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APPROACHES TO NATIONAL STANDARDS IN

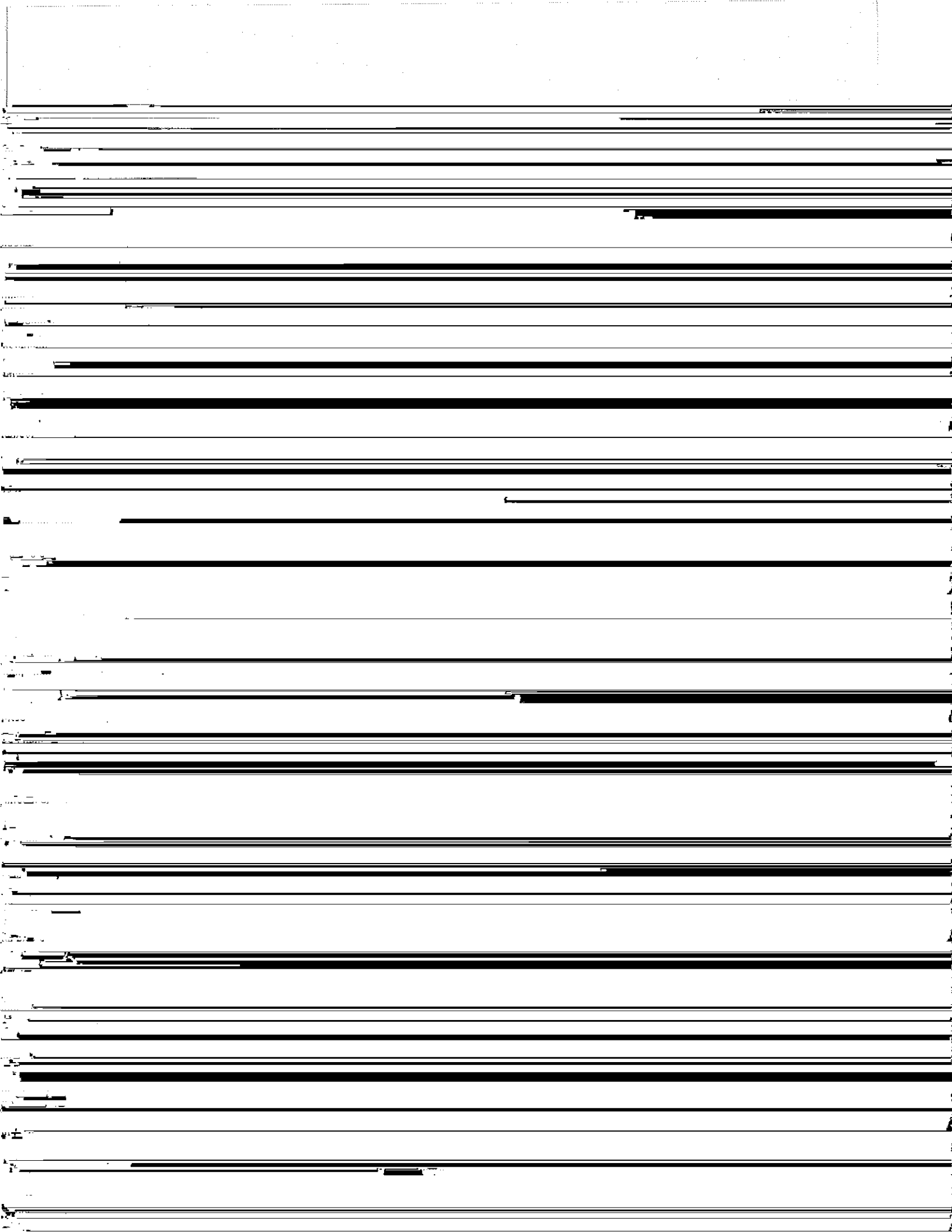
FEDERAL SYSTEMS

A Research Report Prepared by

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- various interprovincial mechanisms which operate without direct federal involvement;
- the unique role of the German "Bundesrat" for providing a forum for intergovernmental negotiation of federal legislation; and
- the Swiss methods of direct democracy involving initiative and referenda in the process of reaching (or impeding) national standards.

The report also summarizes the following means of **enforcing** national standards:

- legislative control whereby legislators enact sanctions and conditions, provide or withhold funds and (where there is concurrent jurisdiction) preempt the laws of constituent legislatures;
- judicial control whereby the courts adjudicate disputes between federal and

report identifies those means which are both the most effective and the most easily adapted to Canada.

As discussed in more detail in Part IV of this report, the most effective instruments and processes selected were those which achieve results directly and have been used extensively (as compared to only rare use) in other federal systems. The most feasible for Canada were those which in the judgement of the authors of this report could be more easily implemented in Canada because they would not require radical systemic reform in order to work.

From these assessments, the following constitutional and institutional innovations are proposed for further consideration:

Legislative Jurisdiction:

1. The explicit constitutional recognition of a federal spending power;
2. The establishment of partial federal jurisdiction in a limited number of fields to allow for federally legislated standards;
3. The further use in Canada of concurrent powers, with provincial paramountcy

Charters and Statements of Principles:

6. Entrenchment of a general set of principles for economic union objectives;
7. Entrenchment of a general set of principles for social objectives;
8. Enlarging upon the equity commitments of Section 36 of the *Constitution Act, 1982*.

