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Stephen Ellmann

New York Law School, stephen.ellmann@nyls.edu

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THE NEW SOUTH AFRICAN CONSTITUTION AND ETHNIC DIVISION

by Stephen Ellmann*

I. INTRODUCTION

In an era of ethnic slaughter in countries from Bosnia to Rwanda, the peril of ethnic division cannot be ignored. Reducing that peril by constitutional means is no simple task, for when ethnic groups pull in different directions a free country can only produce harmony between them by persuading each to honor some claims of the other and to moderate some claims of its own. It will require much more than technical ingenuity in constitution-writing to generate such mutual forbearance. Moreover, constitutional provisions that promote this goal will inevitably do so at a price — namely, the reduction of any single group's ability to work its will through the political process. And that price is likely to be most painful to pay when it entails restraining a group's ability to achieve goals that are just — for example, when it limits the ability of the victims of South African apartheid to redress the profound injustice they have suffered.

This Article examines the efforts of the drafters of the new transitional South African Constitution to overcome ethnic division, or alternatively to accommodate it. We will see from this analysis that the complex arrangements established by the transitional constitution do entail constraints on the power of South Africa's newly enfranchised black majority. Nonetheless, I will argue that these provisions, in general, represent a wise response to the tremendous challenges involved in making a peaceful transition from apartheid to democracy.

At least some of these constraints on majority power might be neither necessary nor desirable if ethnic division were not a reality of South African life, and so it is important to begin by recognizing this reality. It is important as well to try to gauge its severity. Those who

* Professor of Law, New York Law School. I appreciate the helpful comments of Geoff Budlender, Richard Briffault, Matthew Chaskalson, Dana Gershon, Jonathan Klaaren, Bongani Majola, Etienne Mureinik, Thandabantu Nhlapo, and Nancy Rosenbloom, as well as the financial support of New York Law School. Earlier versions of this paper were presented in 1994 at the Conference on Rights in New Constitutions, sponsored by the Center for the Study of Human Rights and the *Columbia Human Rights Law Review*, and at the Annual Meeting of the Law and Society Association. Some passages of this paper are drawn, with permission, from my analyses of the new South African Constitution published in the February 14, 1994, and May 3, 1994, editions of *South Africa: The Countdown to Elections* (a newsletter of the Southern Africa Project of the Lawyers' Committee for Civil Rights Under Law).

shape South Africa's constitutional response to ethnic division must struggle to distinguish implacable and deep-seated ethnic hostility from the potentially curable effects of individual demagogic leaders. They must also try to distinguish between the *fears* of many South Africans about their future in a country where their groups do not enjoy majority status, and the likely realities of different ethnic groups under a new constitutional order.

It hardly requires argument that one form of ethnic tension exists in South Africa, namely the longstanding white prejudice against blacks. Perhaps it is now similarly clear that black hostility towards whites exists, though the weak showing of the Pan Africanist Congress in the country's recent, flawed, but wonderful election¹ suggests that such feelings are hardly dominant in black political sentiment in South Africa.² It may be more controversial to assert that ethnic tensions exist between different groups of blacks.³ Yet Coloured alienation from Africans seems to have played a significant part in the victory of the National Party (not long ago the architects of apartheid) in the provincial elections in the Western Cape;⁴ there have also been

1. The April 1994 election, the first nonracial election ever held in South Africa, was for many South Africans an event to celebrate. The long lines of patient voters waiting to exercise their franchise were an inspiring example of democracy in action, all the more miraculous because of the threats of violence which had been so widespread until just a few days before the election. *See infra* notes 19-20 and accompanying text. Unfortunately, the results in one province of South Africa, KwaZulu/Natal, were tainted by massive fraud. *See infra* note 7.

2. The Pan Africanist Congress, long notorious for its "one settler, one bullet" slogan, placed sixth in the election, in which it won only 1.2% of the vote and just five seats in the National Assembly. *Final Returns From South Africa*, N.Y. Times, May 7, 1994, at A8. The five parties which fared better were the African National Congress (62.7% of the vote and 252 seats), the National Party (20.4% of the vote and 82 seats), the Inkatha Freedom Party (10.5% of the vote and 43 seats), the Freedom Front (2.2% of the vote and 9 seats), and the Democratic Party (1.7% of the votes and 7 seats). *Id.*

3. I follow the practice of many South Africans in using the term "black" to refer to all South Africans of African, mixed-race ("Coloured," in South African parlance), and Indian descent.

4. *See* Jonathan Steele, *De Klerk Unlocks New Hope in Cape*, Guardian (London), May 6, 1994, at 14; Jonathan Steele, *ANC Yields Western Cape to Nationalists*, Guardian (London), May 4, 1994, at 11. At least some Coloured South Africans are angry enough with the new South African government that they rioted on September 15, 1994. *See* Bill Keller, *Mixed-Race South Africans Riot Over 'Favoritism' for Blacks*, N.Y. Times, Sept. 16, 1994, at A9.

suggestions of tension between Indians and Africans,⁵ and finally, there are clearly ethnic tensions between different groups of Africans.

One of these divisions is between the Zulu and the Xhosa, the two largest African ethnic groups in South Africa.⁶ I certainly do not mean to suggest that all Zulu support the Inkatha Freedom Party (Inkatha) or are moved by the ethnic, traditionalist appeals made by Inkatha and its leader, Chief Mangosuthu G. Buthelezi. Perhaps, in truth, less than a majority are pro-Inkatha, though the election in Natal was so traumatized by fraud that it is hard to say for sure either way.⁷ Certainly many Zulu support the African National Congress (ANC), to which Inkatha is fiercely opposed.⁸ But opinion polls cited by Donald Horowitz suggest that Africans of different ethnic groups

5. Most Indians (and most "Coloureds"), it appears, voted for the National Party. Patti Waldmeir & Michael Holman, *South African Elections: Spirit of Conciliation Sweeps Aside Letter of Vote*, Fin. Times (London), May 7, 1994, at 3. See also Kenneth B. Noble, *South Africa's Indians Shift Loyalties*, N.Y. Times, Apr. 22, 1994, at A8.

6. As of 1986, there were approximately 6.5 million Zulu (27% of the African population) and 5.5 million Xhosa (23% of the African population). Seven other groups — Tswana, Pedi (North Sotho), Sotho (South Sotho), Tsonga (Shangaan), Swazi, Venda, and Ndebele — made up the remainder of the country's African population. Donald L. Horowitz, *A Democratic South Africa? Constitutional Engineering in a Divided Society* 48-49 (1991).

7. Although the chairman of the Independent Electoral Commission certified the South African election in Natal, as elsewhere in the country, as "substantially free and fair," John Carlin, *ANC Wins Seven out of Nine Provinces to Complete Landslide*, Independent (London), May 7, 1994, at 12, there were widespread reports of massive election fraud in the province. According to one report, "hundreds of ballot boxes came [for counting] neatly stacked with perfectly folded ballots, almost all marked for Inkatha." Many districts produced more votes, in one case over eight times more votes, than had been projected. Some estimates were that more than one-fourth of the four million votes counted in Natal were tainted. Dele Olojede, *ANC Ignored Fraud; Inkatha 'Victory' Appears Rigged*, Newsday (Nassau and Suffolk ed.), May 17, 1994, at A4. The African National Congress (ANC) could have chosen to object to these events much more forcefully, but that course of action ran the risk of calling the entire election into question and thus undercutting the legitimacy of Nelson Mandela's accession to the Presidency. (The ANC also may have been guilty of fraud.) More chillingly, ANC resistance to recognition of the Natal results might have refueled the terrible violence of previous months. See *id.* (quoting an Inkatha leader as saying that "[i]f they [the ANC] are serious about stopping violence, they must stop this nonsense about irregularities"). Thus, while the official election returns gave Inkatha 50.3% of the vote in Natal, against the ANC's 32.2%, it remains quite possible that a majority of the Zulu (the predominant black ethnic group in Natal) actually oppose Inkatha. See Carlin, *supra*. For the view that fraud did not fundamentally distort the results, however, see Rian Malan, *Party Time: Finally Out of the Darkness*, Guardian (London), May 13, 1994, § 2, at 13.

8. See Carlin, *supra* note 7, at 12.

sometimes hold views of each other's groups that are so hostile that, if we encountered them in whites' attitudes towards blacks, we would not hesitate to describe them as prejudiced.⁹ In one startling study, Zulu expressed a variety of negative views of Ndebele, Tsonga and especially Xhosa people.¹⁰ Much of the recent political violence among blacks has been linked to the hostility between Zulu and Xhosa.

But South Africa has seen incidents of violence between other African groups as well.¹¹ Given the appalling example of Bosnia, where groups that had lived together peacefully for many decades and substantially intermarried descended in a few years to criminal or even genocidal war,¹² it would be a mistake to assume that even the

9. Horowitz, *supra* note 6, at 61-71. For example, Horowitz points to "[t]he frequent finding that Africans of various groups believe at least some Whites to possess more desirable attributes than those possessed by Black groups other than their own." *Id.* at 70.

10. In this study, Zulu living in KwaMashu, a township near Durban, expressed "[f]airly elaborate stereotypes" and "[s]trongly negative characterizations" for some other African groups. "Ndebele were 'backward,' Tsonga were 'loose-living,' and Xhosa were 'clever' people who would make the Zulu feel 'lost' and 'inferior' or would cheat them. In fact, 'Zulu really get their ire up when they refer to the Xhosa,' whom they described as 'too clever,' 'crooks,' 'scheming,' 'very cunning,' 'crafty,' and 'stiffheaded.'" *Id.* at 65-66 (quoting Brian M. du Toit, *Ethnicity, Neighborliness, and Friendship among Urban Africans in South Africa*, in *Ethnicity in Modern Africa* 153, 158 (Brian M. du Toit ed., 1978)).

11. Horowitz, *supra* note 6, at 73 (citing incidents of violence between Shangaan and Pedi, and between Ndebele and Pedi). Both of these incidents were evidently provoked by South African government manipulation of the boundaries of the so-called "homelands," to which it sought to consign Africans, but, as Horowitz also notes, the fact that ethnic conflict has to some extent been "artificially" created does not mean that it is not real. *Id.* at 46-48, 73-74.

12. One writer has commented that "Yugoslavs before the [civil] war considered themselves, by and large, to be Yugoslavs first, Serbs, Croats or Muslims second. Intermarriage was common. By some estimates, one-third of Yugoslav families are headed by parents of different ethnic origins. Sarajevo, Belgrade and Zagreb were true melting pots." Michael Meyer, *Using Force in Bosnia War Won't Lead to a Vietnam*, L.A. Times, Jan. 10, 1993, at M2. In Rwanda, somewhat similarly, Hutu and Tutsi shared a common culture and language and had intermarried significantly; it apparently is often difficult even for Rwandans to say which group a particular person belongs to. A reporter describing a village where Tutsi had been massacred by Hutu wrote that "[t]he story of this village is the story of Rwanda: Hutu and Tutsi living together, intermarrying, not caring or even not knowing who was a Hutu and who a Tutsi." Raymond Bonner, *In Once-Peaceful Village, Roots of Rwanda Violence*, N.Y. Times, July 11, 1994, at A8.

lesser tensions that exist between Africans other than Xhosa and Zulu are too trivial to be exploited politically.¹³

There is reason to believe, nonetheless, that South Africa's ethnic tensions can be contained. The sheer holding of the April election is some evidence of this, since ethnic strife can make elections inconceivable. The widespread euphoria associated with the election is further testimony that a shared sense of national liberation can prevail over a host of possible divisions. Moreover, the ANC's victory brings to power (constrained power, to be sure) a group notable for its longstanding opposition to tribalism¹⁴ and for its striking willingness to respond to the anxieties of whites.¹⁵ (The ANC is also, however, a group in which Xhosa have played a visible and disproportionate role.¹⁶) In addition, there is growing evidence that much of the past years' putatively ethnic violence was not spontaneous ethnic passion but rather was engineered by agents of apartheid, the often-suspected "third force."¹⁷ These grim revelations ironically offer reason to hope

13. For a more optimistic view, though one written before ethnic violence around the world escalated to its most recent heights, see Allister Sparks, *The Mind of South Africa* (1990). Sparks predicted that "[i]n a post-apartheid South Africa, whatever power struggles arise in the black community, the competing political leaders will not be appealing to tribal power bases but to ideologically defined political bases" — with Inkatha as the sole exception to this pattern. *Id.* at 391.

14. *Id.* at 390-91.

