because the agency, rather than Congress, decides the amount of annual funding that it draws from the Federal Reserve System. This argument proceeds from a mistaken premise. Congress determined the amount of the Bureau's annual funding by imposing a statutory cap. The Bureau's funding statute provides that "the amount that shall be transferred to the Bureau in each fiscal year shall not exceed" 12 percent "of the total operating expenses of the Federal Reserve System" as reported in 2009 and adjusted for inflation. The only sense in which the Bureau decides its own funding, then, is by exercising its discretion to draw less than the statutory cap. But, as we have explained, "sums not exceeding" appropriations, which provided the Executive with the same discretion, were commonplace immediately after the founding. Thus, we cannot conclude that Congress violated the Appropriations Clause by permitting the Bureau to decide how much funding to draw up to a cap.

B

Next, the associations suggest that the Bureau's funding statute is not a valid appropriation because it is not time limited. On their reading, the Appropriations Clause requires both Chambers of Congress to periodically agree on an agency's funding, which ensures that each Chamber reserves the power to unilaterally block those funding measures through inaction. The Bureau's funding mechanism, the associations insist, inverts this baseline by allowing it to draw funds—forever—unless both Chambers of Congress step in and affirmatively prevent the agency from doing so.

But, the Constitution's text suggests that, at least in some circumstances, Congress can make standing appropriations. The Constitution expressly provides that "no Appropriation of Money" to support an army "shall be for a longer Term than two Years." Art. I, § 8, cl. 12. Hamilton explained that this restriction ensures that, for the army, Congress cannot "vest in the Executive department ... permanent funds" and must instead "once at least in every two years ... deliberate upon the propriety of keeping a military force on foot," "come to a new resolution on the point," and "declare their sense of the matter, by a formal vote in the face of their constituents." The Framers were thus aware of the dynamic that the associations highlight, but they did not explicitly limit the duration of appropriations for other purposes.

The First Congress' practice confirms this understanding. Recall that the appropriations that supplied funding to the Customs Service and

the Post Office were not time limited. The associations resist the analogy to the Post Office and other fee-based agencies, arguing that such agencies do not enjoy the same level of fiscal independence as the Bureau. Fee-based agencies, the associations reason, "could not demand funds from the federal fisc, but rather needed to persuade the people they served to pay them, and the public could refuse to purchase to influence their conduct." The associations, however, make no attempt to explain why the possibility that the public's choices could restrain fee-based agencies' revenue is relevant to the question whether a law complies with the constitutional imperative that there be an appropriation.

C

Finally, the associations contend that the Bureau's funding mechanism provides a blueprint for destroying the separation of powers, and that it invites tyranny by allowing the Executive to operate free of any meaningful fiscal check. If the Bureau's funding mechanism is consistent with the Appropriations Clause, the associations reason, then Congress could do the same for any—or every—civilian executive agency. And that, they conclude, would be the very unification of the sword and purse that the Appropriations Clause forbids.

The associations err by reducing the power of the purse to only the principle expressed in the Appropriations Clause. To be sure, the Appropriations Clause presupposes Congress' powers over the purse. But, its phrasing and location in the Constitution make clear that it is not itself the source of those powers. The Appropriations Clause is phrased as a limitation: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." Art. I, § 9. And, it is placed within a section of other such limitations. Compare *ibid.* ("No Bill of Attainder or ex post facto Law shall be passed") and *ibid.* ("No Tax or Duty shall be laid on Articles exported from any State"), with § 8 ("The Congress shall have Power To ..."). The associations offer no defensible argument that the Appropriations Clause requires more than a law that authorizes the disbursement of specified funds for identified purposes. Without such a theory, the associations' Appropriations Clause challenge must fail.

IV

The dissent's theory fares no better. The dissent accepts that the question in this case is ultimately about the meaning of "Appropriations." It faults us for consulting dictionaries to ascertain the original public meaning of that word, insisting instead that "Appropriations" is a "term of art whose meaning has been fleshed out by centuries of history." But, as we have explained at length, both preratification and postratification appropriations practice support our source-and-purpose understanding. What is more, the dissent never offers a competing understanding of what the word "Appropriations" means. After winding its way through English, Colonial, and early American history about the struggle for popular control of the purse, the dissent declares that "the Appropriations Clause demands legislative control over the source and disposition of the money used to finance Government operations and projects." The dissent never connects its summary of history back to the word "Appropriations." And, even setting that problem aside, it is unclear why the dissent's theory leads to a different outcome: Congress controls the "source and disposition of the money used to finance Government operations and projects" by enacting a law that identifies the source of public funds and authorizes the expenditure of those funds for designated purposes.

The dissent's rendition of history largely ignores the historical evidence that bears most directly on the meaning of "Appropriations" at the founding—preratification appropriations laws. For example, the dissent spends pages recounting how Parliament secured fiscal supremacy and wielded that power to superintend the King. Although that history is a helpful

starting point, it at most explains why appropriations must be "made by Law"—not what it means for the legislature to make an "Appropriation." The dissent does not meaningfully grapple with the many parliamentary appropriations laws that preserved a broad range of fiscal discretion for the King. It makes no attempt to explain "sums not exceeding" appropriations. And, the dissent brushes aside the civil list, asserting that it " 'presented a constitutional problem in the conflict between the principle of the independence of the Crown and the principle of parliamentary control of finance.' " The problem was that the King claimed absolute power to use the sums granted in the civil list as he pleased and regularly spent in excess of the allotted amount. See *id.,* at 320, 324–329. But, the dissent never explains why the reforms that Parliament adopted in response to these abuses bear on whether the law establishing the civil list was an "appropriation."

The dissent's treatment of early American history does not advance its point either. It highlights the undisputed point that colonial and state legislative bodies exercised the power of the purse while sidestepping the discretionary and open-ended appropriations they enacted. The dissent quibbles with the open-ended appropriations laws that we rely on, speculating that state constitutions somehow constrained the breadth of those laws. But, the dissent never explains how these constitutional provisions informed what it meant for state legislative bodies to make an "appropriation" and, in any event, its critique misses the point: It was commonplace for preratification appropriations laws to be open-ended in a way that is not consistent with the specificity that the dissent's theory appears to require.

When the dissent turns to postratification history, it engages with several appropriations laws enacted by the First Congress. The dissent acknowledges, as it must, that the fee- and commission-based funding schemes for the Customs Service and Post Office show that Congress exercised broad discretion over how to appropriate money. To square these funding schemes with its understanding of the Appropriations Clause, the dissent points out that Congress required "fees in excess of what was needed to defray the cost of providing services be turned over to the Treasury." This requirement, the dissent reasons, "ensured that Congress maintained control over the ways in which [the appropriated] money was spent." But, if what matters is that Congress controls how funds are spent, then we are all in agreement—appropriations must designate the purposes for which money can be spent.

Even under the dissent's "legislative control" theory, its attempt to distinguish the Customs Service and the Post Office from the Bureau is not convincing. The dissent points out that Congress had control over the Customs Service, for instance, because Customs had a "carefully delineated mission" and "early tariff Acts spelled out in excruciating detail the various fees" customs officers could collect, as well as the salaries the officers could be paid from those receipts. According to the dissent, the Bureau is different because "[i]ts powers are broad and vast," "[i]t does not collect fees," and "it is permitted to keep and invest surplus funds." But, it is unclear why these differences matter under the dissent's theory. After all, to make a valid appropriation, Congress must designate the objects for which the appropriated funds may be used—as it did here. Although there may be other constitutional checks on Congress' authority to create and fund an administrative agency, specifying the source and purpose is all the control the Appropriations Clause requires.

V

The statute that authorizes the Bureau to draw money from the combined earnings of the Federal Reserve System to carry out its duties satisfies the Appropriations Clause. Accordingly, we reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Justice KAGAN, with whom Justice SOTOMAYOR, Justice KAVANAUGH, and Justice BARRETT join, concurring.

I join in full the Court's opinion holding that the funding mechanism for the Consumer Financial Protection Bureau complies with the Appropriations Clause. As the Court details, that conclusion emerges from the Clause's "text, the history against which that text was enacted, and congressional practice immediately following ratification." At its inception, the Clause required only that Congress "identify a source of public funds and authorize the expenditure of those funds for designated purposes." The Clause otherwise granted Congress "a wide range of discretion." The result was "significant variety" in appropriations—most notably, as to their specificity, duration, and funding source. The CFPB's funding scheme, if transplanted back to the late-18th century, would have fit right in.

I write separately to note that the same would have been true at any other time in our Nation's history. "'Long settled and established practice' may have 'great weight'" in interpreting constitutional provisions about the operation of government. And here just such a tradition supports everything the Court says about the Appropriations Clause's meaning. The founding-era practice that the Court relates became the 19th-century practice, which became the 20th-century practice, which became today's. For over 200 years now, Congress has exercised broad discretion in crafting appropriations. Sometimes it has authorized the expenditure of a sum certain for an itemized purpose on an annual basis. And sometimes it has departed from that model in one or more ways. All the flexibility and diversity evident in the founding period has thus continued unabated, making it ever more obvious that the CFPB's funding accords with the Constitution.

For one thing, Congress has never thought it necessary to designate specific amounts for specific items. Over the years, many appropriations have instead given the Executive leeway to decide how to allocate funds, up to a ceiling, among a set of activities. As the Court shows, the First Congress made appropriations of "sums not exceeding" stated amounts for "broad categories" of purposes; the Executive then decided the level of funding it would use for all things within a category. In instituting those "lump-sum grants," the First Congress created a template for later ones to follow. Examples of such grants "abound in our history." *Clinton v. City of New York.* During the Civil War, Congress authorized the allocation of $76.5 million for various expenses "as the exigencies of the [Army] may require." In the Depression, Congress made $950 million available "for such projects and/or purposes" as the President "in his discretion may prescribe." More recent examples include an appropriation not to exceed $135 million for uses that the Secretaries of Defense and Energy determine are "necessary for Atomic Energy Defense Activities." The constitutionality of such measures, Justice Scalia observed, "has never seriously been questioned"—in part because of their prevalence. *Clinton.* Our government practice has been "replete with instances of general appropriations" to be "expended as directed by designated government agencies." The CFPB's authority to take and allocate moneys up to a statutory cap is just one more instance to add to the list.