Mechanisms for Intergovernmental Relations:

9. Entrenching the role of important intergovernmental bodies, including the consideration of explicit decision-making rules for their operation;

APPROACHES TO NATIONAL STANDARDS IN FEDERAL SYSTEMS

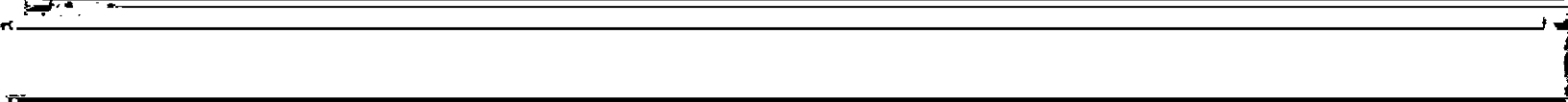
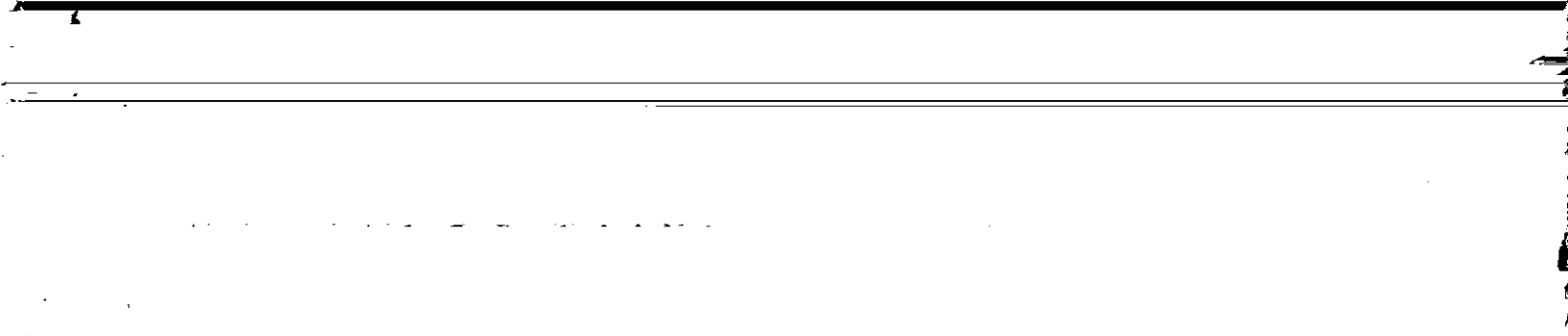
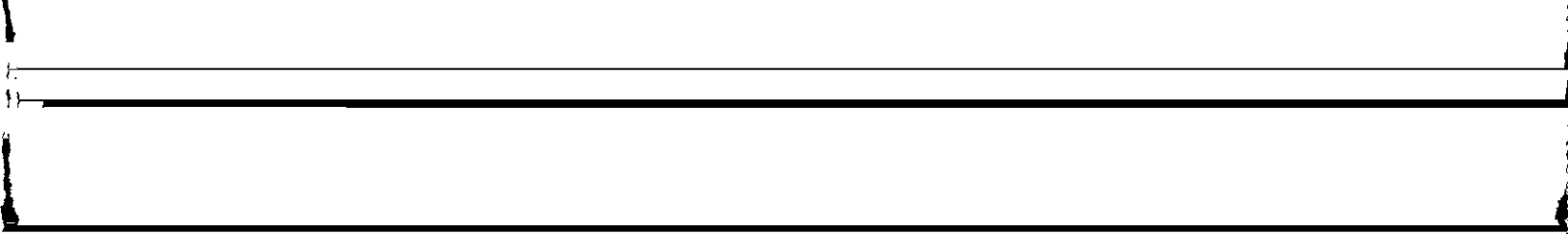
A Research Report

prepared by the Institute of Intergovernmental Relations
for the Government of Ontario

I. INTRODUCTION

Canada is again in the midst of a broad ranging debate about the future of their federal

and social services (not to mention proposed new programs such as child care). Much of the discussion about social programs has been essentially defensive -- seeking ways to "entrench" national standards in the face of potential decentralization. However, the concern over national standards can also be focused on the need for policy harmonization in emerging policy areas. Environmental regulation and standards are a key example in this respect, as is also the harmonization of fiscal, industrial, ~~adoptional and other policies in order to improve Canada's capacity to compete~~



use of any one instrument varies by the federal system, but the important lesson is that

federations under review. This includes a summary of the basic features of the different federal systems and a comparative survey of important institutional factors such as legislative jurisdiction, financial arrangements and other institutions.

Part III identifies the approaches to national standards taken in other federations. This survey covers (1) the types of policy areas where national standards (as defined above) have been attempted, (2) the principal instruments for defining and

partnership among governments.² The institutional context for the achievement of "national standards" across the constituent units in a federation therefore includes both

Basic features of the U.S. federation include:

- separation of powers among the executive, legislature and judiciary, et

with respect to procedural matters. Policy is nonetheless much less standardized across the states than is the case, for example, in Germany. This is partly a result of

1990-1991

members may also be elected to Cantonal legislatures; the upper house

concentrated primarily in one constituent unit of the federation, the province of Quebec (where it forms the majority).