15. Thus Nelson Mandela, in his inaugural address, characteristically declared that "[w]e enter into a covenant that we shall build the society in which all South Africans, both black and white, will be able to walk tall, without any fear in their hearts, assured of their inalienable right to human dignity — a rainbow nation at peace with itself and the world." *Mandela's Address: "Glory and Hope,"* N.Y. Times, May 11, 1994, at A8. He also chose to use this occasion to express deep appreciation to F.W. de Klerk, the outgoing white president whom Mandela had in previous months sometimes bitterly criticized. *Id.*

16. As of mid-1989, "ten [of the twenty African members of the ANC's National Executive Committee] were Xhosa, five Tswana, four Pedi, and one Zulu. In short, fully half the black leadership of the ANC was Xhosa-speaking, which means that Xhosa were overrepresented by a factor of about 2.2. Zulu were dramatically underrepresented, by a factor of more than 5." Horowitz, *supra* note 6, at 54. Among others, Nelson Mandela and Thabo Mbeki (now, respectively, president and executive deputy president of South Africa) are both Xhosa. *Id.*

17. Shortly before the election a judicial commission of inquiry headed by Judge Richard Goldstone (who has since been appointed to prosecute war crimes in Bosnia) reported findings implicating high-level police officers in assisting violence by Inkatha. See Bill Keller, *Inquest Finds South Africa Police Aided Zulus in Terror Campaign*, N.Y. Times, Mar. 19, 1994, at 1. Both Inkatha and General Basie Smit, the second-highest-ranking police officer in South Africa and one of those accused in the Goldstone report,

that in the future such killings will become less common, as those who engineered so much of it lose their access to the levers of power.¹⁸

Despite these grounds for hope, it is still only a few months since the AWB, an Afrikaner extremist group, attempted to go to battle in the apartheid "homeland" of Bophuthatswana,¹⁹ and even less time since fiery talk of civil war in Natal and KwaZulu was commonplace.²⁰ It is too soon for complacency. Moreover, the men and women who shaped the transitional constitution that now governs South Africa do not appear to have taken the danger of ethnic strife lightly.²¹

denied the charges. *Zulu-Based Group Sees a 'Dirty Trick' in Report by Judge*, N.Y. Times, Mar. 21, 1994, at A9.

18. It is not a foregone conclusion, however, that "third force" activity ended with the April elections. In July 1994, a South African newspaper reported "[f]resh allegations about a high-ranking South African policeman arming an Inkatha warlord three weeks after the April elections." Farouk Chothia, *New Evidence — But No Action*, Weekly Mail & Guardian (Johannesburg), July 15-21, 1994, at 2. Meanwhile, violence in the KwaZulu/Natal area appears to be rising again. Patrick Collings, *S. Africa to Investigate Hit Squads*, UPI, July 27, 1994, available in LEXIS, Nexis Library, UPI File. Nationally, according to the non-governmental Human Rights Commission, "[p]olitical violence has dropped by two-thirds since the election," but in the first 100 days of Nelson Mandela's presidency there still were 457 deaths and 592 injuries in "606 incidents of political violence." *Human Rights Commission Assesses First 100 Days*, BBC Summary of World Broadcasts, Aug. 20, 1994, available in LEXIS, Nexis Library, BCSWB File.

19. See Bill Keller, *Mixed Signals Fatal for South African Separatists*, N.Y. Times, Mar. 12, 1994, at 3.

20. On April 5, 1994, for example, an Inkatha regional secretary told a rally of 20,000 Zulu carrying traditional weapons that " [i]f our demands cannot be addressed, then there is no election on the 27th of April . . . We will do everything in our power to destroy any attempt by any state organ used by the A.N.C. to divide the Zulu nation.' The same words were used in almost every speech [at the rally]." Donatella Lorch, *Arms Ban Is Defied at Rally by Zulu Party*, N.Y. Times, Apr. 6, 1994, at A13.

21. The transitional constitution is, by definition, not the final constitution that will govern a post-apartheid South Africa. That document is expected to be written by a Constitutional Assembly (described below). See *infra* note 36. It seems very likely, however, that the negotiations which produced the transitional constitution have also profoundly affected the shape of the final constitution to come. As a legal matter, this is so because the transitional constitution includes constitutional principles with which the final constitution must comply. See *infra* note 75 and accompanying text. As a practical matter, it is so because the new institutions of the state seem likely to generate their own protective interest groups. As an intellectual matter, it is so if only because the present document will inevitably become a starting point for subsequent debates.

The likely impact of the transitional constitution is particularly striking in light of the considerable emphasis which the ANC earlier placed on the importance of empowering a democratically elected constitutional assembly to write a new constitution for the country. See Jeffrey Herbst, *Creating a New South Africa*, Foreign Pol'y, Spring

In fact, as we will see, this constitution includes a broad range of provisions meant, at least in part, to limit, channel or even, if necessary, to suppress ethnic division in South Africa. In particular, we will find three different categories of constitutional response to ethnic division: the shaping of the structure of the new government; the fashioning of constitutional rights; and the provisions for the use of force. We will also find that in many respects these provisions represent significant constraints on the ability of the ANC, now the majority party in the new South African government, to carry out the kinds of reforms it has long sought and promised. Their adoption thus reflects very substantial concessions made by the ANC in the course of negotiations, and it is possible to attack these concessions as too substantial.

I do not endorse that attack. On the contrary, I believe that in general the concessions made by the ANC in the transitional constitution were appropriate. In many respects, these concessions represent wise limitations on the power of government, provisions as appropriate in South Africa as in any other country, or reasonable accommodations of the ethnic tension that is a particular fact of South African life. If some provisions concede more protection to particular ethnic groups than can be justified in principle, moreover, we must remember that the end of apartheid was the product of negotiations rather than of warfare. This was fortunate indeed for South Africa, but

1994, at 129. To be sure, the ANC did anticipate that negotiations before the Constitutional Assembly was chosen would produce constitutional principles that would bind the Constitutional Assembly. See African National Congress Constitutional Committee, Discussion Document: Constitutional Principles and Structure for a Democratic South Africa 5-6 (n.d.). Even so, the sheer length and detail of the transitional constitution, as well as a number of its specific provisions, suggest that the ANC's negotiators ultimately decided to accept greater constraints on the Constitutional Assembly's discretion than they had originally advocated.

As influential as the transitional constitution will be, however, those who are drafting the final constitution may still prove to have considerable room for maneuver. Cyril Ramaphosa, a lead negotiator for the ANC in the shaping of the transitional constitution, is now the chairman of the Constitutional Assembly. He has commented that the negotiating body responsible for the transitional constitution "was too exclusive, and . . . not fully representative of the various views and opinions in our country," and characterized the "negotiation process experience" in connection with the framing of the transitional constitution as "important, but not . . . sufficiently important to lead us to the drafting of the final constitution of our country." *Further on Ram[a]phosa's Constitutional Assembly Strategies*, International Intelligence Report, Aug. 3, 1994, available in LEXIS, Nexis Library, Non-US File. Whether a revised "negotiation process" will generate significantly different outcomes will only become clear over time.

the price of a negotiated settlement may well have included concessions of the sort I examine in this article. Not surprisingly, many of the provisions in question also reflect concessions made by the *government* during the negotiations. At the same time, we do not yet know how well these various constitutional arrangements will work, and I will seek to delineate the areas of uncertainty in the discussion that follows. In addition, endorsement of the general approach of the transitional constitution does not require us to approve all of its details, and I will identify certain particularly troubling features of the new arrangements.

II. THE STRUCTURE OF GOVERNMENT

The importance of governmental structure has been a central theme of American constitutionalism for two centuries,²² and a focus of South African political struggle for a comparable period.²³ The ANC battled for many years to achieve a nonracial, unitary state in South Africa.²⁴ In this unitary state, the abominations of the homelands — those pseudo-nations to which the rulers of apartheid sought to attach the African majority of South Africa's citizenry — would certainly be abolished, as they now legally have been.²⁵ It appears, moreover, that

22. American constitutional debates have long revolved around such questions as the separation of powers within the national government and the division of authority between the national government and the states. I explored the relevance of some of these debates for South African constitutional choices in Stephen Ellmann, *The Separation of Powers in a Post-Apartheid South Africa*, 8 Am. U. J. Int'l L. & Policy 455 (1992-93).

23. South African constitutional history includes a host of "structural" conflicts: Afrikaner efforts to secede, by physically escaping, from British rule in the early 19th century; the founding of independent Afrikaner republics and their consolidation into the British Empire, after the Boer War, as part of the nation of South Africa; the repartition of South Africa under apartheid into what were envisioned as multiple African states dotting the landscape of a white-ruled South Africa; and repeated constitutional restructuring of the government of South Africa itself, culminating in the 1983 creation of the tricameral Parliament, with one House each for whites, Coloureds, and Indians, a "reform" that helped bring on the demise of apartheid. See generally David Harrison, *The White Tribe of Africa: South Africa in Perspective* (1985); Joseph Lelyveld, *Move Your Shadow: South Africa, Black and White* (1985); Sparks, *supra* note 13.

24. "The African National Congress envisages a united, democratic, non-racial and non-sexist South Africa, a unitary State . . ." African National Congress Constitutional Committee, *supra* note 21, at 7.

25. *Id.* at 7-9. The homelands' abolition is effected in the new constitution. Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993), §§ 1, 230, sched. 7 [hereinafter S. Afr. Const.].

the ANC contemplated a highly centralized governmental structure in which the new leaders of the nation would exercise more or less plenary, albeit democratic, power.²⁶ But there are many ways that a nation can be structured and still be one nation, and the ANC over time reconsidered, and gave ground on, a variety of structural issues. As ultimately adopted, the transitional constitution accommodates the anxieties of ethnic minorities in South Africa, and in particular the concerns of conservative whites and traditionalist Zulu. It does so through five features of the new governmental structure that it establishes: a quasi-consociational national government; a federal division of power between the center and the provinces; an accommodation of the existing civil service and security forces; an enhancement of minority power on the local level of government; and the creation of a process for consideration of an Afrikaner homeland or *volkstaat*.

A. Consociationalism

Apartheid was so repugnant in part because it allowed a minority to rule over the majority. The fight against apartheid could easily be characterized as a struggle for majority rule. In that light, it is startling to realize that a central element of the transitional constitution's effort to accommodate ethnic tension is a departure from conventional understandings of the meaning of majority rule. This departure constitutes a partial embrace of consociationalism. Consociation is a form of government which, so its supporters claim, enables a sharply divided nation to hold together by protecting each of the nation's subgroups from encroachment by the others and enlisting their leaders in a grand, elite coalition that can transcend the hostilities that divide many of their followers.²⁷ The South African

26. For a critical appraisal of federalism as a structure for South African government, by an influential ANC constitutional lawyer, see Albie Sachs, *Protecting Human Rights in a New South Africa* 151-53 (1990). See also Herbst, *supra* note 21, at 129 (describing the ANC's evolution on the federalism question from an original stance of "outright opposition (because it considered the devolution of powers to be simply a way of entrenching white rule) to an acknowledgement that delegation of authority to sub-national units would be a good idea").

27. See Arend Lijphart, *Power-Sharing in South Africa* (1985). Lijphart here defines the "four basic elements of consociational democracy" as: "(1) Executive power-sharing among the representatives of all significant groups; (2) A high degree of internal autonomy for groups that wish to have it; (3) Proportional representation and proportional allocation of civil service positions and public funds; and (4) A minority veto

Constitution seems to aim towards such a grand coalition, in the form of a "government of national unity."²⁸

The institutional form for this coalition is the executive branch. The transitional constitution provides two paths by which the parties that lost the election nonetheless are able to wield a share of executive power. The first is the guarantee of an executive deputy presidency to any party winning at least one-fifth of the seats in the National Assembly.²⁹ As a result of this provision, President Nelson Mandela and the executive deputy president designated by the ANC, Thabo Mbeki, were joined in the government by a second executive deputy president, the white former president of the nation, F.W. de Klerk. The president and the executive deputy presidents, in turn, are part of the Cabinet, the ministers of which are selected by proportional representation.³⁰ The Cabinet, the constitution instructs, "shall function in a manner which gives consideration to the consensus-seeking spirit underlying the concept of a government of national unity as well as the need for effective government."³¹

Certain aspects of the constitutional provisions for the new parliament also seem designed in part to enhance the likelihood of a grand coalition's success. South Africa has adopted a system of proportional representation for the election of the most powerful house of Parliament, the National Assembly, and for the provincial legislatures.³² To be sure, proportional representation is in use in a

on the most vital issues." *Id.* at 6.

28. This phrase is used repeatedly in the transitional constitution. *See* S. Afr. Const., §§ 86(3); 88(2), (5); 89 (1), (2). In addition, the conclusion of the constitution is entitled "National Unity and Reconciliation." *See* S. Afr. Const., unnumbered concluding sec.

29. *Id.* § 84(1).

30. Every party that won 20 seats in the National Assembly (that is, essentially, at least 5% of the vote) is entitled to representation in the Cabinet in proportion to its seats in the Assembly. *Id.* § 88(2).

31. *Id.* § 89(2).