Similarly, Congress has never thought appropriations must be annual, or even time-limited. (Appropriations that *are* time-limited themselves show variety: Most are annual, but some last for longer periods—say, two or five years.[*]) "Standing" appropriations—those making funds "always available for specified purposes" without "requir[ing] repeated [legislative] action"—have a long history. As the Court notes, the First Congress, by setting up fee-based schemes, provided the Customs Service and Post Office with indefinite funding. And in doing so, that Congress again inspired

its successors. Standing appropriations proliferated during the 19th century; by 1880, 138 statutes making them were on the books. And the growth has not stopped: By Fiscal Year 2022, spending that does not require periodic appropriations (whether annual or longer) accounted for nearly two-thirds of the federal budget. Frequently, too, standing appropriations do not designate specific sums of money, thus combining one type of flexibility with another. They instead may provide the sums "necessary for purposes of " a program—such as to provide unemployment assistance or give scholarships to veterans' dependents. So again, Congress's non-time-limited grant to the CFPB for amounts (up to a cap) "reasonably necessary to carry out" its duties falls within an established tradition.

And "flexible approaches to appropriations" have been particularly common in the sphere of financial regulation. There, Congress's adoption of assessment-based funding mechanisms (similar to those the First Congress used for the Customs Service and Post Office, has meant that regulators do not have to seek yearly legislative funding. And they generally may devote the funds they collect to any of a range of activities. For example, the Office of the Comptroller of the Currency has authority to levy assessments on banks as "necessary or appropriate to carry out [its] responsibilities." Similarly, the Federal Reserve Board assesses Federal Reserve Banks for whatever amount is "sufficient to pay its estimated expenses." Indeed, not a single federal bank regulator is currently, or has been for a long while, funded by standard congressional appropriations. The CFPB received from those regulators most of the powers it wields today. So it is not surprising that the CFPB also inherited a bank-funded scheme enabling it to allocate moneys, at its own discretion, to carry out its responsibilities.

I would therefore add one more point to the Court's opinion. As the Court describes, the Appropriations Clause's text and founding-era history support the constitutionality of the CFPB's funding. See *ante*, at 1481. And so too does a continuing tradition. Throughout our history, Congress has created a variety of mechanisms to pay for government operations. Some schemes specified amounts to go to designated items; others left greater discretion to the Executive. Some were limited in duration; others were permanent. Some relied on general Treasury moneys; others designated alternative sources of funds. Whether or not the CFPB's mechanism has an exact replica, its essentials are nothing new. And it was devised more than two centuries into an unbroken congressional practice, beginning at the beginning, of innovation and adaptation in appropriating funds. The way our Government has actually worked, over our entire experience, thus provides another reason to uphold Congress's decision about how to fund the CFPB.

Justice JACKSON, concurring.

Today, the Court correctly concludes that, based on the plain meaning of the text of the Appropriations Clause, "an appropriation is simply a law that authorizes expenditures from a specified source of public money for designated purposes." The statute that Congress passed to fund the Consumer Financial Protection Bureau easily meets the Appropriations Clause's minimal requirements. It authorizes the Bureau to withdraw money from "the combined earnings of the Federal Reserve System," 12 U.S.C. § 5497(a)(1), in order "to pay the expenses of the Bureau in carrying out its duties and responsibilities," § 5497(c)(1). In my view, nothing more is needed to decide this case.

Indeed, there are good reasons to go no further. When the Constitution's text does not provide a limit to a coordinate branch's power, we should not lightly assume that Article III implicitly directs the Judiciary to find one. The Constitution was "intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs." *McCulloch v. Maryland.* An essential aspect of the Constitu-

tion's endurance is that it empowers the political branches to address new challenges by enacting new laws and policies—without undue interference by courts. To that end, we have made clear in cases too numerous to count that nothing in the Constitution gives federal courts " 'some amorphous general supervision of the operations of government.' " Put another way, the principle of separation of powers manifested in the Constitution's text applies with just as much force to the Judiciary as it does to Congress and the Executive.

This case illustrates why. As the Court explains, in response to the devastation wrought by the 2008 financial crisis, Congress passed and the President signed the Dodd-Frank Wall Street Reform and Consumer Protection Act. In that statute, Congress chose to fund the Bureau outside of the annual appropriations process. Drawing on its extensive experience in financial regulation, Congress designed the funding scheme to protect the Bureau from the risk that powerful regulated entities might capture the annual appropriations process.

Respondents, two associations of payday lenders, represent exactly the type of entity the Bureau's progenitors sought to regulate and whose influence Congress may have feared. In urging us to find the Bureau's funding scheme unconstitutional, then, respondents would not only have us find unstated limits in the Constitution's text, they would have us undercut the considered judgments of a coordinate branch about how to respond to a pressing national concern.

Of course, to say that Congress had reasons for designing the Bureau's funding scheme in the manner it did is not to endorse those policy choices. "With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal." *Nebbia v. New York.* Instead, the Constitution places primary responsibility for checking the political branches with the People. It is to them that the Court rightly returns any remaining policy questions posed by today's case.

Justice ALITO, with whom Justice GORSUCH joins, dissenting.

Since the earliest days of our Republic, Congress's "power over the purse" has been its "most complete and effectual weapon" to ensure that the other branches do not exceed or abuse their authority. The Appropriations Clause protects this power by providing that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." Art. I, § 9, cl. 7. This provision has a rich history extending back centuries before the founding of our country. Its aim is to ensure that the people's elected representatives monitor and control the expenditure of public funds and the projects they finance, and it imposes on Congress an important duty that it cannot sign away. "Any other course" would give the Executive "a most dangerous discretion."

Unfortunately, today's decision turns the Appropriations Clause into a minor vestige. The Court upholds a novel statutory scheme under which the powerful Consumer Financial Protection Bureau (CFPB) may bankroll its own agenda without any congressional control or oversight. According to the Court, all that the Appropriations Clause demands is that Congress "identify a source of public funds and authorize the expenditure of those funds for designated purposes." Under this interpretation, the Clause imposes no temporal limit that would prevent Congress from authorizing the Executive to spend public funds in perpetuity. Nor does the Court's interpretation require Congress to set an upper limit on the amount of money that the Executive may take. Today's decision does not even demand that an agency's funds come from the Treasury. As the Solicitor General admitted at argument, under this interpretation, the Appropriations Clause would permit an agency to be funded entirely by private sources. In short, there is apparently nothing wrong with a law that empowers the

Executive to draw as much money as it wants from any identified source for any permissible purpose until the end of time.

That is not what the Appropriations Clause was understood to mean when it was adopted. In England, Parliament had won the power over the purse only after centuries of struggle with the Crown. Steeped in English constitutional history, the Framers placed the Appropriations Clause in the Constitution to protect this hard-won legislative power.

I

In the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act, Congress created the CFPB, an independent regulatory agency with "vast rulemaking, enforcement, and adjudicatory authority over a significant portion of the U. S. economy." *Seila Law.* And in designing the CFPB, "Congress deviated from the structure of nearly every other independent administrative agency in our history." At every turn, the statute attempted to insulate the CFPB from control by any official answerable to the people. First, "Congress provided that the CFPB would be led by a single Director, who serves for a longer term than the President," and Congress attempted to protect the Director from removal by the President "except for inefficiency, neglect, or malfeasance."

Elected in the atmosphere that followed the financial crisis of 2008, the Congress that created the CFPB also sought to free the CFPB from supervision by subsequent Congresses that might wish to superintend the Bureau's exercise of its vast powers. To achieve that end, the CFPB was given an unprecedented way of obtaining funds that was expressly designed to make it totally "independent of the Congressional appropriations process."

Under that scheme, the CFPB is not funded by appropriations enacted by Congress. Instead, each year, the CFPB Director tells the Federal Reserve Board of Governors how much money it thinks is "reasonably necessary" to carry out the CFPB's operations. So long as this amount does not exceed 12% of the Federal Reserve System's total operating expenses, the Board of Governors must comply with that demand and hand over the specified sum "from the combined earnings of the Federal Reserve System." The Framers would be shocked, even horrified, by this scheme. Beginning with the First Congress, agencies were generally funded by annual appropriations from the Treasury. While there have been departures from this dominant model, nothing like the CFPB's funding scheme has previously been seen.

II

A

The Appropriations Clause contains two key terms—"Money ... drawn from the Treasury" and "Appropriations"—both of which require a little explanation. As the Government acknowledges, "Money ... drawn from the Treasury" is synonymous with the term "public Money," which appears in the Statement and Account Clause. And in this case, it is undisputed that the funds requisitioned by the CFPB constitute "public Money." Thus, the only remaining textual question is whether the CFPB gets its funding from "Appropriations" in the sense in which the Constitution uses that term.

The Court answers that question by consulting a few old dictionaries, which it says establish that "[i]n ordinary usage, ... an appropriation of public money would be a law authorizing the expenditure of particular funds for specified ends." It accordingly concludes that the Appropriations Clause requires no more than a law, a fund, and a purpose.

This analysis overlooks the fact that the term "Appropriations," as used in the Constitution, is a term of art whose meaning has been fleshed out by centuries of history. To be sure, in interpreting the Constitution, we *start* with the presumption that " 'its words and phrases' " carry their " 'normal and ordinary' " meaning. But our analysis cannot end there. Some provisions use terms with specialized and well-established meanings that we cannot use dictionaries to

brush aside. " '[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.' " I therefore turn to that history.

B

1

The delegates to the Constitutional Convention did not invent the appropriations requirement. Rather, that important safeguard arose from centuries of "British experience." The Framers were aware of the requirement's deep roots and the critical role it had played in "the history of the British Constitution." By steadily asserting the power to condition appropriations, the House of Commons, originally "an infant and humble representation of the people[,] gradually enlarg[ed] the sphere of its activity and importance, and finally reduc[ed], as far as it seems to have wished, all the overgrown prerogatives of the other branches of the government."

A short summary of this process illustrates the important role of the appropriations requirement. During the Middle Ages, kings relied almost entirely on what was called "ordinary" revenueThis included income from lands owned by the Crown, customs duties, and feudal dues. Consequently, there was little meaningful difference "between the national revenue and the king's private pocket-money." Maitland 433.