Basic features:

- the first federation to combine a federal constitution with a system of parliamentary responsible government (a design followed by Australia, Germany and numerous newer Commonwealth federations);

... exclusive federal, exclusive provincial

Australia

Australia began as a number of self-

under a federal constitution in 1901. Today, the federation is comprised of six states
and two mainland and several offshore territories. The *Coastal Australia*

Federal Republic of Germany

The Federal Republic was proclaimed in "West Germany" in 1949. Another parliamentary federation, the Federal Republic of Germany was originally comprised

of East and West Germany was achieved in 1990, resulting in five new Länder plus a united Berlin as a new Land. While the basic features of the original constitution

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- how comprehensive is the list;
- where the residual power lies;
- whether powers are exclusive or concurrent; and
- which jurisdiction is paramount in the case of conflicting or concurrent jurisdiction.

A more detailed comparison of the distribution of powers is beyond the scope of this report. However, one can examine the effect of this distribution in a few relevant social policy areas. Table 2.1 notes the distribution of powers in federal

Table 2.1: Social Policy Fields: Is whether a policy field is the domain of

Table 2.1: Distributions of Power in Federal Systems

<i>policy field</i>	Canada	United States	Switzerland	Australia	Germany
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Despite this complexity, there is a general trend in all of these federations to allocate responsibility for social policy to the constituent governments. This original allocation has been moderated by subsequent constitutional amendment, by judicial review, by the increased fiscal clout of federal governments and by the mechanisms of intergovernmental relations. (These instruments are reviewed in detail in Part III).

require. Thus the federal legislature may pass laws incrementally that partially negate the laws of constituent legislatures. In practice, over several decades, there is often

...legislation, but the administration of justice is

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of the federations, the federal government is better able to effectively tax the national

level. For these reasons, there has

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power has often been employed by federal governments to assist constituent governments where they cannot afford to provide the services being demanded of them. This occurred especially during the economic depression of the 1930s. However, it has proven to be a source of considerable controversy and intergovernmental conflict when such financial assistance continues uninvited and is perceived by the constituent governments to be a federal invasion of their exclusive

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and local government. It is

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once consensus is achieved. However the latter systems provide more variety and flexibility of response.

(4) The Role of Constituent Units in Federal Institutions

The fourth set of features, the role of constituent units in the institutions of the federal government, is complex and can take many forms. The most important of these roles for the achievement of national standards is the representation of constituent unit interests in the second chambers of federal legislatures.

house in the German parliament, the Bundesrat, directly represents the constituent governments of its federation. The Bundesrat not only has a role in the "sober second thought" of lower house legislation, it can veto completely any legislation designed to

In Canada, the second chamber has less perceived legitimacy, and more emphasis has been placed on executive federalism to provide regional representation. This has consequences for the development of national standards, as reviewed below.

In summary, the significance of representing constituent interests effectively in the federal legislative process is that it provides increased political legitimacy to federal attempts to establish national standards. It can also -- as in Germany --

Parliamentary federations have no comparable tradition of entrenched civil rights. The British constitutional tradition which has been part of the Canadian and

outlines "basic rights" to human dignity, liberty, equality, religion, freedom of speech, privacy, and property, among others. There are also some limited rights to education and the equal care of children. The Basic Law also provides in Article 33 for political rights and duties and in Article 72 for guaranteed uniformity in living conditions.

(6) *Judicial Review*

The last institutional feature bearing upon national standards is the role of

~~judicial review~~ This feature is especially important where national standards are

federal legislature (Federal Assembly) itself determines the constitutional validity of its laws, or must respond to a legislative referendum proposed directly by the people through an initiative process.

C. Summary

This comparative survey of institutional factors demonstrates the various features that condition the achievement of national standards in federations. In any single federation national standards are a function of a mix of factors: the division of

III. SURVEY OF APPROACHES TO THE SETTING OF NATIONAL STANDARDS

In none of the federations is there a single exclusive mode for achieving

policy categories which have been the subject of national standards in the federations under review.

Table 3.1: Categories of Subject Matters

<i>subject</i>	Canada	United States	Switzerland	Australia	Germany
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federal act itself or else under power conferred by the act and they may relate to

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amount that was extra-billed or raised through user charges. This example of establishing and enforcing a condition of uniform standards in a field of exclusive provincial jurisdiction remains a highly contentious and hotly debated issue.

In the United States, national standards are also evident in the field of health

reforms which included a national minimum benefit level (\$1,600 annually for a family of four) to be received by all eligible families if they had no earned income

In terms of establishing national standards through this instrument, the Australian approach has typically been one of setting broad national goals, rather than specifically enforceable conditions. The question of establishing conditions to specific purpose events has been a matter of debate in Australia for some time

"sufficient" or "reasonable" revenues, the "standards" inherent in these equalization schemes are usually defined by ordinary legislation or merely through executive agreement.