32. *See id.* sched. 2. As the text implies, the National Assembly is only one of the two houses of the national parliament. The other chamber, the Senate, is not chosen by direct popular election at all. *See id.* § 48; *see also infra* note 66.

The National Assembly's greater power derives from its role in the legislative process. Ordinary legislation must normally be approved by both houses, but if one house votes a bill down, it can still be enacted if it is approved at a joint sitting "by a majority of the total number of members of both Houses." S. Afr. Const. § 59(2). Since the National Assembly has 400 members and the Senate only 90, *id.* §§ 40, 48, & 124(1), 246 members of the National Assembly can enact legislation even over the Senate's unanimous objection. The National Assembly's powers over taxation and spending are

number of countries and need not be a part of a consociational system, but its effect in South Africa may be to buttress the grand coalition.³³

On paper, at least, the system would enable the political parties that have joined the Cabinet of the government of national unity to enact the Cabinet's decisions into law without any resistance. The members of the National Assembly in theory owe no allegiance to any particular group of constituents who have the power to vote them out of office, for South Africans did not vote for individual district representatives but rather for political parties.³⁴ Moreover, the members of those parties who have taken seats in Parliament and the provincial legislatures will be subject to expulsion from Parliament if they are expelled by their parties.³⁵ In addition, unless the process of drafting a permanent constitution breaks down,³⁶ there will almost certainly be no new elections until 1999.³⁷ Until then, the political parties can work together, each one bringing its reluctant members along, without having to face the voters. The effect may be to make it easier for the leaders of these parties to join in a grand coalition.

This is not full consociationalism by a long shot, for despite the efforts to foster a government of national unity, the constitution by no

even greater. *Id.* § 60. For circumstances in which Senatorial power over legislation is enhanced, however, see *infra* note 65 and accompanying text.

33. For a description of the partially-proportional system of representation in West Germany, a country not notably consociationalist, see Lloyd N. Cutler, *Modern European Constitutions and Their Relevance in the American Context*, in *Reforming American Government: The Bicentennial Papers of the Committee on the Constitutional System* (Donald L. Robinson ed., 1985). For an example of an arguably consociationalist nation employing proportional representation, see Arend Lijphart's discussion of Switzerland, in Lijphart, *supra* note 27, at 90-91.

34. S. Afr. Const. sched. 2. The constitution did provide, however, for 200 of the 400 Assembly seats to be filled from "regional lists" based on the parties' success in the nine regions or provinces of the country. *Id.* sched. 2, §§ 2(a), 5.

35. *Id.* §§ 43(b), 133(1)(b).

36. The new constitution is to be worked out by the two houses of Parliament, sitting together as the Constitutional Assembly. *Id.* § 68(1). The transitional constitution charges the Constitutional Assembly to complete its work of adopting a new constitution within two years "as from the date of the first sitting of the National Assembly under this Constitution." *Id.* § 73(1). If the Constitutional Assembly does not succeed in this task, the constitution provides for deadlock-breaking procedures, one of which is the holding of new Parliamentary elections. *Id.* § 73(9).

37. *Id.* §§ 38(1), 80(1)(a). The only possible cause for new elections, other than a breakdown of the constitution-writing process, would be a parliamentary vote of no confidence in the Cabinet or in the president and the Cabinet — but the chances of this seem essentially nonexistent. Even with a vote of no confidence, it appears that elections would not necessarily follow. See *id.* § 93.

means guarantees that the new government will operate as a grand coalition.³⁸ The executive deputy presidents are entitled only to consult and not to veto.³⁹ Similarly, the Cabinet is not obliged to make decisions by consensus, but only to “give[] consideration to the consensus-seeking spirit.”⁴⁰ The constitution embodies a framework for, and an aspiration towards, national unity, rather than a requirement of it. It is also decidedly less consociationalist than the proposals the government had put forward.⁴¹ Nonetheless, as a framework for a government of national unity, it is a consociational strategy.

38. In Lijphart's terms, the new South African Constitution provides for a measure of “executive power-sharing,” but does not, in general, offer a binding “minority veto” even on important issues. See Lijphart, *supra* note 27. Nor does the constitution broadly guarantee a “high degree of internal autonomy for groups that wish to have it,” though provisions for federalist institutions, for local government, and for consideration of a *volkstaat* — all discussed below — do offer some hints of such autonomy. Most notably, the constitution's provisions bearing on private discrimination ultimately do not insulate much of what might be some groups' preferred discriminatory life-style from governmental override. See *infra* notes 113-122 and accompanying text. In addition, the constitution does not guarantee “proportional representation” in civil service positions; ironically, the ANC might well have welcomed this element of consociationalism, but such a provision would have jeopardized the jobs of many current, white civil servants. See *infra* notes 84-88 and accompanying text.

39. See S. Afr. Const. § 82(2).

40. *Id.* § 89(2).

41. The National Party had proposed a bicameral legislature, in which the second house would have had the power to block a wide range of legislation. The first house would have been selected on the basis of proportional representation, while representation in the second house would have been based on regions. So far, this description matches the system South Africa has actually adopted. But in the National Party's proposal, representation in the second house would have been skewed far away from democratic proportionality by a rule that every party winning more than a to-be-specified percentage of the region's vote would receive an equal number of seats in the region's delegation. Constitutional Rule in a Participatory Democracy: The National Party's Framework for a New Democratic South Africa 11-12 (Sept. 4, 1991) [hereinafter National Party Framework]. The National Party also proposed that the executive branch be headed not by a single president but by a presidency, “consist[ing] of the leaders of the three largest parties in the First House” (assuming those three parties made up a majority). The National Party proposed that the chairmanship of this presidency could rotate on an annual basis, and that a “State President” could “be elected on a rotating basis from the ranks of the Presidency.” Decisions would be made “by consensus.” *Id.* at 13. While much of this may have fallen away at earlier stages of the negotiations, President de Klerk reportedly sought a rule requiring major Cabinet decisions to be made by a two-thirds majority almost to the last minute. See Bill Keller, *South African Parties Endorse Constitution Granting Rights to All*, N.Y. Times, Nov. 18, 1993, at A1, A14.

This new government is now in place. Whether it can attain the unity which the constitution urges it to seek remains to be seen, but so far it seems to have had considerable success in maintaining a degree of harmony and consensus.⁴² Nelson Mandela, appraising his first 100 days in office, recently said that in the government:

We don't paper over difficulties, over differences, but we are concentrating on those issues which unite us, and there is scope for all the leaders, and I think that they are playing their role very well. There is scope to concentrate on those issues that unite us, and I think that is the essence, the achievement of the Government of National Unity. We have made progress because the calibre of the leaders in the Government of National Unity are able to see those issues that unite us.⁴³

42. One instance of this harmony was the recent decision to replace Derek Keys, a prominent and well-regarded member of the National Party who served as finance minister in the Mandela Cabinet, with Chris Liebenberg, after the former announced his plans to resign. Liebenberg was neither a member of Parliament nor a member of the National Party's (or any other party's) election list of candidates for Parliament. Since the transitional constitution requires that ministers come from Parliament, and since resigning members of Parliament — such as Keys — are to be replaced by people on the election list of the party to which the resigning member belonged, Liebenberg could not be appointed to Parliament or to the Cabinet according to the transitional constitution. See S. Afr. Const. §§ 44, 51(2), 88(4). In addition, Liebenberg's appointment to the Cabinet would deprive the National Party of one of its share of the Cabinet seats, and the only way to restore the National Party's share without firing some other minister would be to add a minister to the Cabinet. However, the Cabinet was already at its constitutionally-specified maximum size of 27 ministers. See *id.* § 88(1). All of these problems were to be resolved through the adoption of amendments to the constitution, evidently with the approval of both the ANC and the National Party. Chris Louw, *Making Up the Rules as They Go Along*, Weekly Mail & Guardian (Johannesburg), July 8-14, 1994, at 2. The necessary amendment was passed by Parliament on a vote of 343 to 3, on September 15, 1994, and Liebenberg has been appointed. South African Press Association, *Parliament Passes Bill Allowing for Appointment of Finance Minister*, BBC Summary of World Broadcasts, Sept. 17, 1994, available in LEXIS, Nexis Library, BBCSWB File; Xinhua News Agency, *South Africa's New Finance Minister on Economic, Financial Policies*, Sept. 29, 1994, available in LEXIS, Nexis Library, XINHUA File.

43. *Mandela Gives Interview on First 100 Days*, BBC Summary of World Broadcasts, Aug. 20, 1994, available in LEXIS, Nexis Library, BBCSWB File [hereinafter *Mandela Interview*]. Later in this same interview, Mandela commented that he would like to bring into the government even those parties that did not make the five percent cut-off fixed by the constitution for cabinet membership. See *supra* note 30.

For his part, F.W. de Klerk affirms that "the Government of National Unity [GNU] has established a good working relationship, there's a commitment in the GNU to make the system work, there is a growing consensus on major goals."⁴⁴ Political violence has eased, though it is still a serious problem,⁴⁵ at least one opinion poll suggests that relations between the races have improved.⁴⁶ All of this suggests that the consociational strategy reflected in the constitution is working well.

How long the new government can retain this initial harmony is another question. Some South African observers predict that the Government of National Unity will ultimately divide, as the "National Party and Inkatha will withdraw from the government in time to re-establish their political identities for the next scheduled election in 1999."⁴⁷ Even now, ANC parliamentarians are working to establish Parliament's prerogative to question and even to reject the proposals of the government; the more this independent legislative function becomes part of the South African scene, the less it will be possible for the consensus-minded cabinet simply to work its will in Parliament.⁴⁸ Ironically, in South Africa the effect of freeing Parliament from executive domination — in other words, of building the separation of powers, which in the United States is seen as a limit on majority

44. *De Klerk Discusses 100 Days, Government of National Unity, MPs' Salaries*, BBC Summary of World Broadcasts, Aug. 23, 1994, available in LEXIS, Nexis Library, BBCSWB File [hereinafter *De Klerk Interview*].

45. See *supra* note 18.

46. According to a news report, "[a] recent poll showed that 60 percent of respondents in the greater Johannesburg area believed that different racial groups are getting on better now, while 36 percent thought relations were unchanged. Only 4 percent thought the situation had worsened." Gwynne Dwyer, *South Africa Finds a Century Is Not Erased in 100 Days*, San Diego Union-Tribune, Aug. 28, 1994, at G5.

47. Patrick Collings, *First 100 Days of Mandela's Government*, UPI, Aug. 16, 1994, available in LEXIS, Nexis Library, UPI File.

48. See Chris Louw, *The Back Bench Seizes the Crown*, Weekly Mail & Guardian (Johannesburg), Aug. 26-Sept. 1, 1994, at 10. One prominent ANC legislator, Johnny de Lange, is quoted in this article as saying that "[t]here is no reference whatsoever in the constitution forcing the legislature to be part of the government of national unity." *Id.* It is interesting to note that the ANC has also been taking steps to set up "a rough parliamentary constituency system," in which each of its legislators, despite not having been elected from a particular district, will be answerable to an ANC "sub-region" structure. Anton Harber, *From Trade Unionist to ANC 'Surgeon'*, Weekly Mail & Guardian (Johannesburg), Aug. 26-Sept. 1, 1994, at 13. The effect of this system might be to reduce somewhat the influence that the ANC's executive branch leaders wield over the individual legislators, who will now need to look to their sub-regions as well as to the president and Cabinet.

power — may be to weaken the limits on majority power built into the functioning of the executive branch. ANC legislators have already proposed to assign themselves the chairing of twenty-three of the twenty-seven parliamentary standing committees overseeing cabinet ministries, while granting the National Party the chairs only of four “housekeeping” committees and none of the twenty-seven “portfolio committees.”⁴⁹ Not surprisingly, F.W. de Klerk has already attacked the ANC’s parliamentary caucus,⁵⁰ and one of the leaders of the ANC parliamentary caucus, Cyril Ramaphosa, has responded by saying that “[d]e Klerk has not acclimatised himself to being number three in the government.”⁵¹ Not everyone in South African politics is disposed to be as statesmanlike as Nelson Mandela.⁵²

49. *Nats Angry at ANC Stance on Committees*, This Week in South Africa: News Highlights from the South African Media (S. Afr. Consulate Gen., New York, N.Y.), Aug. 16-22, 1994, at 2; *Buthelezi Backs Deputy President de Klerk in Chairmanships Row*, This Week in South Africa: News Highlights from the South African Media (S. Afr. Consulate Gen., New York, N.Y.), Aug. 23-29, 1994, at 1 (*This Week in South Africa* describes itself as “compiled and produced by the South African Consulate General” in New York; its reports “reflect[] the wording and terminology of various newspapers.”). A senior member of Parliament from the National Party has since warned that “ANC attempts to shift the balance of power in parliament away from the cabinet would be fought by the National Party and could end up in the Constitutional Court.” Chris Louw, *Parliament Power Play Could Go to Court*, Weekly Mail & Guardian (Johannesburg), Sept. 2-8, 1994, at 11.