The Crown's financial independence gave it the ability to govern with little parliamentary interference. As Maitland puts it, "throughout the Middle Ages the king's revenue had been in a very true sense the king's revenue, and parliament had but seldom attempted to give him orders as to what he should do with it." "Under the Tudors, parliament hardly dared to meddle with such matters."

In the 17th century, however, this pattern began to change. By that time, "the king's ordinary revenues were no longer even remotely sufficient to cover the normal costs of royal governance," and the heavy expenditures of James I and Charles I exacerbated the problem. Rather than seeking appropriations from Parliament, the early Stuart kings engaged in controversial efforts to obtain additional ordinary income through the use of various royal "prerogative[s]." Among other things, they unilaterally imposed duties on imports, stepped up the collection of feudal dues, sold monopolies, and forced individuals to loan money on pain of imprisonment.

These measures aroused opposition and, in any event, did not yield sufficient funds. As a result, James I and Charles I periodically found it necessary to ask Parliament to impose new taxes in order to obtain the funds they wanted. When they did so, the Commons began to flex the power of the purse and to demand a measure of royal accountability. Disputes between the Commons and the Stuart kings about the power of the purse played a pivotal role in the transition from royal to parliamentary financial supremacy.

A few incidents illustrate this dynamic. In 1621, the power of the purse played a central role in disputes between the Crown and Parliament over religious, geopolitical, and judicial authority. For some months, Parliament ignored requests from James I for more tax revenue. Though Parliament finally expressed "willing[ness] to grant a moderate subsidy," it insisted "first" on redress for "grievances." Parliament's petition infuriated James I, who ultimately dissolved Parliament and sent several of its leaders—including Sir Matthew Hale—to the Tower of London. Taswell 534, 536.

Under Charles I, the situation worsened. At the beginning of his reign, the Commons refused to grant him the life-time power to impose tonnage and poundage duties, *i.e.*, duties on imports and exports, as had been the custom, but instead granted the power for only one yearThe

members of Commons "had no intention of refusing a further supply, but were resolved to avail themselves of their Constitutional right to make it dependent upon redress of grievances." Indignant about this temerity, the King hastily dissolved Parliament before the Lords passed the bill. But as a consequence, the King once again then found himself without sufficient funds. So he took matters into his own hands by resorting to the monarchy's "old illegal methods of raising money." Taswell 543.

This reignited a power struggle between the two branches. As a result, when Charles I again turned to Parliament in 1628, the Commons refused to grant funds until he agreed to the Petition of Right, which demanded that he cease efforts to obtain more "ordinary income" by objectionable means, such as compulsory loans and the payment of "any tax, tallage, aid, or other like charge not set by common consent, in parliament." The King, of course, did not like this. So when the Commons continued to challenge royal prerogatives, Charles I prorogued Parliament. And during the long period that ensued in which Parliament did not meet (1629–1640), the King sought new sources of "ordinary income," including the imposition of "Ship-money," that is, fees imposed on both maritime and inland counties to pay for the construction of ships. Taswell 566–569. These practices "further enraged an already alienated Parliament, reinforcing a vicious cycle that led to the Civil War and, ultimately, to Charles's beheading."

This constitutional crisis restored the English Government's financial separation of powers for a season. During the Commonwealth, the Commons exercised "complete authority ... over the whole receipts and expenditure of the national treasury." Taswell 626. But shortly after the Restoration, the war for the supremacy of the purse reignited. Starting in 1665, "Parliament was largely unwilling to grant [the King] additional money without specifying in some measure how it was to be used." "This precedent was followed in some, but not all ... cases under Charles II." Maitland 310. Charles II, "fed up with parliamentary interference, ruled without Parliament, and therefore without any parliamentary taxation, for the rest of his reign."

After the Revolution of 1688, Parliament took strong measures to curb the Crown's financial independence. The 1689 Bill of Rights declared "[t]hat levying Money for or to the Use of the Crowne by pretence of Prerogative, without Grant of Parlyament for longer time or in other manner than the same is or shall be granted is Illegall." 1 Wm. 3 & Mary 2, c. 2 (1688). In other words, to ensure "that it was supreme in directing the use of [all] public funds," Parliament "asserted that any use of funds by the monarch that lacked Parliament's authorization was unlawful."

These steps, however, did not cement Parliament's power of the purse. Royal officers continued to collect revenue and to evade the appropriations requirement by exaggerating collection costs, giving very little in "net receipts" to Parliament, and keeping the rest for the use of the Crown. P. So Parliament took steps to crack down on this practice. In 1711, for example, Parliament passed a resolution declaring that " 'applying any sum of unappropriated money, or surplusages of funds to usages not voted, or addressed for by parliament, hath been a misapplication of the public money.' "

Parliament also appointed a commission to prevent the Crown from defying the appropriations requirement. In that commission's very first report, it recommended that "[r]evenue should come from the Pocket of the Subject directly into the Exchequer." Permitting revenue departments to retain or divert any public funds, the Commissioners concluded, would create a "private Interest ... in direct Opposition to that of the Public." *Ibid.* Finally, Parliament took an increasingly "firmer line ... against *virement*, that is, the transfer of funds appropriated for one department for the use of another department."

2

The Court's treatment of this history begins by conceding most of what I have recounted. The Court notes that after the Revolution of 1688, "Parliament's usual practice was to appropriate government revenue 'to particular purposes more or less narrowly defined,' " and "Parliament began limiting the duration of its revenue grants." 'Every year,' " the Court continues, the King and his ministers " 'had to come, cap in hand, to the House of Commons, and more often than not the Commons drove a bargain and exacted a *quid pro quo* in return for supply.' "

In an effort to find a trace of helpful precedent in pre-founding British constitutional history, the Court turns to laws appropriating funds for the "civil list," which it touts as a particularly "notable exception" to the centuries-long understanding of appropriations. In truth, however, Parliament's treatment of the civil list actually undermines the Court's position. The civil list, although renamed in 2012, remains to this day, and it consists of the money needed to cover the expenses of the royal family. By the end of the 17th century, "the Civil List was a relatively small share of the total public expenditure," but the independence it afforded the Crown "presented a constitutional problem in the conflict between the principle of the independence of the Crown and the principle of parliamentary control of finance."

To prevent the Crown from using the civil list to erode Parliament's hard-fought supremacy over the purse, eminent statesmen like Edmund Burke and Charles James Fox began pushing for substantial reforms. Beginning in 1760, Parliament enacted a series of laws that altered the appropriation of civil list funds. And by 1782, Parliament finally secured its "right ... to interfere at its discretion in the affairs of the Civil List." "The eighteenth-century tension between the conflicting principles of parliamentary supremacy and an independent financial provision for the Crown had been resolved—as it had to be—in favour of parliamentary supremacy."

C

1

"The conflicts between Parliament and the Crown over the power of the purse ... were replayed in the American colonies in struggles between the royal governors and provincial assemblies." But learning from Parliament's experiences with the monarchy, some of the American Colonies assumed appropriations authority "greater even than that of the British House of Commons," exercising significant auditing powers and legislative oversight. Indeed, by 1787, all but one of the 11 State Constitutions provided their respective legislatures with some control over appropriations; and no State allowed the executive to draw money from the state treasury without legislative approval.

The Framers built on this legacy at the Constitutional Convention when they adopted the Appropriations Clause, which they "well understood" would "complet[e] the power vested in Congress over money." The Clause not only "gives to the Legislature an exclusive authority of raising and granting money," but it also obligates Congress to keep that authority from "the hands of the Executive" at all times thereafter. It makes the President "depen[d] on the will of [Congress] for supplies of money" in the first instance and puts him continually "in a state of subordinate dependence" to the people's elected representatives. The Appropriations Clause enables Congress, "*without the concurrence of the other branches*, to check, by refusing money, any mischief in the operations carrying on in any department of the Government."

Early budgets illustrate how the appropriations power was understood. Although the Constitution does not require that appropriations be limited to a single year, that was the dominant practice in the years immediately following the adoption of the Constitution. And while the first few appropriations laws were brief and

lacked details about how the money was to be spent, the amounts approved closely tracked the estimates submitted by Secretary of the Treasury Alexander Hamilton. Indeed, the second appropriations act expressly incorporated the estimates of specific expenses contained in Hamilton's report to Congress. As a result, Congress clearly contemplated that the money would be devoted toward particular purposes.

In the mid-1790s, appropriations laws became even more specific. And when Thomas Jefferson became President, he urged Congress "to multiply barriers against" the "dissipation" of public funds by "appropriating specific sums to every specific purpose susceptible of definition," and "by disallowing applications of money varying from the appropriation in object, or transcending it in amount."

To be sure, not all early funding laws followed the dominant model of specified short-term appropriations. Agencies that provided services to a particular segment of the public were funded by fees that were paid by the recipients of those services. If these fees exceeded the costs of providing the services, however, these agencies were required to send the surplus to the Treasury, which oversaw the collection and use of such fees.

As the Government notes, this practice had deep historical roots, and was presumably based on the idea that the cost of providing certain services should be borne by the recipients of those services rather than the general public. At the same time, the requirement that fees in excess of what was needed to defray the cost of providing services be turned over to the Treasury ensured that Congress maintained control over the ways in which this money was spent. Under these arrangements, therefore, Congress exercised close control over both the amount of money that the agencies in question obtained and the way in which that money was used. The agencies received and were allowed to use the amount of money necessary to provide their narrowly prescribed services. All the rest was sent to the Treasury and could then be used only as authorized by a congressional appropriation.

2

In discussing this early American history, the Court begins by essentially conceding the principal lesson outlined above. As the Court candidly puts it, " '[w]hen called upon to grant supplies,' the lower houses in the colonial assemblies 'insisted upon appropriating them in detail.' " The best the Court can muster to support its assertion that "state legislative bodies often opted for open-ended, discretionary appropriations" are a few minor state laws that, when understood in relation to the Constitutions of the States in question, provide no support for the Court's argument..[1]

[1] Citing two Massachusetts laws directing that certain revenue be used for broadly defined purposes, the Court infers that the executive enjoyed wide discretion to decide how this money would be spent, but this inference is unwarranted. One of the two Massachusetts laws cited by the Court, Act of Nov. 17, 1786, 1786 Mass. Acts and Laws ch. 47, clearly illustrates this point. That law stated expressly that the revenue in question was to be paid "into the Treasury of this Commonwealth, for the exigencies of Government." Under the State Constitution, this money could be not be taken from the treasury without the approval of the legislature. See Mass. Const. of 1780, ch. 2, § 1, Art. XI. And to fortify legislative control, the state treasurer was elected annually by the legislature.