In terms of achieving national standards, it is important to note that while revenue equalization may in theory provide the fiscal capacity for state governments to provide programs or services of similar quality and scope (although in practice no

20 The foundation of how the Common equalization system works see

concurrency, identified in Article 75 of the Constitution, allows the federation to pass outlining legislation or "framework provisions" for certain specified matters which involve Länd jurisdiction.

In theory, this constitutional provision enables the federal government to enact "framework legislation" which enunciates broad principles in the most general of terms for such matters as the conditions of the public service, the management of land and water resources and general principles for the

then becomes the responsibility of the Länd governments to fill in the necessary detail

approval. Two bodies were established under these provisions -- a planning committee for the promotion of building projects and a Bund-Länder Commission for educational planning and research promotion. However, any attempt at establishing federation-wide norms or uniform standards has met with only limited success.

American experience with concurrency operates rather differently. The distribution of powers in the United States Constitution of 1789 lacks the precision and comprehensiveness of jurisdictional assignment in Germany's Basic Law (enacted in 1949), but concurrent powers nonetheless remain a dominant feature of that

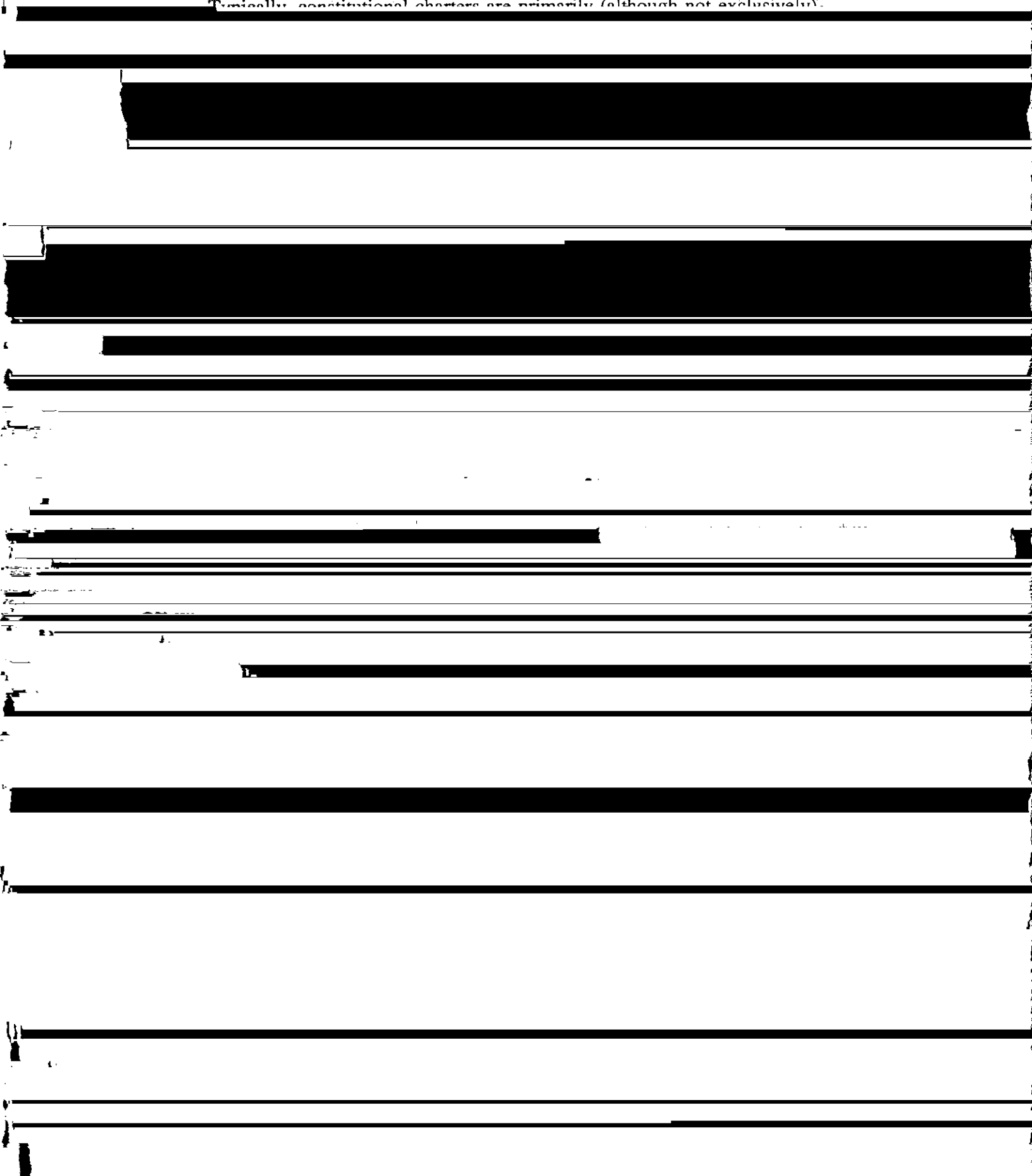
From National Standards are typically created in state policy or regulatory

Transportation Act, 1982); Motor Vehicle Width Regulations, 1983; and marine-vessel safety regulations (Vessel Safety Standards Act, 1983).