50. De Klerk told a television interviewer that he sees “a lack of management by the leadership of the ANC of its caucus,” and “a tendency on the side of the ANC as a party, as a caucus, to disregard the lead which they get from their leadership.” *De Klerk Interview*, *supra* note 44. In this interview, de Klerk offered a generally positive picture of the first 100 days of the new government. Earlier he had reportedly declared that, although the National Party “had decided to remain in the Government of National Unity . . . ‘the red lights are flashing.’” *Nats Angry at ANC Stance on Committees*, *supra* note 49, at 2.

51. Ramaphosa’s words are quoted in Anton Harber, *supra* note 48. The reference to de Klerk as “number three” in the government implicitly asserts that de Klerk is junior not only to President Mandela but also to the other executive deputy president, Thabo Mbeki, who was designated by the ANC. The constitution itself does not establish any hierarchy among the executive deputy presidents.

52. The difference in the positions of Ramaphosa and Mandela is reflected in their responses to National Party criticism. Ramaphosa says that “[t]here is a growing feeling in the ANC caucus that, if the NP wants to play this role of an opposition, then we don’t need to be that accommodating.” Harber, *supra* note 48. Mandela, in contrast, told a television interviewer that “the fact that we have a Government of National Unity, and we are seeking consensus, does not mean that the minority parties are not in the opposition. They are perfectly entitled to criticize the Government of National Unity.” In fact, he emphasized that “[o]ne of the things I am resisting, and I’ll continue to resist, is that the minority parties should feel that the Government of National Unity is a

Finally, and perhaps most importantly, it remains to be seen whether unity can be preserved without sacrificing the African National Congress's ability to meet the long-postponed aspirations of South Africa's black men and women.⁵³ Consociational government cannot work unless the group leaders making up the grand coalition are enlightened enough to make it work, and this is never guaranteed.⁵⁴ South Africa's leaders have, however, shown quite a remarkable ability to respond to considerations of enlightened self-interest in recent years, and it seems likely that the government will be able to muster consensual support for a significant program of reform.⁵⁵ Certainly Nelson Mandela appears optimistic. He maintains that the Reconstruction and Development Program, the government's grand plan for redressing the grim heritage of apartheid, "is no longer a programme of any particular party. It is now a programme for the entire country. Every political party, every individual can now say with confidence: This is my programme to better the lives of our people"⁵⁶

B. Federalism

For Americans, consociational structures are still unfamiliar and sometimes — as evident from the response to Lani Guinier, who urged the adoption of somewhat similar structures as a way of

hollow shell, and that they are being used for the purpose of rubber-stamping what the majority party has decided." Mandela Interview, *supra* note 43. It is not irrelevant to understanding this apparent difference in views to know that Mandela chose not to appoint Ramaphosa as an executive deputy president, and that Ramaphosa then chose not to accept a position in the Cabinet. Chris Louw, *Behind the Code Lies Cyril's Bid to Win Power*, Weekly Mail & Guardian (Johannesburg), Sept. 16-22, 1994, at 6. With respect to F.W. de Klerk in particular, however, Mandela and Ramaphosa may not be far apart, for Mandela, often very generous in his response to opponents, is not always so generous to de Klerk. Bill Keller, *A Day in the Life of Mandela: Charm, Control, a Bit of Acid*, N.Y. Times, Sept. 12, 1994, at A1.

53. See Bill Keller, *Mandela Is Mr. Nice Guy, Irking Some Allies*, N.Y. Times, June 23, 1994, at A11.

54. See Lijphart, *supra* note 27, at 100-01; Horowitz, *supra* note 6, at 139-45; Ellmann, *supra* note 22, at 465 n.30.

55. At this writing, it seems likely that the next few months in South Africa will witness something of a burst of legislative creativity, as the new government gets its programs of reform under way. We will know much more about the likely successes and failures of the government of national unity when this battery of new legislation is in place.

56. *Mandela Interview*, *supra* note 43.

enhancing blacks' access to political power in this country — taboo.⁵⁷ Americans are more familiar with the idea of federalism as a limitation on the power of a central government. For many in South Africa, in particular for many who stood with the ANC, the idea of a federal South Africa was anathema.⁵⁸ Nonetheless, I believe that South Africa's new constitution, particularly as it was amended in 1994 as the ANC and the National Party sought to bring their opponents into the election process, does give South Africa a federal structure — but one in which the power of the component states, or rather “provinces,” is decidedly more limited than the authority of the states which make up the United States of America.

Among the most important of the March 1994 amendments to the constitution, at least symbolically, is one that actually did not directly regulate the provinces' powers. This provision abandoned the “single ballot” format for the elections, and declared instead that there would be two ballots, one for the National Assembly and one for the provincial legislatures.⁵⁹ This change, a welcome one as a matter of democratic principle, may well have helped persuade Buthelezi to participate in the election (though he did not make that decision until almost election eve). As a matter of pragmatic politics, the effect of this provision could have been to give parties which might have been unable to win great support at the national level a better chance of electoral success in particular provincial governments — though as the election turned out, there may have been relatively little of this sort of ticket-splitting. To whatever extent (if any) this change actually increased the voice of dissenting groups in the provincial governments, it will tend to make those governments more important sites of political struggle.

The amendments enhanced the power of the provinces in other respects as well. The range of issues on which the provinces are competent to legislate — quite a long list even before these amendments — is now even longer.⁶⁰ The provinces' claim on national revenues has been somewhat bolstered, as has their ability to impose

57. Anthony Lewis has commented that South Africans “used proportional representation to mitigate conflict; we mocked a Lani Guinier who thought we should consider a form of PR for the same reason.” Anthony Lewis, *Miracle with Reasons*, N.Y. Times, Apr. 29, 1994, at A27.

58. See *supra* note 26.

59. Constitution of the Republic of South Africa Amendment Act (Act No. 2, 1994), § 12, amending S. Afr. Const. sched. 2, § 15 [hereinafter March Amendments].

60. *Id.* § 14, amending S. Afr. Const., sched. 6.

taxes.⁶¹ But on all these scores the provinces' powers remain decidedly circumscribed. The national Parliament retains concurrent authority to legislate in all areas of provincial legislative competence. The section specifying whose laws are supreme in the event of conflict was rephrased in one of these amendments, but despite this rephrasing the section still accords supremacy to national laws in a wide, perhaps virtually limitless, set of circumstances.⁶² Parliament's discretion to allocate funds among the provinces remains substantial.⁶³ The provinces' taxing authority remains very limited.⁶⁴ And while the constitution somewhat bolsters the position of the provinces by requiring that various legislation affecting them be passed not only by the National Assembly but also by the Senate,⁶⁵ whose members presumably are more attentive to the provinces' interests than are the members of the National Assembly,⁶⁶ the impact of this requirement is diluted by the fact that the ANC has a clear majority in both houses.⁶⁷

61. *Id.* §§ 3-7.

62. *Id.* § 2, *amending* S. Afr. Const. § 126.

63. *Id.* § 3, *amending* S. Afr. Const. § 155.

64. *Id.* § 4, *amending* S. Afr. Const. § 156.

65. S. Afr. Const. § 61. The March Amendments extended — or at least made explicit — the application of § 61 procedures in connection with several aspects of provincial finances. March Amendments, *supra* note 59, §§ 3(b), 4(b), 5(b). The Senate's role is more substantial when Parliament is considering amendments to §§ 126 and 144, which define the provinces' spheres of legislative and executive authority; separate approval by two-thirds of the members of each house of Parliament is required to enact such amendments. *Id.* § 62(2). Other provisions of the constitution can be amended whenever two-thirds of the total number of members of the two houses — in other words, 327 out of the total of 490 members — vote for them. *Id.* § 62(1). Since the National Assembly has 400 members, most provisions of the interim constitution can be amended even over the unanimous opposition of the Senate.

66. It is my understanding that the members of the Senate were selected by the provinces, though the constitution did not mandate exactly this procedure. *See* S. Afr. Const. § 48(1) (providing for nomination of senators by the political parties represented in provincial legislatures, rather than by the legislatures themselves). In practice, the legislatures may simply have ratified the political parties' choices. *Cf.* Brendan Boyle, *ANC Dominates First All-Race S. African Senate*, Reuters World Service, May 19, 1994, available in LEXIS, Nexis Library, REUTER File (describing the Senate as "nominated by [the] nine provincial parliaments," while also reporting a statement by a Senate spokesman referring to the number of senators whom the ANC "would nominate").

67. The ANC won absolute majorities in six of the nine provincial legislatures; in a seventh it won exactly half the seats but won the provincial premiership with the aid of the Democratic Party and apparently with the tacit support of the right-wing Freedom Front. *See* Patti Waldmeir & Michael Holman, *South African Elections: Spirit of*

Perhaps the most significant direct addition to the provinces' powers, however, deals neither with money nor with ordinary legislative competence, but rather with the provinces' authority to frame their own constitutions. As adopted in 1993, the interim constitution closely regulated much of what the provincial constitutions would be permitted to say.⁶⁸ By virtue of the March 1994 amendments, the national constitution now provides that provinces can structure their legislative and executive branches in ways that depart from the start-up rules (as they can now be seen) which the national constitution originally provided for the provinces' governance.⁶⁹ The April 1994 amendments explicitly permit provincial constitutions to "provide for the institution, role, authority and status of a traditional monarch in the province," anywhere in the country, and require such provision for the Zulu king in the province of KwaZulu/Natal.⁷⁰

The April amendments make almost explicit what perhaps was implicit even in March, namely that the province of KwaZulu/Natal can adopt a constitution making itself a constitutional monarchy within South Africa.⁷¹ The powers of such a monarch would be

Conciliation Sweeps Aside Letter of Vote, Fin. Times (London), May 7, 1994, at 3; Chris Louw, *The Big Hole in the Northern Cape*, Weekly Mail & Guardian (Johannesburg), May 13-19, 1994, at 12. These legislatures then chose the national Senate, see *supra* note 66, and 60 of the 90 members of the national Senate turned out to be from the ANC, *South African Senators Sworn in, Coetsee Made Their President*, Agence France Presse, May 20, 1994, available in LEXIS, Nexis Library, CURNWS File. This two-thirds majority is actually greater than the ANC's majority in the National Assembly, where the ANC holds 252 of the 400 seats. See *Elections: Final Returns from South Africa*, N.Y. Times, May 7, 1994, at 8.

68. See S. Afr. Const. § 160(3)(a) (directing that provincial constitutions "shall not be inconsistent with" the extensive specifications contained in the national constitution's chapter on provincial government, *id.* §§ 125-59).

69. March Amendments, *supra* note 59, § 8, amending S. Afr. Const. § 160.

70. Constitution of the Republic of South Africa Second Amendment Act, 1994 (Act 3 of 1994), § 1, amending S. Afr. Const. § 160 [hereinafter April Amendments].

71. As the March Amendments were being prepared, Cyril Ramaphosa, the ANC's lead negotiator, observed that under the proposed amendments "[p]rovinces would be able to decide on what structure they would like to have. . . . For instance, a province could decide to have a constitutional monarch. When their parliament opens, he could sit on a very high chair with diamonds and gold and silver and all that. They could build him a palace as big as Johannesburg." Michael Hill, *S. Africa Scrambles for Consensus*, Chi. Sun-Times, Feb. 19, 1994, at 17 (quoting Ramaphosa) (paragraph break omitted). The flavor of KwaZulu/Natal sentiment for the Zulu king is reflected in this account of opening day in the KwaZulu/Natal legislature: "And when Zulu King Goodwill Zwelithini swept into the chambers, the ANC bench jumped up along with everyone else to shout, in salute, 'Wena ndlovu!' ('You're the elephant.') King Goodwill expressed confidence that,

bounded by both national legislative competence and the constitutional guarantees of human rights. However, exactly how those limits will interact with possible provincial constitutional provisions dealing with the "institution, role, authority and status of a traditional monarch" remains to be seen. Thus far, the government has apparently been able to avoid any definitive exploration of the powers of the Zulu monarchy. For example, even a shadowy transfer of tremendous amounts of land owned by the now-defunct homeland of KwaZulu to the authority of the Zulu King just before the April elections⁷² did not prove to be an insurmountable problem, as the government and the King reportedly found a way to share authority over the land in question.⁷³

Finally, the interim constitution seeks to quell anxiety, on the part of those who pressed for greater provincial authority, that any concessions made in the interim constitution would simply be erased when the final constitution was written. Even as adopted in 1993, the interim constitution included a constitutional principle giving the provinces significant insulation from such a diminution of their

now, peace would surely reign in 'my kingdom.' " Olojede, *supra* note 7.