As another supposed example of a state law giving the executive wide discretion to decide how funds could be spent, the Court cites a Maryland law specifying that certain revenue was to be used for the general purpose of defending the Chesapeake Bay and protecting trade. 1783 Md. Acts ch. 26, § 5, (1799). The Court overlooks the fact that under the State's Constitution, the two state treasurers were appointed by and served at the pleasure of the legislature, Maryland Constitution of 1776, Art. XIII, and the legislature was specifically authorized to "examine and pass all accounts of the State, relating either to the collection or expenditure of the revenue, or appoint auditors, to state and adjust the same," Art. X.

In sum, centuries of historical practice show that the Appropriations Clause demands legislative control over the source and disposition of the money used to finance Government operations and projects.[2]

III

A

As the previous discussion shows, today's case turns on a simple question: Is the CFPB financially accountable to Congress in the way the Appropriations Clause demands? History tells us it is not. The Government attempts to show that there is ample precedent for the CFPB scheme, but that effort fails.

The CFPB's funding scheme contains the following features: (1) it applies in perpetuity; (2) the CFPB has discretion to select the amount of funding that it receives, up to a statutory cap; (3) the funds taken by the CFPB come from other entities; (4) those entities are self-funded corporations that obtain their funding from fees on private parties, "not departments of the Government," (5) the CFPB is not required to return unspent funds or transfer them to the Treasury; and (6) those funds may be placed in a separate fund that earns interest and may be used to pay the CFPB's expenses in the future. At argument, the Government was unable to cite any other agency with a funding scheme like this, and thus no other agency—old or new—has enjoyed so many layers of insulation from accountability to Congress.

The Government points to the Post Office and the Customs Service as founding-era precedents for the CFPB, but the analogy is flawed. As noted, funding Government agencies with fees charged to the beneficiaries of their services has long been viewed as consistent with the appropriations requirement. And both the Post Office and the Customs Service fell comfortably into that category.

A quick look at the laws that set up the Post Office and the Customs Service shows that they were nothing like the CFPB. In the Act establishing the Post Office, Congress gave that agency a narrow and specific mission: to "provide for carrying the mail of the United States." The Postmaster's discretionary authority was modest. (He could, for example, decide whether mail should be carried on particular routes "by stage carriages or horses.".) The Act specified in minute detail the fees that could be collected from those who used the Post Office's services. And it required the Postmaster "to render to the secretary of the treasury, a quarterly account of all the receipts and expenditures" and to "pay quarterly, into the treasury ..., the balance in his hands." Under this arrangement, Congress controlled the amount that the Post Office took in (*i.e.*, the sum total of the fees specified by law) and how those fees were to be spent (*i.e.*, to provide for carrying the mail).

Much the same is true with respect to the Customs Service, which the Government claims "best" resembles the CFPB. Like the Post Office, the Customs Service had a carefully delineated mission—basically, to control imports and exports, and to collect duties and other payments from those engaged in those activities. To maintain accountability, the early tariff Acts spelled out in excruciating detail the various

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Finally, the Court points to a Virginia law, but again the Court overlooks the structure of the Virginia government. Under the Virginia Constitution of 1776, the treasurer was elected annually by the legislature, and this obviously gave the legislature extensive power over expenditures. Virginia Constitution of 1776, ¶17.

[2] Not content to rest on the Court's argument, which relies on the Court's understanding of the original meaning of the Appropriations Clause, four Justices advance an entirely different rationale, namely, that congressional practice in the ensuing centuries supports the constitutionality of the CFPB's scheme. This argument is doubly flawed. First, the concurrence cannot point to any other law that created a funding scheme like the CFPB's. Second, as explained by Justice Scalia, the separation of powers mandated by the Constitution cannot be altered by a course of practice at odds with our national charter. "[P]olicing the 'enduring structure' of constitutional government when the political branches fail to do so is 'one of the most vital functions of this Court.' "

fees, fines, and forfeitures that officers were to collect, as well as the salaries and commissions that were to be paid out of those receipts. Surplus funds had to be sent to the Treasury, and for many years, these funds were the lifeblood of the Federal Government. From 1789 to 1862, "[n]early all of federal revenue was derived from customs duties."

The CFPB, by contrast, is an entirely different creature. Its powers are broad and vast. It enjoys substantial discretionary authority. It does not collect fees from persons and entities to which it provides services or persons and entities that are subject to its authority. And it is permitted to keep and invest surplus funds. In short, the Government's "best" argument fails.

The Government's next-best analogs fare no better. Moving to modern agencies, the Government claims that the CFPB's funding scheme is not materially different from the funding schemes of a list of other currently existing agencies. See Brief for Petitioners (comparing the CFPB to the Office of the Comptroller of the Currency (OCC), the Federal Deposit Insurance Corporation (FDIC), the National Credit Union Administration (NCUA), the Farm Credit Administration (FCA), the Federal Housing Finance Agency (FHFA), and others).

But unlike the CFPB, the agencies cited by the Government are funded in whole or in part by fees charged those who make use of their services or are subject to their regulation. This is true for the OCC.[3]

For these reasons, it is undeniable that the combination of features in the CFPB funding scheme is unprecedented. And it is likewise clear that this assemblage was no accident. Rather, it was carefully designed to give the Bureau maximum unaccountability. Our decision in *Seila Law* addressed part of the problem posed by this arrangement. It made the CFPB accountable to the President, but that decision did nothing to protect Congress's power of the purse. Indeed, standing alone, *Seila Law* worsens the appropriations problem. The appropriations requirement developed to ensure that the Executive (in England, the monarch) would be accountable to the people's elected representatives. *Seila Law,* however, increased the power of the *Executive* over appropriations. By brandishing or wielding the threat of removal, a President may push the CFPB director to requisition the amount of money that the President thinks is appropriate and to spend that money as the President wishes. I joined the decision in *Seila Law* and continue to believe that it was correctly decided, but it solved only half the accountability problem that inheres in the CFPB's structure.

B

Left with no analog in history, the Government employs a divide-and-conquer strategy to defend the CFPB's funding scheme. It argues that even if no prior agency had a funding scheme with all the features of the CFPB's, the funding schemes of other presumptively constitutional agencies contain one or more of the features found in the CFPB's scheme. It then reasons that the combination of these features in the CFPB's scheme must be constitutional as well.

This argument founders for two reasons. First, the CFPB's scheme includes an important feature never before seen. As explained, the

[3] The Government also suggested that the Federal Reserve Board is a close historical analog for the CFPB. But that setup should not be seen as a model for other Government bodies. The Board, which is funded by the earnings of the Federal Reserve Banks, is a unique institution with a unique historical background. It includes the creation and demise of the First and Second Banks of the United States, as well as the string of financial panics (in 1873, 1893, and 1907) that were widely attributed to the country's lack of a national bank. The structure adopted in the Federal Reserve Act of 1913 represented an intensely-bargained compromise between two insistent and influential camps: those who wanted a largely private system, and those who favored a Government-controlled national bank. For Appropriations Clause purposes, the funding of the Federal Reserve Board should be regarded as a special arrangement sanctioned by history.

CFPB's money does not come from Congress, from private recipients of its services, or from private entities that it regulates. It does not even originate with another Government agency. Instead, the CFPB gets its money via a three-step process: The Federal Reserve Banks earn money from the purchase and sale of securities, as well as from the fees they charge for providing services to depository institutions. The Federal Reserve Banks then deliver these earnings to the Federal Reserve System. Finally, the CFPB requests an amount from the Federal Reserve Board. That feature of the CFPB scheme is entirely new.

Second, the Government's argument fails "to engage with the Dodd-Frank Act as a whole." *Seila Law*. By addressing the individual elements of the CFPB's setup one-by-one, the Government seeks to divert attention from the combined layers that insulate the CFPB from accountability to Congress. Elements that are safe or tolerable in isolation may be unsafe when combined. In the case of the CFPB, the combination is deadly. The whole point of the appropriations requirement is to protect "the right of the people," through their elected representatives in Congress, to "be actually consulted" about the expenditure of public money. The CFPB's design strips the people of this power.

The Federal Reserve's earnings represent "specific charges for specific services to specific individuals or companies." It would be "a sharp break with our traditions" to allow the CFPB to use these earnings to fund a broader array of governmental activities that have little-to-no relationship with those specific charges, services, and regulated entities. By allowing the CFPB to use the Federal Reserve's earnings to enforce and implement broader consumer protection laws, Congress impermissibly removed the CFPB "from its customary orbit" as an agency, authorizing the Bureau to appropriate funds obtained from private sources "in the manner of an Appropriations Committee." In other words, Congress abdicated its appropriations authority, an exclusively legislative prerogative. But Congress lacks the authority to "transfer to another branch powers which are strictly and exclusively legislative."

In sum, the CFPB's unprecedented combination of funding features affords it the very kind of financial independence that the Appropriations Clause was designed to prevent. It is not an exaggeration to say that the CFPB enjoys a degree of financial autonomy that a Stuart king would envy.

C

This autonomy has real-world consequences. The CFPB is a powerful agency with the authority to impose "substantive rules [on] a wide swath of industries" and "lev[y] knee-buckling penalties against private citizens." *Seila Law*. In the last several months alone, the Bureau has announced plans to effectuate not one, but three major changes in consumer protection law. The CFPB has issued guidance cautioning financial institutions from "denying credit to individuals based on their [illegal] immigration status, regardless of their personal circumstances and demonstrated ability to repay." It has also begun "a rulemaking process to remove medical bills from Americans' credit reports" and to cap overdraft fees "at an established benchmark—as low as $3." These may or may not be wise policies, but Congress did not specifically authorize any of them, and if the CFPB's financing scheme is sustained, Congress cannot control or monitor the CFPB's use of funds to implement such changes. That is precisely what the Appropriations Clause was meant to prevent.