In addition to these instances of preemption in purely regulatory fields, Congress has in the past also assumed full authority over previously state-administered programs such as income support. In 1972, an amendment to the Social Security Act transferred the primary responsibility for Supplemental Security Income (SSI) --

income support for the aged, blind, and disabled.

Typically, constitutional charters are primarily (although not exclusively)

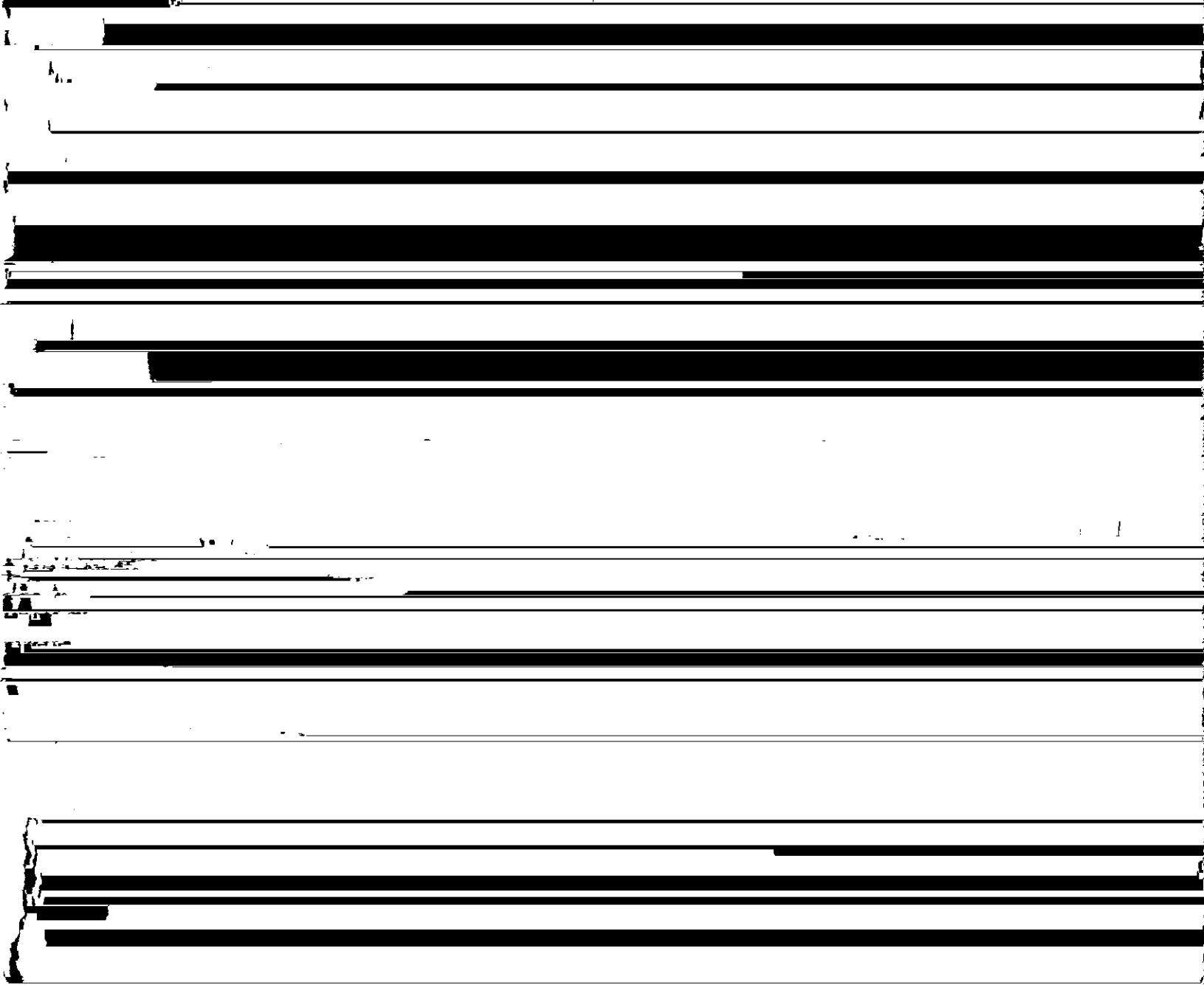


standards or greater policy harmonization amongst the Länder. For example, in a

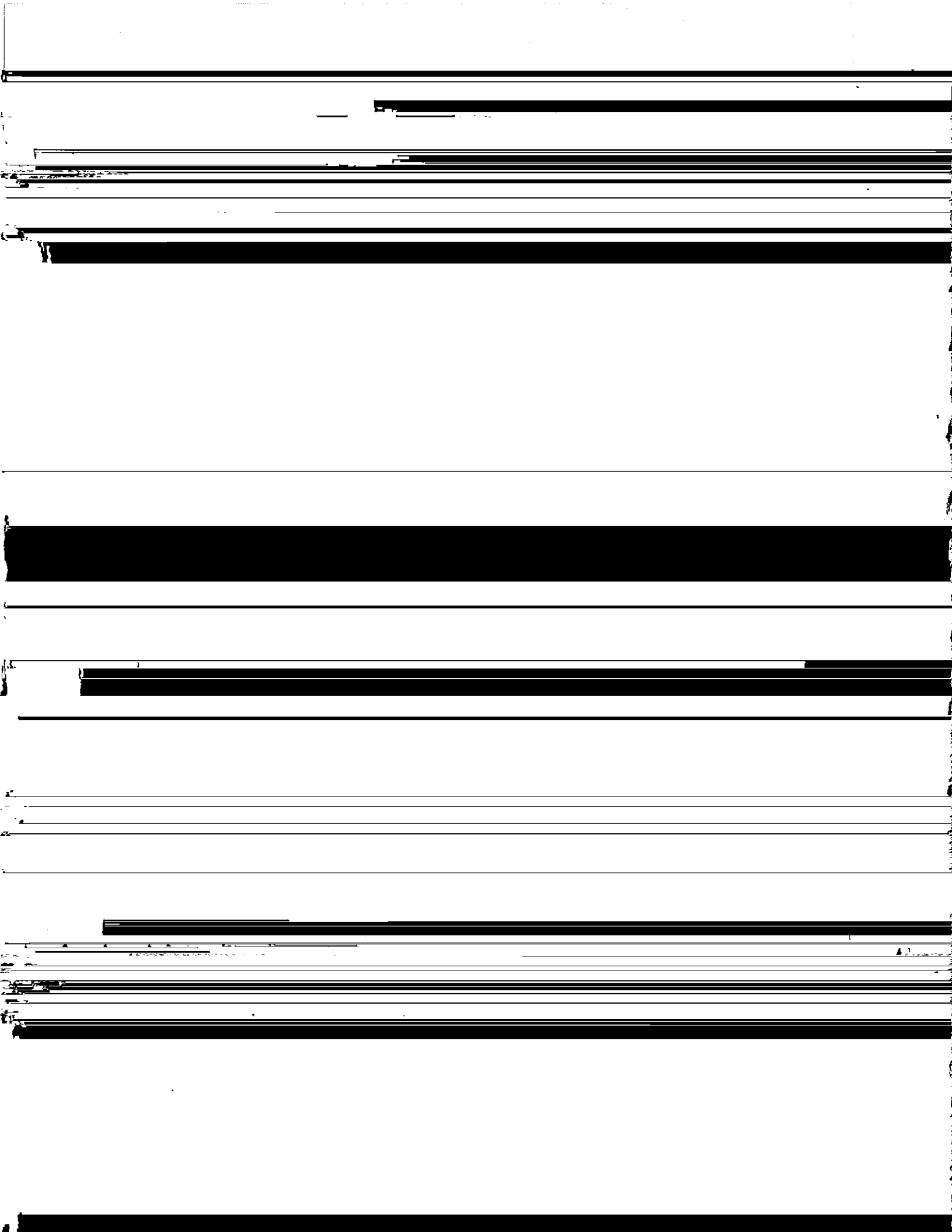
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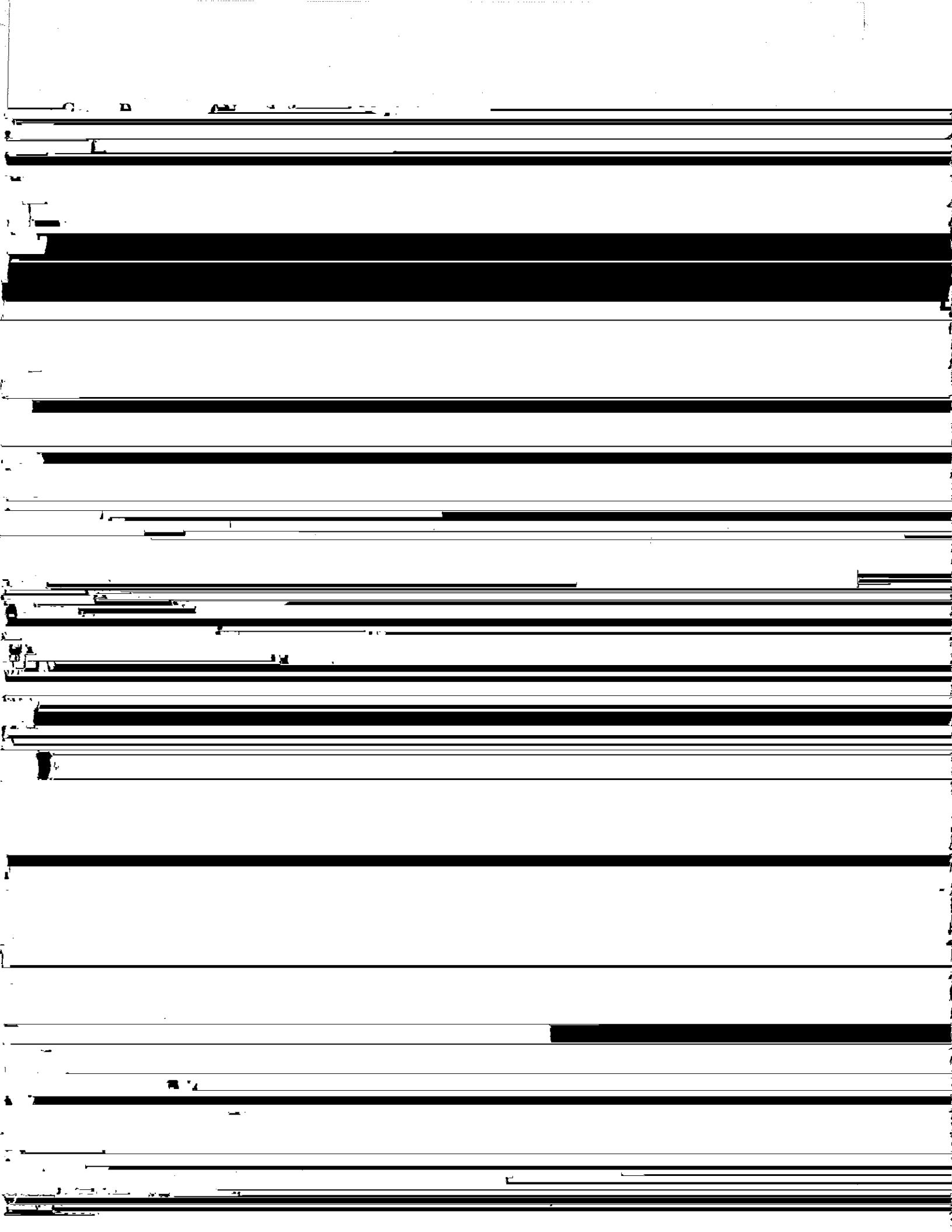
of government). Three such instruments are: the Swiss "Concordat"; interländer treaties in Germany; and the movement for uniform state laws in the United States.