72. Bill Keller, *Secret Zulu Land Transfer Poses First Crisis for Mandela*, N.Y. Times, May 24, 1994, at A3.

73. See *Cabinet Resolves Zulu Land Dispute*, This Week in South Africa: News Highlights from the South African Media (S. Afr. Consulate Gen., New York, N.Y.), June 14-20, 1994, at 2. That this accommodation was possible reflects another of the developments of South Africa's complex ethnic politics — namely, the break between Chief Mangosuthu Buthelezi, leader of the Zulu-based Inkatha Freedom Party, and the Zulu King, Goodwill Zwelithini. Buthelezi, in his capacity as leader of the KwaZulu "homeland" within apartheid South Africa, had long ago wielded his power over the King's budget to bring the King under his control. In February of this year, as the crisis over Inkatha's boycott of the elections grew ever more acute, Zwelithini met with F.W. de Klerk and "raised the stakes by demanding that the entire province [of Natal] be given to him as a sovereign monarchy," though Buthelezi claimed that Zwelithini acted without telling him in advance. Bill Keller, *Zulu Leader Is More Isolated But Is Still Proudly Resistant*, N.Y. Times, Mar. 31, 1994, at A1. Now, however, Zwelithini seems to have escaped somewhat from Buthelezi's power, and appears to be taking a much more moderate stance. Supporters of the ANC reportedly describe this development as the "liberation" of the King, while Buthelezi in a public speech recently "bluntly reminded the monarch that 'his kingly way of life' is paid for by the Inkatha-controlled provincial government. He intimated that the King's life might be in danger." Bill Keller, *Zulu Royalists Fight For Region, But Forfeit Their King's Allegiance*, N.Y. Times, June 20, 1994, at A7; see Farouk Chothia, *Edged Out, But Buthelezi Fights Back*, Weekly Mail & Guardian (Johannesburg), June 17-23, 1994, at 4. The conflict between Buthelezi and Zwelithini has now grown even more acute. See Bill Keller, *Zulu King Breaks Ties To Buthelezi*, N.Y. Times, Sept. 21, 1994 at A11.

powers.⁷⁴ Moreover, this and other constitutional principles are not just expressions of lofty sentiment, as the Constitutional Court is responsible for enforcing them when it reviews the proposed final constitution.⁷⁵ The amendments, however, ensure that in the final constitution the provinces' powers, including their power to write their own constitutions, "shall not be substantially less than or substantially inferior to those provided for" in the interim constitution.⁷⁶ The final constitution must also "recognise[] and protect[]" provincial constitutional provisions that are adopted with respect to the status of traditional monarchs.⁷⁷ The amendments also secure the provincial boundaries established by the interim constitution, presumably to remove any fear of boundary manipulation by the Constitutional Assembly.⁷⁸ The result is to insure that the final constitution will be no less federalist than the interim constitution.

The interim constitution's handling of the provinces represents a significant shift or concession by the ANC. At one point, the ANC apparently felt that fixing "the powers, functions and even the boundaries of future regional government" before the election of the Constituent Assembly would be "clearly undemocratic and unacceptable"⁷⁹ — but the transitional constitution goes a substantial distance in this very direction. At the same time, however, the ANC's negotiators appear to have carefully protected the real power of the national government vis-à-vis the provinces.

I believe that the adoption of a federal system for South Africa should not be seen as a defeat for opponents of apartheid. Such a

74. S. Afr. Const. sched. 4, princ. XVIII; *see also id.* princs. XX, XXII.

75. S. Afr. Const. § 71(2).

76. March Amendments, *supra* note 59, § 13, *amending* S. Afr. Const. sched. 4, princ. XVIII(2).

77. April Amendments, *supra* note 70, § 2, *amending* S. Afr. Const. sched. 4, princ. XIII.

78. March Amendments, *supra* note 59, § 13(a), *amending* S. Afr. Const. sched. 4, princ. XVIII(3). In certain respects, however, the interim constitution makes clear that the provincial boundaries it sets out are not final, and that what Principle XVIII(3) protects is the provincial boundaries established "in terms of" the interim constitution — in other words, the boundaries that emerge out of the process of boundary reconsideration provided for in the interim constitution itself. S. Afr. Const. § 124(2). Among the possible changes alluded to by Section 124(2) would be the division of one province, the Eastern Cape, into two. *See* Mark Suzman, *South African Elections: Newly-formed Regions Prepare to Flex Their Muscles*, *Fin. Times* (London), May 7, 1994, at 3.

79. ANC Regional Policy: Draft Discussion Document 5 (October 1992) (described as "A Document of the Constitutional Committee and the Department of Land & Regional Government & Housing").

system can helpfully restrain the power of the national government, while not depriving it of the authority it needs. The new arrangements appear to leave the national government with such authority. It remains to be seen, however, whether in practice the new provinces have the power they need to become meaningful and effective political entities, and whether they — with or without real governmental powers — become the bases for divisive, even ultimately secessionist, ethnic politics.

The verdict is not yet in on either of these scores. It does seem that the provinces are rapidly becoming sites of political struggle and perhaps even bases for political ambition,⁸⁰ though the process of assigning them concrete authority has been slow.⁸¹ Zola Skweyiya, a leading ANC member and now the minister of public service and Administration, has gone so far as to say that “[t]he main confrontation in the constituent assembly is not going to be between the ANC-NP-IFP [that is, between the largest political parties] but between the (ANC-led) national government and regional premiers of the ANC.’”⁸² The provinces *should* become fields of struggle and ambition if they are to be significant political institutions. This development may also generate political momentum that will help the provinces to claim additional authority if their current powers prove inadequate. Yet it is troubling to have to acknowledge that in KwaZulu/Natal, the only province in which Inkatha holds majority power, and the only one in which black secessionist politics have already shown great appeal, relations between Inkatha and the ANC

80. Thus, the provinces have already seen battles over the location of the provincial capitals, as well as the beginnings of conflict between provincial and national officials in areas of overlapping responsibility. See Chris Louw, *Conflict Over the Capital Business*, Weekly Mail & Guardian (Johannesburg), June 17-23, 1994, at 13; Suzman, *supra* note 78. There has also been newspaper speculation that at least one provincial premier might be positioning himself for a run for the national presidency, much as governors in the United States have been known to do. See *The Houses That Tokyo Will Build*, Weekly Mail & Guardian (Johannesburg), July 15-21, 1994, at 26 (editorial discussing the dispute over housing policy between the national government and Tokyo Sexwale, premier of the Pretoria-Witwatersrand-Vereeniging province).

81. The government reportedly indicated in August 1994 that “it would be years before the process [of allocation of powers to the provinces] was completed.” *Provincial Empowerment to “Take Years,”* This Week in South Africa: News Highlights from the South African Media (S. Afr. Consulate Gen., New York, N.Y.), Aug. 9-15, 1994, at 2.

82. Patti Waldmeir, *Survey of South Africa*, Fin. Times (London), July 18, 1994, at VII. The words “(ANC-led)” are apparently an insertion by Waldmeir.

are so deadlocked that the goal of what might be called a "government of provincial unity" seems completely out of reach.⁸³

C. The Accommodation of the Civil Service and Security Forces

The newly elected leaders of South Africa will preside over the apparatus of the State, including the civil or public service, the police and the military. The makeup of these institutions is an issue with ramifications for the future of ethnic and racial politics in South Africa. In part, this is because those who occupy these positions can significantly affect the shaping and implementation of government policies. In addition, many of these jobs have been part of the apparatus of white privilege in the past and could become part of affirmative action programs in the future.

Officials who dominate the senior positions in these institutions today are predominantly white, and many or most may still harbor strong sympathies for the apartheid order they served for many years. The negotiators of the interim constitution decided to provide considerable protection for these officials' vested interests. To do so made sense, as a way of avoiding the alienation of people who could become very troublesome opponents, and whose expertise in many cases was probably still needed. Thus, the new constitution provides that officials now employed in public service jobs will continue in them after the new constitution enters into force,⁸⁴ and also protects these

83. On the state of KwaZulu/Natal politics, see Farouk Chothia, *Natal in Chaos as Parties Argue On*, *Weekly Mail & Guardian* (Johannesburg), June 24-30, 1994, at 4. It may be a mildly promising sign that the KwaZulu/Natal legislature reportedly planned to convene on August 23, 1994, for its first session since its inauguration. *KwaZulu/Natal Legislature Set to Meet for First Time*, *This Week in South Africa: News Highlights from the South African Media* (S. Afr. Consulate Gen., New York, N.Y.), Aug. 23-29, 1994, at 2.

The interim constitution does not use the phrase "government of provincial unity," but it does provide that the provincial Executive Councils, the counterparts to the national Cabinet, "shall function in a manner which gives consideration to the consensus-seeking spirit underlying the concept of a government of national unity as well as the need for effective government." S. Afr. Const. § 150(2). Like the national Cabinet, moreover, the Executive Councils are to be selected through proportional representation, and any party with at least ten percent of the seats in a provincial legislature is entitled to such representation on the province's council. *Id.* § 149(2).

84. S. Afr. Const. § 236(2).

officials' already-accrued pensions and their current retirement ages.⁸⁵

However, the interim constitution also affords the government a considerable measure of discretion to reform these institutions. In particular, the constitution allows efforts to make the public service more representative of South Africa's full population, and permits legislation and presidential action which may alter many of the terms and conditions of employment of the current officials and perhaps eliminate their jobs.⁸⁶ These provisions also make sense because they help to open a new field of opportunity for black South Africans, and also because they make it easier for the government to build a civil service genuinely committed to overturning the heritage of apartheid. What use the Government of National Unity will make of these powers remains to be seen, however, and their exact dimensions remain to be interpreted.⁸⁷ In the meantime, it seems quite likely that the considerable protection given to present officeholders has impeded efforts to bring change to the civil service.⁸⁸

85. *Id.* § 212(7)(a) & (b).

86. *See id.* §§ 236(4), 237.

87. One indication of the government's plans, and of the obstacles those plans may encounter, is a reported "Government draft proposal to rationalize the public service [which] provides for dismissing public servants who are not prepared to be transferred to different towns, and voluntary redundancies for public servants who cannot be found jobs as a result of restructuring. Public service employee organizations expressed concern on Tuesday, August 23 that the Government could use the scheme to circumvent an understanding in the constitution of job security in the public service." *Government's Plan to Restructure Public Service Puts Jobs on the Line*, *This Week in South Africa: News Highlights from the South African Media* (S. Afr. Consulate Gen., New York, N.Y.), Aug. 23-29, 1994, at 3.

88. There are a number of signs of these difficulties. A significant number of ANC employees who had hoped for government jobs, but were not senior enough to move into the highest positions, were reported to be encountering great difficulty in getting these jobs. One reason for this was said to be the job protections enjoyed by officials of the old regime. (Perhaps another reason was sheer inefficiency on the part of the Ministry of Public Service and Administration, which must approve all new appointments. *Shell Shocked Over Cutbacks*, *Weekly Mail & Guardian* (Johannesburg), July 22-28, 1994, at 4.) Most of these people did ultimately find government positions, however, either in the various legislatures or "the civil service, notably the security and intelligence forces." Harber, *supra* note 48.

The Ministry of Education has been described as "still in the grip of 'old guard' apartheid-era bureaucrats." Philippa Garson, *Ministry of Paralysis?*, *Weekly Mail & Guardian* (Johannesburg), July 22-28, 1994, at 10. Meanwhile, in the highly sensitive Ministry of Safety and Security (i.e., the police ministry), Minister Sydney Mufamadi of the ANC "faces a problem [which] sets him apart from other ministers with tough

D. Protection of Racial Minorities In Local Government

Although the constitution directs that "local government[s] shall be elected democratically,"⁸⁹ the election procedures specified certainly do not comply with the principle of one person, one vote. Instead, they follow the rule that "[a] voter shall not have more than one vote *per local government*."⁹⁰ Each voter can vote in the town where she lives, and also in those other towns where she is liable for "property rates, rent, service charges or levies to that local government."⁹¹ This allocation of the franchise seems to give those who enjoy economic privilege a political bonus as well.

In addition, the constitution provides that local government elections are to utilize "both proportional and ward representation,"⁹² rather than the purely proportional system which elects the National Assembly.⁹³ Another provision, worded with considerable delicacy,

agendas: he does not have a staff. And he won't be getting one. . . . Two months after the election, Mufamadi has not been able to employ his own civilian advisers." As a result, the liberal *Weekly Mail & Guardian* called his ministry a "one-man department." *Minister in Charge of an Empty Office*, *Weekly Mail & Guardian* (Johannesburg), July 15-21, 1994, at 1. But some ministers have apparently found ways to bring in more of their own people. Garson, *supra*. In particular, ten ANC ministers have chosen to employ consultants, who apparently do not have to meet civil service requirements; perhaps not surprisingly, the Ministry of Safety and Security has eight such advisers, more than any other. Paul Stober, *What the Advisers Can Earn*, *Weekly Mail & Guardian* (Johannesburg), Sept. 2-8, 1994, at 2.