* * *

The Court holds that the Appropriations Clause is satisfied by any law that authorizes the Executive to take any amount of money from any source for any period of time for any lawful purpose. That holding has the virtue of clarity, but such clarity comes at too high a price. There are times when it is our duty to say simply that

a law that blatantly attempts to circumvent the Constitution goes too far. This is such a case. Today's decision is not faithful to the original understanding of the Appropriations Clause and the centuries of history that gave birth to the appropriations requirement,[4] and I therefore respectfully dissent.

[4] At the end of its opinion, the Court suggests that broad separation of powers principles may provide more protection for Congress's power of the purse than does the Appropriations Clause. But we do not generally resort to broad principles when a provision of the Constitution specifically addresses the question at hand. At any rate, since the decision below relied on both the Appropriations Clause and broad separation of powers principles, it is not clear why the Court does not proceed to apply those principles.

Lydia DePillis, *A watchdog grows up: The inside story of the Consumer Financial Protection Bureau*, The Washington Post, Jan. 11, 2014

In late 2011, a quiet revolution took place at the corner of 17th and G streets NW.

About 500 federal workers were vacating the drab, 1970s-era headquarters of the Office of Thrift Supervision. The agency had just been scrapped for its role in the financial crisis, which in retrospect seemed almost inevitable: Its primary mission had been to keep banks solvent, and its budget depended on how many of them chose it as their regulator, leading to almost criminal complacence.

The building's new occupant was supposed to fix all that.

The Consumer Financial Protection Bureau, created by the Dodd-Frank financial reform law, was designed as a Google-era regulator: a data-obsessed start-up, forever iterating, laser-focused on the safety of consumers rather than the soundness of banks. With a culture of creativity and corps of true believers, it would avoid the kind of coziness that had paralyzed its predecessors in the face of rampant wrongdoing.

The new sign on the outside of the building bore a logo unlike any in federal Washington, with "CFPB" in hip lowercase letters. The bureau's leaders imagined a lobby welcoming to the public, full of financial education materials; for the time being, it had placards describing the agency's guiding principles: "Serve. Lead. Innovate."

The reality was not so idyllic.

For nearly two years, as political infighting and industry resistance held up the confirmation of its first director, the bureau operated under a chilling cloud of uncertainty. Perhaps predictably, it failed to escape the byzantine rules that hobble every other agency. And its strong-willed staff, drawn from other agencies, private companies and consumer advocacy groups, got bogged down in constant fights over the mission.

"They started out with such a complete rethinking of everything," said Jo Ann Barefoot, a former deputy comptroller of the currency who tracks the CFPB for a financial services consultancy. "I think they were more clear on what they were not than what they were."

The instability and red tape drove some of its most talented hires back out the door — many wooed by consultancies and law firms willing to pay top dollar for their newfound expertise.

"The bureaucracy finally caught up with me," said one former high-ranking official who left and asked for anonymity in speaking about former colleagues. "There's so much overhead in running a government agency that's required by Congress that it cuts into what's already a 16-hour a day job. You've got to have the tolerance that 40 percent of your time will be wasted on things government says has to happen."

The Senate finally confirmed Richard Cordray as director in July. Since then, a torrent of enforcement actions has rolled out of 1700 G St., from an $80 million judgment against Ally Financial for racial discrimination in auto lending to a sweeping case against Ocwen Financial for deceptive mortgage-servicing practices. The activity reflects the strength of a maturing agency that has fundamentally changed how financial institutions understand the power of their customers to fight back.

It also obscures the internal story of conflict and turmoil that led to this point — and how the CFPB still has to confront the creeping malaise of the federal bureaucracy it set out to reinvent.

Starting from scratch

The bureau began as an idea published in 2007 in Democracy Journal, a small lefty quarterly. Its author, a Harvard Law School bankruptcy professor named Elizabeth Warren — who has since become a Democratic senator from Massachusetts — described a feisty "Financial Product Safety Commission" whose emissaries

would be as familiar to Americans as firefighters.

The epic financial crisis of 2007-08, with its roots in unchecked lending by America's financial sector, brought her idea to the fore; President Obama embraced the plan in June 2009 as a core part of overhauling the financial industry.

Warren's manifesto became Wally Adeyemo's best recruiting tool. Once Dodd-Frank passed in 2010, the young deputy executive secretary of the Treasury began laying the groundwork for the agency, then housed in Treasury's basement. He handed the article to prospects, including Leandra English, a special assistant at the Office of Management and Budget, who joined up.

"It shocked me that something like the bureau didn't already exist," English said. "The need for it was so obvious. I knew I wanted to help build it — it didn't matter that I had little idea what I'd be doing."

Officials tasked with the setup had little other guidance. Consultants provided them with a binder of case studies on how other agencies had been launched. But most of these were either bad examples, such as the Department of Homeland Security's disintegration into feuding fiefdoms, or not applicable. Even the Securities and Exchange Commission, built in the aftermath of the Great Depression, didn't have the immense range of mandates granted to the Bureau.

In particular, the binder was silent on how to hire people. Applications poured in from idealistic young lawyers, and Warren — then a special adviser to the Treasury and the CFPB's de facto leader — brought on recruits from Harvard. The bureau's headhunters especially liked passionate applicants who had some personal experience with the financial crisis -- somebody they knew lost a house or job -- and an intense devotion to the agency's mission.

But the founders also knew that they needed to send a message with some high-profile hires. "When you're the new kid on the block, you kind of have to prove yourself," Adeyemo said. "They think, 'we've been doing this for a long time. Do you have the talent to do what we're doing?'"

They got their big shots. Catherine West, who had led Capital One's U.S. credit card business, came on as chief operating officer. Len Kennedy, general counsel at Sprint, joined in that role. Holly Petraeus, a celebrity general's wife who had worked on financial literacy for military families, would head the Office of Servicemember Affairs.

Soon the ballooning staff expanded into government space in a nondescript office building. New recruits would show up to no desk, no phone and way too much to do. All-hands meetings were held in the elevator lobby, with people sitting on the floor while Warren gave pep talks. Even senior hires often started out in a big, windowless room called "the cave." But the bureau had lured the kind of people who wouldn't mind all that much.

"It didn't faze me at all, because I was an entrepreneur. It just brought me to the first day of my company, where we're all on picnic tables in an attic," said Pete Carroll, who became assistant director for mortgage markets. "It turned out to be the nerve center. Someone said, 'Do you want to move?' I said, 'No, this is great! Everybody's buzzing around, Elizabeth Warren's popping her head in.' I was like, 'this is awesome, this is the greatest thing ever.'"

The bureau's leadership took steps to solidify that sense of togetherness and a tight-knit culture, with mixed success.

Despite Warren's hope to centralize the staff in Washington, a few satellite supervision offices were created to keep travel expenses down. A "Culture Team" organized bonding events and brown-bag lunches; there was a softball team

called the Overdrafts. New staff were assigned "peer mentors" to create bonds across offices. Every hire, from assistant director to secretary, went through three days of consultant-designed training called "Excellence through Collaboration and Communication." It engendered its fair share of eye-rolling (and has since been shortened).

"I was certainly bemused by it," said Peter Wilson, who came from a private law firm to work in the general counsel's office and has since left. "Some people thought it was a waste of three days."

Many of the culture efforts were driven by Sartaj Alag, the former head of Capital One in Canada who came on as an adviser to Warren, supplying her with advice from management philosophy books like "Good to Great" and "Level 5 Leadership" (he's now chief operating officer at the bureau). Early on, he organized a survey of the staff to come up with the CFPB's official mission and vision. When the time came to finally forge an agreement, he figured that the leadership team might be too busy and offered to put it off.

"We went round the table," recalled Alag. "And it really told me what a special place this was when the people working really hard, the line people, said, 'No, this is crucial, let's do this now.'"

The conflicts within

Like any startup, early days were occupied by adding people as quickly as possible.

The Bureau had three ways to do that. It could make outside hires, from the private sector or academia or nonprofits. It could also take people who applied to transfer from other government agencies, like the Federal Trade Commission.

Most of those type weren't hired, which created resentment, and sometimes even legal action: Three former bank examiners sued for age discrimination when their applications were rejected, noting Warren's published comments about wanting to bring in "new, young staff and train them to follow the law." The Bureau usually settled with such plaintiffs, rather than let cases get to federal court.

The third way to join the Bureau was to be absorbed by default. Dodd-Frank had consolidated all the consumer protection functions of other agencies within the Bureau, so some employees -- from the department of Housing and Urban Development, for example -- transferred automatically.

The first problem with that was one of talent. The agency's hard-charging leadership found many of the staff inherited from government bureaucracies too slow and unimaginative to take on the bureau's big tasks.

But the larger issues were cultural. Most of the rule-writing team came from the Federal Reserve's relatively small, neglected Division of Consumer and Community Affairs. There they had been accustomed to an orderly environment, where small groups drew up separate rules and sent them to higher-ups for approval.

By contrast, the CFPB's process was consensus-driven. Everything had to come before a Thursday morning policy committee and be vetted through working groups with staff from other divisions, on the theory that multiple perspectives improve the final outcome.

"Everybody was weighing in on everybody's business, which I really think to this day bogs down the agency," said one former Fed staffer who has since left the CFPB — and who, like several others, asked not to be quoted to retain a relationship with the bureau.

"There wasn't even consensus about whether we were to achieve consensus," another said. "The poor folks sent to participate in my working group — were they supposed to be arguing with me?"

Bureau officials unapologetically defend the process. “We very purposely weren’t going to do things exactly how they may have been done in the past,” said Deputy Director Steve Antonakes. “That made some folks uncomfortable.”

The two camps also clashed over substance: What was the purpose of regulation, anyway?

Many in the Fed contingent, as well as from the private sector, thought they should strive simply to make banks more transparent, so that consumers could make informed decisions. But the Warren devotees and those from consumer groups emphasized a “cop on the beat” approach, with high-profile enforcement actions that would send a message. They also wanted to discourage exotic financial products, like complicated mortgage repayment plans and credit card teaser rates.