The "*Concordat*" is an intergovernmental mechanism based on a voluntary agreement among the cantons in Switzerland. Typically it is employed to ward off centralizing initiatives of the federal government by introducing a coordinated intercantonal position or program. While the Concordat has the potential to be utilized



Finally, there is the case of the *uniform state law* movement in the United States. Originally conceived by the American Bar Association in 1892, its purpose is to minimize conflicts of laws in the common interest of the American states without having to resort to nationalization of law and policy by the central government. It is also important in standardizing legal procedures and practices in a federation which has largely autonomous state legal systems. *Proposals for the uniformity of state laws*





and Medical Services, which meets on a regular basis to produce guidelines for established standards in such matters as special services for hospitals.

2. State/Cantonal Lobby of Federal Legislatures

Executive coordination of intergovernmental relations is considerably less

... of ... directly involve the federal government. Such interactions can lead to

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interstate associations have played a critical role in providing feedback to Congress when it is contemplating the introduction of a new conditional grant program, many of which are intended in part to establish federation-wide uniform standards.

4. The Bundesrat

The role of the Bundesrat as an institution of intergovernmental consultation and mediation has been elaborated upon elsewhere in this report, so its basic features are only briefly restated here. Constituent governments are directly represented in the

propose minimum standards in primary and secondary education in Switzerland. However, it subsequently failed to meet the dual requirements of the Swiss Constitution of being ratified both by a popular referendum and the cantonal governments.

D. Enforcement and Adjudication of National Standards

In most federal systems, successful attempts at establishing national standards are usually the product of years of discussion and endless negotiations between the various orders of government and other affected interests. Often the result is not a

Table 3.4: Enforcement Bodies and Measures

	Canada	United	Switzerland	Australia	Germany
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Another example of enforcement which can be effected by federal legislatures is found in the case of federal preemption -- or rather the threat of preemption -- of regulatory fields falling under concurrent jurisdiction. As noted earlier, Congress may partially occupy a field of jurisdiction held concurrently with the states by either assuming responsibility in part for regulatory activity or else by establishing certain

Many of the national standards which are established in federations are by their definition non-legal in nature, and therefore not subject to court remedy. Included in this category would be most types of federal-state agreements, most of which are

political in intent and non-binding.

effective means of achieving national standards? Second, how feasible is the

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only be acceptable if they are well explained and understood by voters. Regardless of

B. Options for the Canadian Agenda

1. Legislative Jurisdiction

The most direct and effective method of creating new national standards in a federation is, as noted in this report, to reallocate exclusive legislative jurisdiction for a given subject matter to the federal government. Uniform standards do not always follow from exclusive federal jurisdiction, but the potential is clearly present. All of the federations reviewed here, except the United States, have amended their constitutions to provide new areas for exclusive federal jurisdiction, especially for matters related to social security and unemployment insurance. Canada did so itself for the latter category in 1940. While the thrust of most proposals to revise legislative authority coming from Quebec and elsewhere tends to support decentralization, not centralization, there may be some limited scope for transferring certain matters to exclusive federal jurisdiction.