Joe Slovo, the communist leader who is now minister of housing, "dismiss[ed] the director of the housing department and put in a man he trusted," and a spokesman explained that "[i]t is common practice internationally' to purge department heads when a new Government takes power," but "[a]lmost a month into the Mandela presidency, Mr. Slovo [was] still the only Cabinet minister who [had] dismissed any prominent official . . ." Bill Keller, *Same Old Bureaucracy Serves a New South Africa*, *N.Y. Times*, June 4, 1994, at 1. Keller also mentions that "[s]ome top officials moved into offices that had been stripped of furniture, files and computers." *Id.* More often, however, the holdover bureaucrats' tack has been to make themselves "instantly indispensable," *id.*, a strategy that certainly helps explain why so few have lost their jobs.

Discontent over the constraining influence of civil servants on the cabinet ministers whom they serve has reportedly fueled the ANC legislators' desire to establish their right to scrutinize and challenge cabinet decisions. *See supra* notes 48-52 and accompanying text. *See also* Louw, *supra* note 48.

89. S. Afr. Const. § 179(1).

90. *Id.* § 179(4) (emphasis added).

91. *Id.* § 179(3)(a).

92. *Id.* § 179(2).

93. *Id.* § 40(1).

directs that in the first local government elections held under the new constitution, sixty percent of the members of local governments shall be elected from wards. Moreover, half of these wards will be allocated to areas apparently defined so as to exclude any areas in which Africans lawfully resided prior to the recent end of *de jure* segregation in South Africa.⁹⁴ In theory, the result of this system might be local government councils on which Africans hold a majority, albeit a smaller one than that to which their population would entitle them. It also seems within the realm of possibility, however, that some majority-African localities will have non-African majorities on their governing councils. This could be cause for celebration if it resulted from voters' decisions to disregard race in their balloting. However, if fewer Africans than non-Africans turn out to vote — not an implausible result of the lifelong disadvantages faced by Africans — then they might lose control of governing councils even where race is very much a factor in everyone's voting.⁹⁵

It is worth emphasizing that local governments will wield significant authority under this constitution. Their autonomy is given rhetorical protection by the constitution, though the promise of autonomy is heavily qualified by the specification that these governments "shall be entitled to regulate [their] affairs" "within the limits prescribed by or under law."⁹⁶ More concretely, local governments have a quite substantial authority to tax — a greater tax power, apparently, than that enjoyed by provincial governments.⁹⁷ Local governments also have, or at least can be granted, the power to establish their own municipal police forces.⁹⁸

The fact that these powers have been placed in the hands of governments selected through a system that departs from the principle

94. *Id.* § 245(b). See Secretariat of the Local Government Negotiating Forum, A New Dispensation for Local Government 12 (n.d. — 1993?).

95. *Cf. Ketchum v. Byrne*, 740 F.2d 1398, 1413-17 (7th Cir. 1984), *cert. denied*, 471 U.S. 1135 (1985) (emphasizing that for a racial or ethnic minority group to enjoy an effective voice in elections it may well need to make up sixty-five percent of the jurisdiction's population).

Perhaps this reality is part of the reason that the actual drawing of new municipal borders — to replace the race-based lines of the past — is apparently falling behind schedule, and that the first post-apartheid elections, for which these boundaries must be established, may also not take place on time. See Chris Louw, *Pressure Mounts Over Local Elections*, *Weekly Mail & Guardian* (Johannesburg), June 17-23, 1994, at 13.

96. S. Afr. Const. § 174(3).

97. *Id.* § 178(2). See *id.* § 156.

98. *Id.* § 221(3).

of racial equality is perhaps the most disturbing of the various compromises embodied in the new constitution. But it is important to remember that the system of local government envisioned in these provisions will provide much *less* protection for the privileged than did the old order. Moreover, in practice these arrangements may prove valuable in assuaging the anxieties of the privileged while facilitating reforms that benefit the victims of apartheid. But what if these provisions are not so successful? Even then we may not be justified in labeling these provisions "mistakes." These provisions may have been essential, pragmatic responses to the negotiating position of those people, particularly whites, with the power to impede the transition from apartheid to democracy.⁹⁹ Only a detailed study of the negotiations themselves and an appraisal of the results of these provisions in practice will allow us to make a final judgment about the wisdom of the constitution's partial protection of local privilege.

E. Providing for Consideration of a *Volkstaat*

It is hard to believe that a future South Africa will come to include a "*volkstaat*," or homeland, for whites. The very idea seems incongruous in the context of a constitutional transition whose central purpose is to enable black South Africans to enjoy democratic rights in their own country. The notion of a *volkstaat* is also perplexing in the very prosaic (but important) sense that it is apparently impossible to identify, without gerrymandering, any substantial geographical area in South Africa where whites are a majority.¹⁰⁰ Nevertheless, a significant body of white or Afrikaner sentiment has congealed around the idea of a *volkstaat*, and many whites who hold these views have

99. These provisions do not, however, go as far as the National Party originally proposed. Their suggested distributions of the franchise might have been even more inegalitarian than those ultimately adopted. Perhaps the most striking of the Nationalists' proposals, however, was one providing that *neighborhoods* be given "an option for self-determination over community interests," an option that could include the power to tax and authority over "the regulation of norms and standards for the residential environment" and "security . . . and civil protection matters." National Party Framework, *supra* note 41, at 17-18.

100. The white right has toyed with various responses to this problem, such as "financial incentives" to induce blacks to leave the *volkstaat* once its borders are laid out, *volkstaat* constitutional provisions entrenching an Afrikaner majority in the *volkstaat* legislature, and inducing more whites to move to the new *volkstaat*. For a description of some of these ideas, see Jan Taljaard, *Bizarre Solutions to Volkstaat Problems*, Weekly Mail & Guardian (Johannesburg), Oct. 15-21, 1993, at 4.

just expressed them in the ballot boxes of the nonracial election.¹⁰¹ They were persuaded to do so, in part, through the adoption of constitutional amendments designed to allow continued debate over, and advocacy of, a *volkstaat* within the new South Africa.¹⁰²

Two sections of the constitution now provide for the establishment of a Volkstaat Council,¹⁰³ and a new constitutional principle also attempts generally to accommodate communities' claims of self-determination within South Africa.¹⁰⁴ The Volkstaat Council was elected by those members of Parliament who support the *volkstaat* idea,¹⁰⁵ and is to "serve as a constitutional mechanism to enable" *volkstaat* proponents "to constitutionally pursue the establishment of such a Volkstaat."¹⁰⁶ However, the Council's powers are limited. Unless Parliament grants it more authority, the Council can only study, propose and advocate.¹⁰⁷ But South Africa's new leaders have demonstrated more than once their desire for domestic peace and their willingness to fashion compromises to achieve that goal.¹⁰⁸ President

101. The Freedom Front, which campaigned under the banner of achieving a *volkstaat* through constitutional means, won 2.2% of the vote. See *supra* note 2.

102. Recently, the Freedom Front has reportedly been maneuvering to deny equal negotiating status to its right-wing competitors, the Conservative Party and the Afrikaner Volksfront, on the ground that the Freedom Front "has paid its dues by participating in the election." Jan Taljaard, *Battle to Represent the Right*, Weekly Mail & Guardian (Johannesburg), June 17-23, 1994, at 11. How successful the Freedom Front will be in this endeavor is not entirely clear. In August 1994, President Mandela met with the Conservative Party's leader for discussions which he called "fruitful," and subsequently declared that since the election "[t]he whole scenario has changed . . . and the ability of leaders, even from the right wing, to see that it is necessary for us to speak out, sit down and sort out our problems . . . is being widely accepted today." *Mandela Interview*, *supra* note 43.

103. S. Afr. Const. §§ 184A, 184B (inserted by March Amendments, *supra* note 59, § 9).

104. S. Afr. Const. sched. 4, princ. XXXIV (inserted by March Amendments, *supra* note 59, § 13(b)).

105. S. Afr. Const. § 184A(2) (inserted by March Amendments, *supra* note 59, § 9).

106. *Id.* § 184B(1).

107. *Id.*

108. Executive Deputy President Thabo Mbeki of the ANC spoke at the Volkstaat Council's inauguration ceremony on June 16, 1994, and reportedly said that "the government of national unity acknowledged it could not dictate terms to Afrikaner nationalists seeking self-determination." Reuters World Service, untitled article, June 16, 1994, available in LEXIS, Nexis Library, U.S. File. He also praised the members of the Freedom Front for their willingness to pursue this issue through the electoral and constitutional process: "We'd like to pay sincere tribute to them because they saved the country from a conflict that would have been very destructive." *Id.*

Mandela has recently gone so far as to flirt with the idea of a whites-only referendum on the *volkstaat* idea.¹⁰⁹ While no *volkstaat* may ever emerge from the Constitutional Assembly, it is quite possible that provisions of the final constitution will seek in some way to accommodate the emotional appeal of Afrikaner nationalism.¹¹⁰ A new constitutional principle not only promises that if a *volkstaat* is established before the final constitution is adopted, the final constitution will preserve it, but also declares more generally — if half-heartedly — that the interim constitution does not preclude “constitutional provision for a notion of the right to self-determination by any community sharing a common cultural and language heritage, whether in a territorial entity within the Republic or in any other recognized way.”¹¹¹

F. Evaluating the Structural Provisions

The constitution's structural arrangements are transitional rather than permanent. Some, such as the Government of National Unity, will probably not be retained beyond the transitional period. Others, such as the elements of the federal structure, may yet be further elaborated. For now, their value is three-fold. First, these various concessions helped to secure the support of the National Party, and the grudging accommodation of Inkatha and the Freedom Front,

109. See Christopher Munnion, *Mandela Calls Right's Bluff*, Daily Telegraph (London), June 4, 1994, at 15.

110. A recent report suggests that the Volkstaat Council may plan to submit proposals to the Government of National Unity as early as September 1994, and that these proposals will “not be a demand for the immediate establishment of a volkstaat but will contain several interim measures that the volkstaaters believe will eventually lead to further independence.” A Volkstaat Council spokesman, Koos van Rensburg, reportedly “views the volkstaat . . . as more of an additional province with stronger regional powers than those currently afforded to the provinces,” and maintains that the *volkstaat* “will have to be acceptable to the majority of South Africans. ‘Whatever is proposed can't be allowed to create conflict,’ he said.” Jan Taljaard, *Boshoff Proposes a 'Silicon Volkstaat'*, Weekly Mail & Guardian (Johannesburg), Aug. 12-18, 1994, at 4. This is a tall order, but clearly some South Africans are seriously trying to achieve it.

111. S. Afr. Const. sched. 4, princ. XXXIV(1), as amended by March Amendments, *supra* note 59, § 13(b). This acknowledgement of the possibility of territorial or non-territorial self-determination within South Africa is consistent with at least some understandings of the right of self-determination in international law today. See Frederic L. Kirgis, Jr., *Editorial Comment: The Degrees of Self-Determination in the United Nations Era*, 88 Am. J. Int'l L. 304 (1994); Robert McCorquodale, *South Africa and the Right of Self-Determination*, 10 S. Afr. J. on Hum. Rts. 4 (1994).

and thus made South Africa's first nonracial election possible. This is not to say, however, that each of these concessions necessarily was essential to the deal; indeed, scholars have already confirmed that the South African constitutional negotiations suffered from their share of human error and miscalculation.¹¹² Second, the constitutional arrangements provide a possible path by which the fractious groups within South Africa may live together and get used to resolving their differences peacefully rather than by command and by force. Third, they offer a route by which a venerable democratic ideal — namely, that all people in a society should have some real say in their government, and should be protected from the overwhelming power of any one faction or structure — may be realized.

But, as we say in the United States, the jury is still out. We do not know how much unity these structures will actually foster. We do not know whether the voice given to whites and to Zulu will be used to impede reforms aimed at redressing the injustices of the past, or to build power bases that will ultimately lead to a more divided South Africa. We also do not know whether these structures will provide meaningful restraints on the aspirations of the national government, which may prove as subject as United States institutions sometimes are said to be to the hydraulic pressure of the quest for power. Nor do we know whether these structures will give individual citizens even as strong a voice in their government as that enjoyed by United States citizens, or whether instead they will place undue power in the hands of the political elites. All of this remains to be seen. For now, we must simply recognize how wide-ranging the precautions, or compromises, are that South Africa has taken in an effort to accommodate ethnic and racial tension through the structure of its government. And, of course, we should hope for the success of these devices, and for their wise reform to whatever extent they prove imperfect.