Leonard Chanin, who came from the Fed to oversee rulemaking, chafed at the more-interventionist approach. In September 2012, while his team was scrambling to meet an intense set of deadlines, Chanin left for a partnership at the Morrison Foerster law firm, where he advises clients on dealing with the CFPB.

“I lost faith that the agency would become a truly independent entity and carefully balance consumer costs and access to credit with consumer protection,” Chanin said. He offered the example of payday loans. “I think the bureau sees consumers taking out payday loans and believes ‘there must be something wrong here, because consumers really wouldn’t choose these products.’ There is great risk in assuming you know what is best for the consumer.”

That kind of conflict came by design. One of bureau’s three major divisions, “Supervision, Enforcement, and Fair Lending,” is a mix of the litigious culture of the Federal Trade Commission, which relies on prosecuting wrongdoers, and the more observational approach of the Fed, which could always revoke a bank's charter if it found anything amiss. Another division, “Research, Markets, and Regulation,” blended academically minded behavioral economists with lawyers. A clash of philosophies was inevitable.

Deepak Gupta, who came to the bureau as a litigation counsel from the advocacy group Public Citizen, left for private practice after losing patience with the process. “Your typical mediocre government agency has been around for a while, knows how it does things, has certain bureaucratic traditions or pathologies that have set in,” he said. “The CFPB version is more like a faculty meeting, all jumping all over each other.”

The threat from outside

While Warren’s staff worked to build the institution from the inside, she focused on its public face. Opposition ran high among Republicans and some Democrats with ties to the financial industry, and Warren had the delicate task of ensuring that the bureau wouldn’t be undermined by lawmakers before it could get up and running.

Even as Warren inveighed against Wall Street “behemoths” and the mess they had made, she was reaching out to those very banks to assure them that she wouldn’t be unfair. “I value your help — and your friendship — more than you know,” Warren wrote Richard Davis, the head of U.S. Bancorp, in an e-mail first obtained by the Hill newspaper.

Community banks, though a tiny slice of U.S. lending, were key to Warren’s strategy. They could become strong allies, casting the bureau as a defender of the little guy, if she could win them over.

Camden Fine, head of the Independent Community Bankers of America, took some convincing. Warren paid him a three-hour visit after seeing him slam the bureau on CNBC’s “Squawk Box.”

“She did not come off as many had characterized her, as some sort of harebrained, way-out-there, wonky liberal,” Fine said. “I found her

arguments to be based on pretty solid reasoning. ” Fine would still argue strenuously for exemptions to rules that would govern the big banks, but at least he wasn’t out slamming the agency to the rest of America.

Every couple of weeks, Warren’s team hit the road, putting on speeches, roundtables and meetings with community bankers in every state.

“It felt like we were engaging in retail politics a little bit,” said Leandra English, who coordinated those events. “Time after time, we would go into a room, especially with community bankers, and you could just feel instantly that they were very skeptical, nervous, not expecting us to be friendly. And by the time we walked out, the tone had completely changed.”

Two of Warren’s key hires reflected the fissures and differing philosophies in the agency.

As director of enforcement, she chose Rich Cordray. He had just lost a bid for reelection as the attorney general of Ohio, where he took Bank of America, JPMorgan Chase and Citigroup to court over mortgage servicing practices and losses to state pension funds. People who have worked with him say Cordray is driven by personal narratives and consumers’ struggles. He walks around the office in socks, goes home most weekends to his family in Columbus and refers to staff members as “folks” in all-hands e-mails.

“Any great organization, over time, comes to feel like a second family to those engaged in it,” he wrote in an e-mail to the staff in early 2012. “We are broadly dispersed across the country, as many families are in this day and age. But the more we know and understand about one another, the more closely knit we become.”

At the other end of the spectrum was Warren’s deputy, Raj Date, who worked at Capital One and Deutsche Bank before founding a think tank in 2009 to help shape the future of the bureau. His style was that of a polished consultant, much more process-oriented than Cordray and more wary of onerous regulations.

“Raj had an affinity for Wall Street conversations,” said Zixta Martinez, head of external affairs at the bureau. “It’s the language he spoke.”

The staff tended to align as “Rich people” or “Raj people.” And it soon became clear that one of those men — not Warren — would be nominated to lead the agency she invented. Her role in the administration’s $25 billion mortgage settlement further rankled banks and their Republican allies, and it didn’t appear that she had the Senate votes to get confirmed. News reports speculated that Date, who had been serving as interim director, would get the nod.

But in July 2011, days before the bureau launched, Obama chose Cordray. An early supporter of Obama’s presidential campaign, he was also Warren’s favorite for the job, came as close to her temperament as anyone in the organization and would carry out her wishes almost identically. Even in losing, Warren had won.

A new front

It felt like a victory. But Cordray’s selection was only the beginning of another war.

Republicans, insisting that the bureau should be headed by a commission instead of a director, refused to hold a vote on the nomination. And without a director, according to statute, it was unable to fulfill a substantial chunk of its mission: regulating non-banks, including payday lenders, providers of private student loans, debt collectors and mortgage servicers.

After six months of this, Obama installed Cordray through a January recess appointment, which enraged opponents even further. In a flurry of public statements -- all collected by the bureau's executive staff -- Republicans accused Obama of “steamrolling the Constitution" in appointing an "unaccountable czar" to

head the "extremely controversial" new agency.

The Supreme Court agreed to hear a lawsuit challenging the president's authority to make recess appointments. (Although the case addressed Obama's picks for the National Labor Relations Board, the decision would apply to Cordray as well.) And there were other court cases, including one community bank's challenge to the bureau's constitutionality in U.S. District Court.

An adverse ruling could have scuttled the bureau and all the decisions it had made up to that point. Meanwhile, companies filed comments on every rule the CFPB proposed, saying the bureau didn't have the requisite authority. When the bureau sent civil investigative demands to some Indian tribes running payday loan operations, they refused to comply.

The unsettled situation weakened the CFPB in dealing with the entities it had just begun to regulate. "Someone will say, 'You're trying to investigate me. I'm just going to say I think you don't have the authority to do this,' " Peter Wilson recalled.

It also made the enforcement side more cautious. After an initial rush of action from "slam-dunk" cases, the pace slowed, as CFPB leaders insisted that cases be airtight before they went out the door. (A bureau spokeswoman said productivity only appeared to decline because attorneys were compiling evidence for future cases.)

The bureau's corps of energetic young lawyers became frustrated. In part to keep them busy, they were sent along with supervision staff to bank examinations, which became the industry's single biggest complaint about the bureau overreaching. To bankers, it was a heavy-handed show of force, a sense that they were constantly on trial. The practice, which drew the attention of the agency's inspector general, has since been abandoned.

The continuing uncertainty influenced all kinds of policy work, where decisions had to go through a clearance process that amplified doubt.

"One word could cost us a week of progress," says Ethan Bernstein, a professor of leadership at Harvard who had joined the bureau for its startup years. "Important, productive initiatives could get delayed all too easily by someone, seemingly at any level, suggesting it might make sense to wait for a more certain environment. Which decisions were implemented immediately and which were put on hold was sometimes affected by the distortion of political influences—the same sort of distortion which played a role in the government's failure to prevent the last financial crisis."

The biggest cost, however, might simply have been an atmosphere of tentativeness.

"It felt at the time like we were bending over backward to make sure nobody ever hated us," said Mark Egerman, who came in the first months to research credit card markets and left in fall 2012 to found a mobile payments company.

"Sometimes you couldn't write down your thinking, because it could wind up in front of some hostile congressional committee," Gupta added. "I would use the word paranoia, except paranoia implies that it's not justified."

But the agency couldn't just work to assuage Republicans and the financial industry. The bureau's leaders knew they couldn't disappoint their left flank either. Although consumer advocates hesitated to criticize the bureau publicly, their willingness to go to bat for its independence depended on how well it did its job.

"They would've been hurt as much by holding back as not," says Mike Calhoun, president of the Center for Responsible Lending, a key force in the CFPB's creation.

In the end, Senate Majority Leader Harry Reid threatened to get Cordray approved with the

“nuclear option,” which would have eliminated the supermajority routinely required under Senate filibuster rules. The threat worked. The final vote in July was 66 in favor to 34 against -- the Bureau had won some friends. Its enemies, meanwhile, had less power to retaliate for any actions they might not like.

"We lost our leverage," said Sen. Richard Shelby (R-Ala.) after the vote.

Out of the foxhole

After two and a half years, the Consumer Financial Protection Bureau has found its footing.

Among its achievements: a consumer complaint process that has already made banks more responsive. A data-based method for assessing which institutions deserve the most scrutiny, rather than inspecting them all at arbitrary intervals. A renewed onslaught of enforcement actions. And a record of hitting each rulemaking deadline set by Dodd-Frank as it fundamentally reshaped the mortgage market, while other agencies let theirs slide.

In the process, however, it has had to become a fairly normal government agency — one that risks drifting into the same kind of complacence that dogged its predecessors. Cordray obliquely acknowledged this in an address to the staff after his confirmation. “I worry that this agency is a well-paid banking regulator,” he said. “And I want to make sure we stay in touch with the people who need us most to do our work.”

By early 2013, the bureau faced a brain drain, as it lost many of the hyper-creative people who helped set it up -- as well as some of the early trophy hires, like Len Kennedy and Catherine West. Some were bad fits; some couldn’t keep up with the exhausting pace. "We busted our asses to hire these amazing people, only to watch them burn out," Egerman says.

Many, though, were just tired of dealing with a calcified government superstructure that governed many aspects of how it had to do business. The staff narrowly voted to join the National Treasury Employees Union in 2013, adding another layer of internal conflict.

In retrospect, the long months of embattlement may have served as a binding agent.

“Ironically, the constant attack from the outside created a real solidarity. Nothing creates cohesion like being stuck in a foxhole with one another,” said Date, who left at the beginning of 2013 with several high-level staffers to found his own boutique financial services firm.

The staff of the CFPB isn’t in a foxhole anymore. And that transition — from uncertain start-up to fully built federal agency — has brought a new culture.