III. THE FASHIONING OF CONSTITUTIONAL RIGHTS

While structure is important, rights are, too. Constitutional rights can be fashioned so as to enlist national authority in the

112. See Matthew Chaskalson, Section 28 of the Constitution of the Republic of South Africa and the Negotiations over Property Rights (unpublished paper, presented at the Law & Society Association Annual Meeting, June 1994); Thandabantu Nhlapo, African Customary Law of the Family and Women's Human Rights in the New South African Constitution: The Problem of Cultural Diversity (unpublished paper, presented at the Law & Society Association Annual Meeting, June 1994).

protection of minority solidarity (for example, by entrenching rights to engage in private discrimination in the practice of one's culture) or instead to bring national power to bear on the disestablishment of minority privilege (by mandating nondiscrimination, or more radically by mandating redistribution of wealth). Let us consider two aspects of the new constitution's chapter on fundamental rights — its provisions concerning private discrimination and those concerning redistribution of property. These two sets of provisions share an overarching similarity: in each case, the government is granted authority to challenge past injustice, but in each case as well the government's power to do so is somewhat constrained.

Thus, the new constitution does not explicitly proscribe most forms of private discrimination. In this respect the new constitution resembles the Fourteenth Amendment of the United States Constitution, as it is currently interpreted.¹¹³ The ANC had hoped to establish constitutional rights that would in many respects be applicable to private individuals as well as to the state,¹¹⁴ and in particular would have placed "[t]he State and all public and private bodies . . . under a duty to prevent any form of incitement to racial, religious or linguistic hostility and to dismantle all structures and do away with all practices that compulsorily divide the population on grounds of race, colour, language, gender or creed."¹¹⁵ The old government apparently successfully withstood the ANC's arguments for such provisions, with one significant exception — a prohibition on

113. As is well known, this interpretation draws textual support from the language of the Fourteenth Amendment, which provides in part that "[n]o state shall . . . 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." U.S. Const. amend. XIV, § 1. In the field of race discrimination, the significance of the state action requirement is significantly, though by no means totally, reduced by the fact that the Thirteenth Amendment's prohibition on slavery is understood to bar acts of enslavement by private as well as public actors. See *Civil Rights Cases*, 109 U.S. 3, 20-23 (1883); *Griffin v. Breckenridge*, 403 U.S. 88, 104-05 (1971). Perhaps even more importantly, the Supreme Court has held that Congress has the power to use its authority under the Commerce Clause, U.S. Const. art. 1, § 8, cl. 3, to outlaw private discrimination that substantially affects interstate commerce. See *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964).

114. Constitutional Committee of the African National Congress, ANC Draft Bill of Rights art. 17(1) (Preliminary Revised Version, Feb. 1993) ("The terms of the Bill of Rights shall be binding upon the State and organs of government at all levels, and where appropriate, on all social institutions and persons.").

115. *Id.* art. 15(3).

new schools that discriminate on the basis of race.¹¹⁶ Otherwise, private rights that could be discriminatory, such as the freedom of association and the right to participation in the cultural life of one's choice, are protected.¹¹⁷ Moreover, while the new constitution protects a wide range of rights from invasion by the government, these limits on the government do not explicitly constrain private individuals, because the chapter on fundamental rights by its terms binds only "legislative and executive organs of state."¹¹⁸ Language that would have unmistakably bound private individuals as well "was rejected deliberately," according to a South African scholar who participated in the negotiations.¹¹⁹

116. S. Afr. Const. § 32(c). The old government's proposed bill of rights would probably have established a constitutional right to set up private, discriminatory schools. Republic of South Africa, Government's Proposals on a Charter of Fundamental Rights, §§ 14(6) (right to establish private schools), 22(3) (freedom not to associate) (Feb. 2, 1993) [hereinafter Government's Proposals].

117. S. Afr. Const. §§ 17 (freedom of association), 31 (participation in the cultural life of one's choice).

118. *Id.* § 7(1). This formulation not only omits private actors from the reach of the fundamental rights provisions but also leaves out the judiciary. Compare *id.* § 4(2) (providing that the constitution as a whole binds "all legislative, executive and judicial organs of state . . .") (emphasis added). A South African scholar, T.W. Bennett, has commented that the language of § 7(1) "will presumably supersede the more general [§] 4(2)" with respect to the application of the chapter on fundamental rights. T. W. Bennett, *The Equality Clause and Customary Law*, 10 S. Afr. J. on Hum. Rts. 122, 126 n.23 (1994).

119. Etienne Mureinik, *Emerging from Emergency: Human Rights in South Africa*, 92 Mich. L. Rev. 1977, 1987-88 n.35 (1994) (reviewing Stephen Ellmann, *In a Time of Trouble: Law and Liberty in South Africa's State of Emergency* (1992)). Mureinik does not regard this drafting decision as foreclosing the application of provisions from the chapter on fundamental rights to private conduct. *Id.* It is worth noting, in this regard, that § 7 of the constitution does *not* include the explicit disclaimer of application to private parties that appeared in the Government's Proposals, *supra* note 116, § 2(1). But Mureinik, like T. W. Bennett, points to a Canadian Supreme Court case, *Retail, Wholesale & Department Store Union, Local 580 v. Dolphin Delivery Ltd.*, 33 D.L.R. 4th 174 (1986), which construed language similar to (and actually less clear-cut than) § 7(1) to mean, in Bennett's words, that "the Canadian Charter did not override common law unless the executive or legislative branches of the government were involved . . ." Bennett, *supra* note 119, at 126 n.23; Mureinik, *supra*, at 1987-88 n.35. Indeed, it is hard not to read § 7(1) as reflecting a desire to confine the application of the chapter on fundamental rights to the review of government actions, although determining when the government should be seen as acting is of course a very complex matter — one which the American "state action" doctrine attempts to handle.

Bennett, borrowing a principle of German constitutional law, goes on to suggest that the rights chapter could properly be applied to private actors where "private

Instead, the new government is granted the authority to legislate against "unfair" private discrimination.¹²⁰ In placing the task of controlling private discrimination in the hands of the legislature, the South African constitutional negotiators adopted a solution quite comparable to that created by modern U.S. constitutional law.¹²¹ What this means is that the scope of what is to be proscribed as unfair will be decided in the first instance, during the next five years, by what is envisioned to be a "Government of National Unity," albeit one led by the ANC. Moreover, the government's decisions on this score (and others) will be subject to review by a Constitutional Court charged with enforcing the provisions of the constitution.¹²² The government *can* act against private discrimination, but it will have to *choose* to act, and its choices will be subject to political and legal constraints. These constraints may well circumscribe to some extent the nature of the South African civil rights legislation of the future, but I expect that this legislation will still be far-reaching, and that the very existence of these constraints may help to cement the national consensus in favor of the new laws.

law" granted the courts broad discretion or did not supply precise and clear rules to govern the matter. Bennett, *supra* note 114, at 127. To the extent that this argument simply suggests using the fundamental rights provisions to interpret other aspects of South African law, it is clearly supported by § 35(3) of the constitution, which directs that "[i]n the interpretation of any law and the application and development of the common law and customary law, a court shall have due regard to the spirit, purport and objects of this Chapter." S. Afr. Const. § 35(3). It does not seem to me, however, that this constitutional language offers strong support for the idea that provisions of the chapter on fundamental rights can be used to invalidate — rather than to interpret — rules bearing on the relations between private individuals that would otherwise escape the ambit of § 7(1).

Resolving the exact reach of the chapter on fundamental rights may well become one of the tasks of South Africa's new Constitutional Court.

120. S. Afr. Const. § 33(4).

121. *See supra* note 113.

122. The importance of this court to South Africa's future made the fashioning of the system of appointing the court's members a subject of intense debate. The system ultimately adopted in §§ 97(2) and 99 seems meant partially to insulate appointments to the court from purely political considerations. The results so far have been very promising. The court will be presided over by Arthur Chaskalson, a principal drafter of the new constitution and an exceptional man, deeply committed to the struggle against apartheid. He will be joined by four members of the existing judiciary, including Ismail Mohamed, a leading anti-apartheid lawyer who became the first black judge of the South African Supreme Court; Richard Goldstone and Laurence Ackermann, two prominent white judges known for their opposition to apartheid; and Tholakele Madala, a member of the Transkei Supreme Court.

Similarly, the new constitution mandates attention to the land claims of some of those whom apartheid dispossessed.¹²³ In some circumstances, it appears to contemplate expropriation of land — if the state certifies that such expropriation is “feasible” — on payment of compensation that may be less than full market value.¹²⁴ But at the same time, the new constitution requires considerable attention to the interests of the present holders of land, attention that seems likely to find expression in the form of at least some monetary compensation.¹²⁵ Given the passionate feelings many South African blacks have about their lost land, it is striking that in these provisions the transitional constitution shows greater solicitude for property than either the International Covenant on Civil and Political Rights or the Covenant on Economic, Social and Cultural Rights.¹²⁶ Yet it is also striking that the ANC was able to prevail over the National Party’s initial preference for compensation at full market value, paid in cash.¹²⁷ Even so, some money will surely be needed, and the money for such redistribution will have to be provided by decisions of what is meant to be a government of national unity. This is a government, moreover, which is likely to be very concerned not to impair investor confidence with radical economic policies, and anxious as well to avoid

123. S. Afr. Const. §§ 121-23. Only those who lost their land after 1913 (when a major piece of South African legislation abridging blacks’ ownership rights, the Natives’ Land Act 27 of 1913, was enacted) are eligible for such restitution. *Id.* §§ 121(2)(a), 121(3). Those who lost their land earlier may become the beneficiaries of other government programs but apparently will not be permitted to sue the state for restoration of their land.

124. *Id.* §§ 28, 121-23.

125. *Id.* §§ 123(2), 28(3).

126. See generally International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (*entered into force* Mar. 23, 1976); International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 19, 1966, 993 U.N.T.S. 3 (*entered into force* Jan. 3, 1976). Neither of these Covenants includes an explicit protection for “the right to enjoy private property.” Louis Henkin, *Introduction to The International Bill of Rights: The Covenant on Civil and Political Rights* 1, 11 (Louis Henkin ed., 1981). Article 17 of the Universal Declaration of Human Rights, however, does explicitly protect property, though it does not explicitly guarantee compensation when property is taken by the state. Universal Declaration of Human Rights, art. 17, G.A. Res. 217A(III), U.N. GAOR, 3rd Sess., at 71, U.N. Doc. A/810 (1948). Professor Henkin argues that “[t]he absence of such a provision [in the Covenant on Civil and Political Rights] can hardly be construed as rejecting the existence in principle of a human right to own property and not to be arbitrarily deprived of it.” Henkin, *supra*, at 21.

127. Government’s Proposals, *supra* note 116, § 18(3). For the story of the negotiations on this issue, see Chaskalson, *supra* note 112.

the potentially divisive effects of confiscatory levels of taxation (or expropriation). And this is a government with many competing claims for its scarce funds.¹²⁸ The government's announced goals for land distribution are ambitious;¹²⁹ they will require determination and ingenuity to achieve.¹³⁰

The upshot is that both in the field of private discrimination and in the field of land redistribution, policies aimed at redressing the legacy of apartheid will be possible (and even likely). But they will also probably be moderated in ways that reduce the chance that governmental policy in the first years of the new South Africa will be perceived by whites, in particular, as an all-out assault on their interests. These restraints will promote racial harmony in this respect.

What remains to be seen is whether the new government can pursue policies that will also provide enough tangible gain for black men and women to avoid another danger to racial harmony, namely a general perception by blacks that they are still not free in their own country. I am inclined to think that this goal also can be substantially achieved. The government's powers, after all, are similar to those of the United States government, and it is clear enough that when the United States government wields its authority determinedly, the scope of that authority is broad indeed. In South Africa, already, the shaping

128. The new government's fiscal policies during its first months in office have been strikingly restrained, if not conservative. As one observer has commented, "Mandela's first post-apartheid budget has tacitly acknowledged the limits of public intervention; it redirects less than three percent of state spending to programs to uplift the poor." Paul Taylor, *South Africa's "St. Nelson" No "Messiah" to Neighbors*, Wash. Post, Sept. 2, 1994, at A1.

129. Legislation about to be submitted to Parliament would "entitle about 1.4 million of the estimated 3.5 million people who were forcibly removed [from their land] to make claims for restitution." Estelle Randall, *Bill Cuts the Wait for Land*, Weekly Mail & Guardian (Johannesburg), Aug. 26-Sept. 1, 1994, at 2 (numbers repunctuated).

130. A further constraint on the government's redistribution efforts is the protection given to traditional authorities. See S. Afr. Const. §§ 181-84; *id.* sched. 4, princ. XIII & XVII. Like the limits on the redistribution of white-owned land, the protection of African traditional authorities may be needed in order to reduce the danger of the resurgence of ethnic politics, in this case African ethnic-traditional politics of the sort practiced by Inkatha among the Zulu. But chiefs may wield considerable authority over the allocation of land, and protection of their authority may significantly affect the actual operation of programs of redistribution. In addition, the more that current rules of customary law remain in place under the constitution and legislation enacted by the new parliament or by the provinces, the more that the redistribution of land to African women may be impeded, for the rights of women to own property under customary law are extremely circumscribed. See Bennett, *supra* note 118, at 125-27.

of programs of land reform, and more broadly of reconstruction and development, promise substantial changes in the years to come. For the government to make good on this promise, however, will certainly require will, and wisdom, and perhaps luck as well.