“You’re left with the people who like the salary of a federal regulator and who are willing to put up with the bulls--- of a federal agency,” said one such staffer. “It kind of ambles along, attracting decent people. But I don’t think anyone has the dreams and idealism that we saw.”

Tony Room, The CFPB took aim at Big Tech. Then Elon Musk moved to dismantle it, The Washington Post, February 11. 2025

About a week before Elon Musk helped take over the nation's leading consumer financial watchdog, his social media site, X, unfurled the details of a new payment system that may have drawn federal scrutiny — underscoring the complicated web of personal interests at stake as the world's richest person advises President Donald Trump on a reconfiguration of the U.S. government.

The system is called X Money, and in the vision sketched out by executives, it would allow millions of users on X to instantly send money to friends, family members and others. Heralding it as a breakthrough in finance, the company said in late January it would launch this year with the support of Visa, which processes billions of transactions globally.

Because of its direct ties to bank accounts and debit cards, X Money normally would fall under the remit of the Consumer Financial Protection Bureau, an agency with vast powers to crack down on unfair, deceptive and predatory corporate practices. Formed in the wake of the 2008 financial collapse, the CFPB has policed traditional banks and lenders as well as Apple, Google and other tech giants that seek to offer digital versions of those services.

But that was before last week, when Musk's team of young agents — acting at Trump's behest — began targeting the CFPB as part of their disruptive campaign to slash spending and regulation across government. As they burrowed into the bureau's computers, Musk made clear his goal is to dismantle the agency, which soon ordered a full stoppage to all of its work to investigate companies and protect consumers.

By Tuesday, top CFPB enforcement officials departed the agency after clashing with the Trump administration over the freeze, according to emails obtained by The Washington Post. And Musk's aides, operating under the banner of the U.S. DOGE Service, appeared to gain authorization to access "all" CFPB computer systems, other emails indicated, raising questions about whether those close to the tech mogul might be able to see nonpublic information about his potential digital-payment competitors.

But the shutdown alone amounted to a long-sought victory for Musk and other CFPB critics in Silicon Valley, where executives have lobbied to neuter its oversight — and some companies, including X, have supported lawsuits to scuttle the agency's rules. And it left unclear the future of Washington's approach to digital finance, as a wave of formerly brick-and-mortar banking services migrate online with no clear federal regulator to oversee them.

"This is like a bank robber trying to fire the cops and turn off the alarms before he strolls in the lobby," Sen. Elizabeth Warren (D-Massachusetts) said at a rally outside CFPB headquarters Monday, where participants — some of whom were federal workers — chanted anti-Musk slogans.

Musk did not respond to a request for comment. Speaking alongside Trump in the Oval Office on Tuesday, he said he had been "maximally transparent" in his work, adding that the public can see and react if he is "doing something that benefits one of my companies or not."

"If we thought that," Trump interjected, "we would not let him do that segment or look in that area, if we thought there was a lack of transparency or a conflict of interest."

Spokespeople for X did not respond to multiple requests for comment.

Trump administration officials are discussing plans to curtail and combine the power of banking regulators—without Congress's input.

In recent discussions, Trump advisers and allies have examined whether it is possible to collapse the Federal Deposit Insurance Corp. into the Treasury Department, according to people familiar with the matter. They have also discussed combining the FDIC's regulatory role with the Office of the Comptroller of the Currency under Treasury.

The Trump administration has already taken aim at one financial regulator, the Consumer Financial Protection Bureau. President Trump over the weekend installed Russell Vought, the head of the Office of Management and Budget, to lead the CFPB. Alongside the Elon Musk-led Department of Government Efficiency, Vought moved at breakneck speed to close the CFPB headquarters and order staff to halt work.

Staff inside the FDIC and the OCC expect to hear from DOGE soon, according to people familiar with the matter.

Discussions on how to shrink, consolidate or even eliminate the bank regulators have been under way since at least late last year, The Wall Street Journal previously reported. Those discussions included combining or otherwise restructuring the FDIC, OCC and the Federal Reserve's supervision role, the Journal reported.

Some Trump allies have pushed for a political loyalist to be named the Fed's vice chair for supervision, some of the people said. Bankers have advocated for the role to be filled by Fed governor Michelle Bowman and have pressed the administration to move quickly.

The discussions are fluid and it wasn't clear what changes would ultimately be proposed.

The administration wants at least de-facto consolidation of the bank regulators, even if the agencies remain separate entities. It's unclear whether the administration could do that on its own. Congressional support would be needed to officially combine agencies.

In a recent proposal, one individual would lead both the OCC and the FDIC, people familiar with the matter said. That would allow the OCC to attempt to take over all of the FDIC's work supervising banks and potentially its role winding down failed banks, the people said. The FDIC, which is funded by insurance premiums paid by banks, would be left in charge of deposit insurance.

There have been separate discussions to also tap that individual as the under secretary for domestic finance at Treasury, which helps advise and carry out policies for the department, one of the people said.

In any plan that advances, significant cuts are likely at the bank regulators. Trump has moved to freeze hiring in the federal government and force workers back to the office full-time. DOGE has been the main driver of cuts.

Bank executives have been telling Trump their industry suffers under too much regulation. For years, the CEOs have argued other industries are encroaching on their business without the same regulatory hurdles.

Bankers have remained broadly optimistic that Trump's administration will have a friendlier stance toward capital requirements, mergers and acquisitions and technology partnerships.

But they would be wary if any changes threatened to undermine even the perception of the ability for the government to insure deposits, monitor risks and coordinate orderly closures across the more than 4,000 banks in the country. Some bankers have called for the expansion of deposit insurance, particularly in the wake of several bank failures in 2023.

Not all banks are against a system of multiple regulators, which allows them to shop around for a lighter touch and work with staff familiar with their size and complexity.

This week, executives at some of the largest commercial banks are set to meet with members of Congress, as well as bank regulators and nominees, according to people familiar with the matter.

While the discussions have included plans to bypass Congress, the banking regulator heads are jobs that require Senate confirmation, which could still give Congress a say. Republicans hold majorities in both the Senate and the House but would be unlikely to find Democratic support for dramatic changes.

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 continuously 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

aims.

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 relgious 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 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; . . .

Joseph M. Lynch, NEGOTIATING THE CONSTITUTION: THE EARLIEST DEBATES OVER ORIGINAL INTENT 218-27 (1999)

In the beginning was the text of the Constitution, but sometimes the text was wrapped in ambiguity. When, for instance, the text of Article I, Section 8, Clause 18, says: 'Congress shall have power. . . to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers," what do these words mean? Do they mean that Congress has the power "to legislate in all cases for the general interests of the Union, and also in those to which the States are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation?" Or, more narrowly, do they mean that Congress has merely the incidental power to pass laws carrying into effect the powers already enumerated in Section 8?

When, following the Constitutional Convention, opponents of ratification charged that the sweeping provisions of the Necessary and Proper Clause would give Congress broad and indefinite powers, and supporters of ratification denied it, both sides created a major problem for those who, after ratification, would run the new government. If the new government were organized on the basis of the assurances given during ratification—that the powers of Congress were limited to those enumerated in Section 8—it would not work. If, however, to make it work, members of the new government went beyond those powers, they would lay themselves open to the accusation that they were repudiating the position they had taken to secure ratification. In the face of this dilemma, the new government might have faltered and the Constitution might soon have been revealed to be a deeply flawed document. But both in Congress and in the executive branch, there were those who, convinced of their responsibility to show the world that Americans could govern themselves, would not allow this to happen. For them, the cause of republicanism was at stake. As Hamilton so eloquently stated in the opening essay of the *Federalist:*

> IT HAS BEEN FREQUENTLY REMARKED, that it seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not, of establishing good government from reflection and choice, or whether they are forever destined to depend, for their political constitutions, on accident and force. If there be any truth in the remark, the crisis, at which we are arrived, may with propriety be regarded as the æra in which that decision is to be made; and a wrong election of the part we shall act, may, in this view, deserve to be considered as the general misfortune of mankind.

Animated, therefore, by a desire to make the Constitution and the new government organized pursuant to it operate successfully, members of the First Congress, in the opening days of the very first session, passed a law imposing a uniform oath of allegiance to the Constitution on state officers, despite the absence of a specific power authorizing them either to provide for the form of such an oath or to adopt uniform laws. Some, relying on the Necessary and Proper Clause, ignored Madison's doubts and Gerry's skepticism concerning congressional power.

Later in the same session, Congress enacted a law recognizing the president's power to remove an incompetent department head, again in the absence of a specific constitutional provision authorizing such an enactment. Approximately three-fifths of those in the House who voted for the measure again relied on the Necessary and Proper Clause, although Madison, for the others, relied on what he termed the implied powers of the presidency under Article II.

The desire for an effective government also led Hamilton to propose the establishment of a national bank. The framers' decision, limiting Congress to the adoption of a

metallic currency, seemed to him a highly unrealistic provision for an underdeveloped country such as the United States of that time. In recommending a national bank, Hamilton cited its several advantages. The paper it would issue would serve as a currency, enabling the government more easily to pay the principal of its foreign debt and the interest on its foreign and domestic debt to its creditors, and make it easier to borrow in times of emergency. In addition, a paper currency would enhance trade.

When Madison challenged the bill establishing the Bank of the United States as beyond the powers of Congress even under the Necessary and Proper Clause, Ames in support of Hamilton argued that the clause should be construed so as to promote "the good of the society, and the ends for which the government was adopted." In his opinion to President Washington defending the bill's constitutionality, Hamilton ingeniously agreed with Madison that the Necessary and Proper Clause merely authorized the enactment of laws carrying into execution one of the specified powers. However, in his application of the clause, as though reasons of practicality carried their own weight, he repeated the positions set forth in his initial report: The bill would ensure an adequate money supply, help the government with its debt, enhance trade, etc.

The wisdom of Hamilton's plan became evident during the War of 1812. The Bank's charter expired, a credible national paper currency disappeared, and the United States defaulted on its debt. The painful lessons learned from that experience forced the Republican majority in Congress to repent and pass a bill chartering the Second Bank of the United States—and forced Madison as president to sign it, in silent acknowledgement that the presence of such an institution was, after all, necessary and proper. After Chief Justice Marshall justified the constitutionality of the law in *McCulloch v. Maryland*, Justice Johnson, in his concurring opinion in *Osborn* v. *The Bank of the United States,* confirmed that the Bank's ultimate usefulness lay in its ability to float a national paper currency as an effective supplement to the constitutionally mandated but inadequate metallic currency.

Practicality—the desire to make the government operate efficiently—was also the basis for Hamilton's construction of the provision for spending for the general welfare in his report to the House in the Second Congress: There are certain needs for the alleviation or advancement of which local resources are inadequate; resort must be had to the larger revenues of the national government. Even Madison in opposition had to bend to the necessity of spending federal money in particular cases, for instance, in his concession to the New England fisheries and his support of the Santo Domingo refugees. Eventually, the Supreme Court sanctioned the Hamiltonian thesis in *United States v. Butler* . . .

The Federalist defense of the constitutionality of the Sedition Act in the Fifth Congress was also based on practical need: that of the national government to protect itself against forceful overthrow and against written or spoken incitement to that end. As a general proposition, the Supreme Court has upheld that position rather than the highly unrealistic Republican argument that the national government lacked the power because it had not been enumerated.

In the circumstances of 1798, however, as we know, the controversial provisions of the Sedition Act—those proscribing writing or speech that brought the federal government, Congress, or the president into disrepute or contempt or excited hatred against them—were administered to suppress political criticism of the administration. As Gallatin in Congress and Madison in his report to the Virginia Rouse of Delegates correctly argued, such legislation rends to immunize incompetent, corrupt, or despotic public officials from criticism and maintain them in office. In effect, it perpetuates bad, not good, government. For that reason, although recognizing the power of the federal government to

defend itself, the Supreme Court has held this type of legislation to be contrary to the provisions of the First Amendment.

None of the measures that the Federalists adopted, however, could have been enacted into law without the concurrence of George Washington. The military leader in the successful revolt from British rule, Washington had accepted the presidency to consolidate that victory. As a man of action and an outstanding administrator with a deep commitment to the success of the new government during his presidency, he naturally favored such legislative and executive measures as would ensure his administration's success. Thus, in the first Congress, he signed both Madison's bill to recognize the president's power to remove a department head and Hamilton's bill to establish a national bank.

In the conduct of foreign affairs, Washington's commanding presence and the widespread public respect for his person and his achievements won him a practical latitude of operation, despite the lack of a specific constitutional provision to that effect. In advocating such a prerogative, Hamilton, acting as Washington's principal adviser, disregarded both his own prior position in the *Federalist* and the argument raised by Madison in his Helvidius essays.

Indeed, during the period under discussion, when he had influence in the government, even Madison labored under the necessity to be practical and, like Hamilton, disregarded the authority of the *Federalist.* Thus, while acting as the Federalist leader in the House in the first session of the First Congress, he worked for the exclusive presidential power to remove a department head in the executive branch, on the ground that otherwise the country might be saddled with an officer who intrigued with members of the Senate against presidential policies. (This subsequently happened to Madison in his own administration, despite the removal power.)

And when Washington asked for his advice or when he was in pursuit of his own legislative agenda, Madison, like Hamilton, followed the dictates of practicality and ignored the authority of the framers. For example, his notes of the proceedings of the Constitutional Convention reveal that the framers intended to exclude the president from participating in fixing the place to which Congress shall return following an adjournment. Yet in the very first session of the First Congress, when he supported a bill to fix the permanent seat of government and remove the temporary seat from New York, Madison assigned the president such a role. He later confirmed that position in the advice he gave to Washington regarding a contemplated change in the location of the first session of the Third Congress from Philadelphia following an outbreak of yellow fever.

During the same period Jefferson, while serving as Washington's secretary of state, also gave practical advice. Thus, regardless of what the *Federalist* said and what the framers intended respecting the power of Congress to declare war and the power of the Senate to participate in the ratification of a peace treaty, Jefferson admitted that in the circumstances of 1793 the president should not call Congress into special session but should decide himself against honoring the provision in the treaty with France that required the United States to go to war against Great Britain.

The Federalist dependence on Washington in carrying on the business of government in an efficient manner—albeit in disregard of the many assurances given in the *Federalist* and in the state ratifying conventions regarding the limited powers of Congress—became evident on his death. Thereafter, Federalist power quickly waned. Jefferson's election to the presidency in 1800, coinciding with Republican control of the Seventh Congress, established a new order of constitutional interpretation. With Jefferson's approval, the Virginia delegation, the largest in the House and the leader of southern interest, limited the powers of the federal government through the routine application of strict construction: Congress was to be confined within the strict

limits of its specified powers under Article I. Sedgwick's assessment—that Jefferson's election would reinstate the principles of the old Confederation—was vindicated.

There were even then, to be sure, limits to the doctrine of strict construction. In certain cases, Republicans, Jefferson and Madison included, had to set aside ideology and be practical. Thus Jefferson, having decided that the Louisiana Purchase was necessary to secure the nation's southern and western borders, disregarded his scruples and the absence of a specific constitutional provision authorizing the acquisition of territory. Later, to carry into effect his policy of a trade embargo upon British shipping, he countenanced a scandalously broad construction of the Commerce Clause. Similarly, Madison signed the bill chartering the Second Bank of the United States despite his own earlier argument against the constitutionality of the Bank under its first charter. And in his conduct of foreign policy, President Jefferson frequently acted without consulting Congress.

On the whole, however, Jefferson, Madison, and their party followers regarded these deviations from the strict limits of Articles I and II as momentary concessions to necessity, tolerable specific exceptions to their general principles, but not repudiations of the principles themselves. After all, their political success was based on strict construction. This party line was maintained until the Civil War. Indeed, Marshall's 1819 opinion in *McCulloch v. Maryland* caused a fury in Virginia, not because it upheld the statute establishing the Bank—Virginians were willing to concede this on practical grounds—but because he dared to invoke the Necessary and proper Clause and use the Hamiltonian rationale of implied governmental powers.

In private correspondence, Madison aided the purists' cause with his advocacy of an alternate theory of constitutional justification of the Second Bank's charter, amounting to a constitutional validation by *stare decisis*: However questionable in the beginning, he wrote, congressional establishment of the First Bank had been constitutionally legitimated by the public's general acceptance of its operations during the twenty years of its charter. He did not add that the reason for its acceptance was that despite his and Jefferson's constant political rhetoric as to its invalidity, its practicality was widely perceived and appreciated from the beginning, even by such strict Constructionists as Gallatin and Senator Maclay.

In writing his opinion in *McCulloch*, Marshall was well aware of his fellow Virginians' fiercely held convictions regarding the limits of federal power in general and or the Necessary and Proper Clause in particular. This awareness led him to include in his opinion the statement that the federal government was "one of enumerated powers," which reinforces the basic premise, still invoked today, that indeed the authority of the federal government is limited in scope.

But, ultimately, the Madisonian Jeffersonian thesis—that the powers of Congress and the presidency must be strictly construed, that their powers are confined to those specifically enumerated, that the Necessary and Proper Clause is limited in its application to the execution of the enumerated powers, and that federal spending must be limited to the purposes set forth in Article I—has been substantially eroded, although not completely set aside. . . .

Indeed, so tenacious has been adherence to the strict construction thesis that resort to a substantive interpretation of the Necessary and Proper Clause has been almost a matter of desperation. Instead, in order to create a government of energy and efficiency, Congress and the Court have preferred to work within what has appeared to be the specific provisions of the Commerce Clause. Thus, in a series of decisions the Court accommodated a broad reading of the Commerce Clause to enable Congress to legislate in matters it considers in the general interests of the country, and in so doing rendered almost irrelevant the requirement that for the federal government to act the commerce must be interstate. . . .

Today, therefore, in most instances, despite Madison and Jefferson, Congress does have the power to legislate, either under the Commerce Clause or the spending power, in cases in which—to use the language of Gunning Bedford's resolution in the Constitutional Convention—the general interests of the United States are concerned, the several states are incompetent to act, or the harmony of the United States may be interrupted by the exercise of individual legislation. Congress has also been held to possess wide legislative powers under the enforcement provisions of the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution to address problems involving racial discrimination. Those powers, the Court has held, are as broad as those under the Necessary and Proper Clause, the clause of ultimate reason.. . .

To return to the question posed at the outset of this epilogue: When the Committee of Detail replaced the Bedford resolution with the Necessary and Proper Clause and the delegates to the Constitutional Convention approved it, did they intend to deprive Congress of the power to pass uniform laws? After the convention, Madison said that they did. During, and after the convention, two of the delegates—George Mason and Elbridge Gerry—said that they did not. Edmund Randolph equivocated.

During ratification, Hamilton agreed with Madison and said in the *Federalist* that they did. But in his opinion to Washington on the bank bill, he said they did not: "Necessary and proper" should be interpreted so as to further the general interests of the country. His construction of the spending power confirmed his reading of the Necessary and Proper Clause and gutted the heart of Madison's construction of that clause. Others, including Washington, agreed with Hamilton's later opinion.

Elsewhere in the *Federalist,* Hamilton openly set forth his views concerning the manner in which constitutions should be written and construed: "Nations pay little regard to rules and maxims calculated in their very nature to run counter to the necessities of society. Wise politicians will be cautious about fettering the government with restrictions that cannot be observed."

In our system, it is the Supreme Court that ultimately construes the Constitution. In the twentieth century, in cases where the general interests of the country have been involved and matters of great importance at stake, it has construed the Commerce Clause so as to permit Congress to attend to the necessities of the country.

Where no federal power enumerated in the Constitution has appeared pertinent, where the general interests of the country or matters of great importance are at stake, and where all else has failed—as in the legal tender and gold clause cases—the Court has sometimes taken refuge in the wonderfully ambiguous language of the Necessary and Proper Clause and held the legislation at issue to be valid.

In all these cases, whether under the Commerce Clause or the Necessary and Proper Clause, the Supreme Court, custodian of Constitutional Law, deciding for the nation, has paid little regard to the rules and maxims of strict construction.

Madison, diligent advocate of strict construction, has been called Father of the Constitution. After constitutions are written, however, they must be interpreted and made to work. It is Hamilton who deserves the title of Father of Constitutional Law.