IV. PROVISIONS FOR THE USE OF FORCE

The path of compromise and gradual reform that this constitution charts may prove impossible to follow. Perhaps extremist whites will attempt rebellion; perhaps Natal will erupt in civil war; perhaps other Africans sympathetic to the ANC will lose patience with reforms that seem to leave white power intact. The drafters of this constitution, many of them opponents or victims of state power in the past, have attempted both to provide, and to restrain, the kinds of state power that might be needed to confront such emergencies in the future. To that end, Section 34 authorizes (subject to a number of constraints) the declaration of a state of emergency, in which some, but not all, of the rights guaranteed earlier in the fundamental rights chapter of the constitution can be suspended.¹³¹ In addition, Section 33 authorizes the limitation of any constitutional right, provided that the limitation is "reasonable" and "justifiable in an open and democratic society based on freedom and equality," does not "negate the essential content of the right in question," and (with respect to some rights, but not all) is "necessary."¹³² These provisions are not misguided, though perhaps particular aspects of them can be criticized; my point is simply that they provide the new government with the

131. S. Afr. Const. § 34. I have discussed the issues bearing on the constitutional handling of emergencies in a post-apartheid South Africa in this journal. Stephen Ellmann, *A Constitution for All Seasons: Providing Against Emergencies in a Post-Apartheid Constitution*, 21 Colum. Hum. Rts. L. Rev. 163 (1989). The transitional constitution seeks to hem in this dangerous power in a variety of ways. The executive cannot declare a state of emergency for more than 21 days, unless it receives the approval of two-thirds of the National Assembly to extend the period for up to three months, and separate approval by the same majority for each subsequent extension of up to three months. S. Afr. Const. § 34(2). Even when the executive does declare an emergency and obtains legislative concurrence, certain rights still cannot be suspended. *Id.* § 34(5)(c). A number of protections are specifically provided for those detained without trial under emergency powers. *Id.* § 34(6). Moreover, courts are empowered "to enquire into the validity of a declaration of a state of emergency, any extension thereof, and any action taken, including any regulation enacted, under such declaration," *id.* § 34(3), and can free detainees whose detention they find unnecessary to the restoration of peace or order. *Id.* § 34(6)(c).

132. S. Afr. Const. § 33(1).

power to breach normally protected rights — as it might have to do, in order to control racial or ethnic violence.

It is one thing to have this authority, and another to carry it out. For the latter, the government must first have loyal and capable security forces — and those forces will be more likely to succeed in their tasks if they face no opposing forces. I have already mentioned some of the efforts the new constitution makes to assuage the anxieties of the military and police forces (and other government employees) for their jobs and pensions, so as to secure their support for the new order. In addition, the ANC may hope that the incorporation of former guerrilla soldiers into the military and the police will enhance those forces' loyalty further; this incorporation, to some extent provided for in the constitution, is now under way.¹³³ So far, the military in particular has shown itself prepared to adapt to a post-apartheid world — South African jets helped celebrate Nelson Mandela's inauguration, and South African soldiers were deployed effectively at some important moments in the transition process. But it is not yet clear just how fully either the military or the police will enter into the process of reform, and there are certainly signs already that the task of moving them will not be simple.¹³⁴

133. *Id.* § 224. The minister of defense, Joe Modise, has announced that 22,000 members of Umkhonto we Sizwe, the ANC's military wing, and 6000 members of the Pan Africanist Congress' Azanian People's Liberation Army "automatically became members of the South African National Defence Force," presumably by virtue of this provision. *22,000 MKs in the Forces*, This Week in South Africa: News Highlights from the South African Media (S. Afr. Consulate Gen., New York, N.Y.), Aug. 31–Sept. 5, 1994, at 7 (the quoted language is from the report and not necessarily from Modise himself). The projected cost of integrating the old South African Defence Force, the guerrilla armies, and the armies of the former homelands, as well as downsizing the resultant force thereafter, is extremely high. One South African newspaper has commented that "[p]lacifying a handful of redundant soldiers will consume a huge chunk of Government revenues that should be spent improving the quality of life — and hence the prospects for social stability — of millions of deprived people in urban ghettos and rural settlements. We have heard of 'peace at a price,' but this is ridiculous." *The Business Day: "Peace at a Price,"* This Week in South Africa: News Highlights from the South African Media (S. Afr. Consulate Gen., New York, N.Y.), Aug. 9-15, 1994, at 7.

134. The new minister of defense, Joe Modise, formerly a senior ANC military leader, recently took the remarkable step of seeking to enjoin a newspaper's publication of information about undercover agents of the old regime. Louise Flanagan & Chandra Gould, *What the Generals Didn't Tell Modise*, Weekly Mail & Guardian (Johannesburg), June 17-23, 1994, at 1. The minister of police, Sidney Mafumadi, has just responded to the same newspaper's request for government files on the police by producing material so stunningly scanty as to compel the conclusion that the police have hidden or destroyed extensive information. *The Mail Gets Its Police File . . .*, Weekly Mail & Guardian

Ensuring that the security forces do not face effective opposition will also not be entirely easy. The government's position is certainly enhanced by the absence of any right for citizens to bear arms, and by the specific indication that the right of assembly is a "right to assemble and demonstrate with others peacefully and unarmed."¹³⁵ In certain respects, however, the government's monopoly on force does not seem absolutely ironclad. Private citizens in South Africa, particularly whites but now many blacks as well, are well armed, and taking these guns away, especially during a period of tremendously high crime, will be difficult, to say the least.¹³⁶

(Johannesburg), July 22-28, 1994, at 1.

This newspaper also reported at one point that President Mandela may have "agreed to cede control of intelligence matters to his deputy, F.W. de Klerk, in an apparent barter for ANC control of the police and the South African National Defense Force," despite the danger that the intelligence services "could continue to function in a partisan manner. Inclined towards the NP [National Party] by tradition, they could become a powerful weapon in De Klerk's hands in the run-up to the next election." Stephen Laufer, *Tug of War over Intelligence Services*, Weekly Mail & Guardian (Johannesburg), June 24-30, 1994, at 8. More recently, the same newspaper has reported that de Klerk now is "refus[ing] to relinquish" control over the intelligence services. As the report points out, President Mandela's authority to divest de Klerk of this responsibility was constrained by the obligation to distribute the various cabinet portfolios not only on the basis of numerical proportionality but also "in the spirit underlying the concept of a government of national unity." Chris Louw, *FW's Tussle Over Intelligence*, Weekly Mail & Guardian (Johannesburg), Sept. 2-8, 1994, at 3; see S. Afr. Const. § 88(5). Although Nelson Mandela recently told a reporter that he had "stripped" de Klerk of his intelligence role, Bill Keller, *A Day in the Life of Nelson Mandela: Charm, Control, a Bit of Acid*, N.Y. Times, Sept. 12, 1994, at A1, de Klerk has held on to at least some authority, for Mandela has appointed him "to head a cabinet committee overseeing intelligence services." David Beresford, *De Klerk to Head Spy Committee*, Guardian (London), Sept. 15, 1994, at 12.

135. S. Afr. Const. § 16 (emphasis added).

136. The founder of the South African Gun Owners' Association claims there are 4,000,000 guns legally in private hands. Stefaans Brümmer, *Critics Open Fire on Gun Proposal*, Weekly Mail & Guardian (Johannesburg), June 10-16, 1994, at 8. Most of these hands are evidently white, as a result of apartheid restrictions on blacks' access to firearms. One proposal under consideration for addressing the issue of private gun ownership has been described as a "one person, one gun" rule. *Id.*

Crime statistics, meanwhile, reflect what everyday anecdotes confirm: South Africa, even disregarding political violence, is a very dangerous place. The homicide rate has been estimated at 20,000 per year — roughly the equivalent of 140,000 per year in the United States. See Keith B. Richburg, *S. Africans Struggle to Cope With a 'Society in Stress': Violence Creates a Heavy Mental Health Burden*, Wash. Post, Sept. 4, 1993, at A1. Apparently the rate of rape in South Africa is comparable to its homicide rate, and thus, again, much greater than that in the United States. See Howard Witt, *S. Africa Takes on Tone of Wild West*, Chi. Trib., Mar. 19, 1990, at 4.

Nor is the problem solely one of private individuals. The interim constitution establishes a single South African Police Service, to function at both national and provincial levels,¹³⁷ and this arrangement will likely ensure that policing in South Africa remains a much more centralized function than it is in the United States. But the interim constitution also devolves a portion of authority over the South African Police Service from the national to the provincial level.¹³⁸ In addition, it calls for the establishment of municipal police forces, outside the South African Police Service.¹³⁹ These steps may reduce the danger to liberty that the centralized South African police have so often posed in the past, but by the same token these measures somewhat limit national authority. Recent news reports of the political battles between the ANC and Inkatha over control of the KwaZulu/Natal provincial police ministry suggest the chilling possibility that provincial police, despite being part of the national Police Service, may succeed in operating with enough independence to constitute a limit on the national government's full possession of a monopoly on force.¹⁴⁰ It is also startling to realize that Section 224, after declaring that the South African National Defence Force "is hereby established as the only defence force for the Republic,"¹⁴¹ also seems to contemplate the establishment of other armed forces under laws, apparently including provincial laws, "for the protection of persons or property."¹⁴²

None of this means that there will be any force in South Africa that can stand against the army; but there may be many people in

137. See S. Afr. Const. §§ 214-20.

138. *Id.* §§ 217-20.

139. *Id.* § 221(3).

140. See Stephen Laufer, *Shake up of the SAP Ranks*, Weekly Mail & Guardian (Johannesburg), May 27-June 2, 1994, at 2; Farouk Chothia, *IFP Police Post Saga Continues*, Weekly Mail & Guardian (Johannesburg), June 3-9, 1994, at 2.

141. S. Afr. Const. § 224(1). This welcome provision stands for the principle that provincial military forces, as such, will not be permitted. The possibility of such direct challenges to the national monopoly on military power was not fanciful. In 1992, the KwaZulu legislature, firmly under the control of Chief Buthelezi, had proposed a provincial constitution that would have authorized the then-hypothetical state of KwaZulu/Natal to make service in its militia compulsory, while prohibiting national armed forces from entering the state without its approval. Proposed Constitution of the State of KwaZulu/Natal arts. 98(a), 67(b). I discuss these and other provisions of this proposed constitution in Stephen Ellmann, *Federalism Awry: The KwaZulu/Natal Constitution*, 9 S. Afr. J. on Hum. Rts. 165 (1993).

142. S. Afr. Const. § 224(3).

South Africa who can operate where the army is absent, or when the army proves reluctant to act. The real power of the new government to respond to ethnic (or other) violence with force, then, is less than its power on paper. Perhaps in the end it is desirable for the national government not to have an absolute monopoly on force. Certainly this was the theory of the framers of the United States Constitution.¹⁴³ But these constraints underline the importance of the government's finding ways to address ethnic division short of force — for when the use of guns becomes the only solution, it may prove not only a horrible but also an ineffectual answer.

V. CONCLUSION

With great courage and hope, and also out of a mutual recognition that the alternatives were even more problematic, black and white South Africans have chosen to adopt an interim constitution which seeks, through its provisions on structure, on rights and on sheer force, to handle the problems of racial and ethnic division within the framework of a single, democratic state. This decision involved major compromises on all sides, and imposes significant constraints on the new government that has now taken office. But both strategic calculation and moral principle, I think, teach that this decision was a fundamentally wise one for the ANC (and an enlightened one for the white government). The uneasy balance crafted by the interim constitution may prove problematic, but it represents a remarkable, and admirable, effort to invent a democratic nation in the face of a heritage of centuries of injustice. This is not the Freedom Charter — the dramatic 1955 expression of the aspirations of the African National Congress and its allies in the struggle against apartheid — but it *is* a first draft of a Freedom Constitution.

143. James Madison, one of the principal authors of the United States Constitution, maintained that the military power of the states' militias would far exceed that of any possible "regular army" of the national government. The Federalist No. 46, at 298-300 (James Madison) (Clinton Rossiter ed., 1961). Furthermore, according to Prof. Tribe, "[t]he congressional debates . . . indicate that the central concern of the second amendment's framers was to prevent such federal interferences with the state militia as would permit the establishment of a standing national army and the consequent destruction of local autonomy." Laurence H. Tribe, *American Constitutional Law* 299 n.6 (2d ed. 1988). Today, however, federal authority over the state militias is virtually plenary. See *Perpich v. Department of Defense*, 496 U.S. 334 (1990).