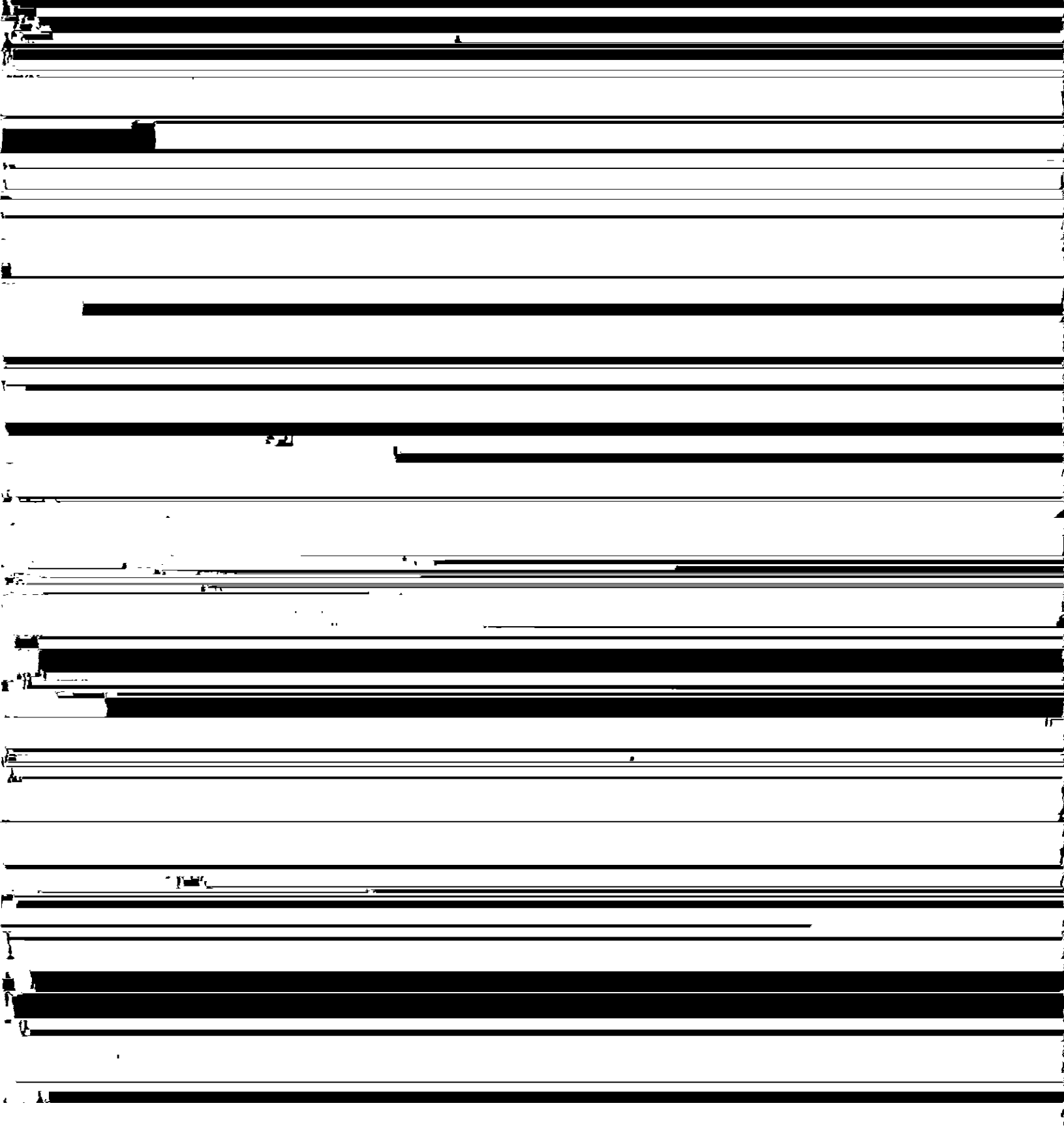
In any case, dwelling upon the zero-sum game of either exclusively federal or exclusively provincial jurisdiction may not be the best approach. The comparative experience reviewed in this report suggests that there appear to be a range of mediating approaches which, short of reallocating jurisdiction from the exclusive domain of one or other order of government, could provide useful options for Canada. These are:

- *Creation of a longer list of concurrent legislative powers.* All of the other federations under review make more extensive use of concurrent powers than does

where social assistance and U.I. could be more effectively integrated. Similarly, as a means for giving greater scope for federal objectives and standards, the environment

A more extensive version of this approach would be to apply the practices of

... followed in Germany and Switzerland. Canada's only



In summary, the options for legislative jurisdiction may be grouped in two categories: those which appear to be more feasible, and those which are less feasible

executives, is not as conducive to the flexible and targetted system of specific grants possible in congressional systems.

Canada does as much if not more than most federations in promoting horizontal fiscal balance in the federation. Equalization in Canada may become even more important if vertical transfers decline. Provincial revenue equalization would become, in those circumstances, even more important as an implicit support for national standards in public services and entitlements in the poorer provinces than it is now.

achieving "equalization". Germany has the only case of an inter-constituent equalization fund. That is, the majority of funds paid to poorer Länder for revenue

important respects. First, in addition to a determination of equalization payments on the basis of deficiencies in revenue capacity, there is also a determination of need based on expenditure differences. Indeed Canada's Rowell-Sirois Commission in 1941 recommended an equalization scheme much along Australian lines, but without success. If Canada, as a result of the developments discussed here, has to rely more on equalization to achieve national standards, then the Australian options will be important to consider. The second unique feature of the Commission is its institutional form. It consists of three appointees of the federal government but

3. *Charters and Statements of Principles*

The comparative experience of other federations suggests two very general types of constitutional codes, charters or statements of principles which could

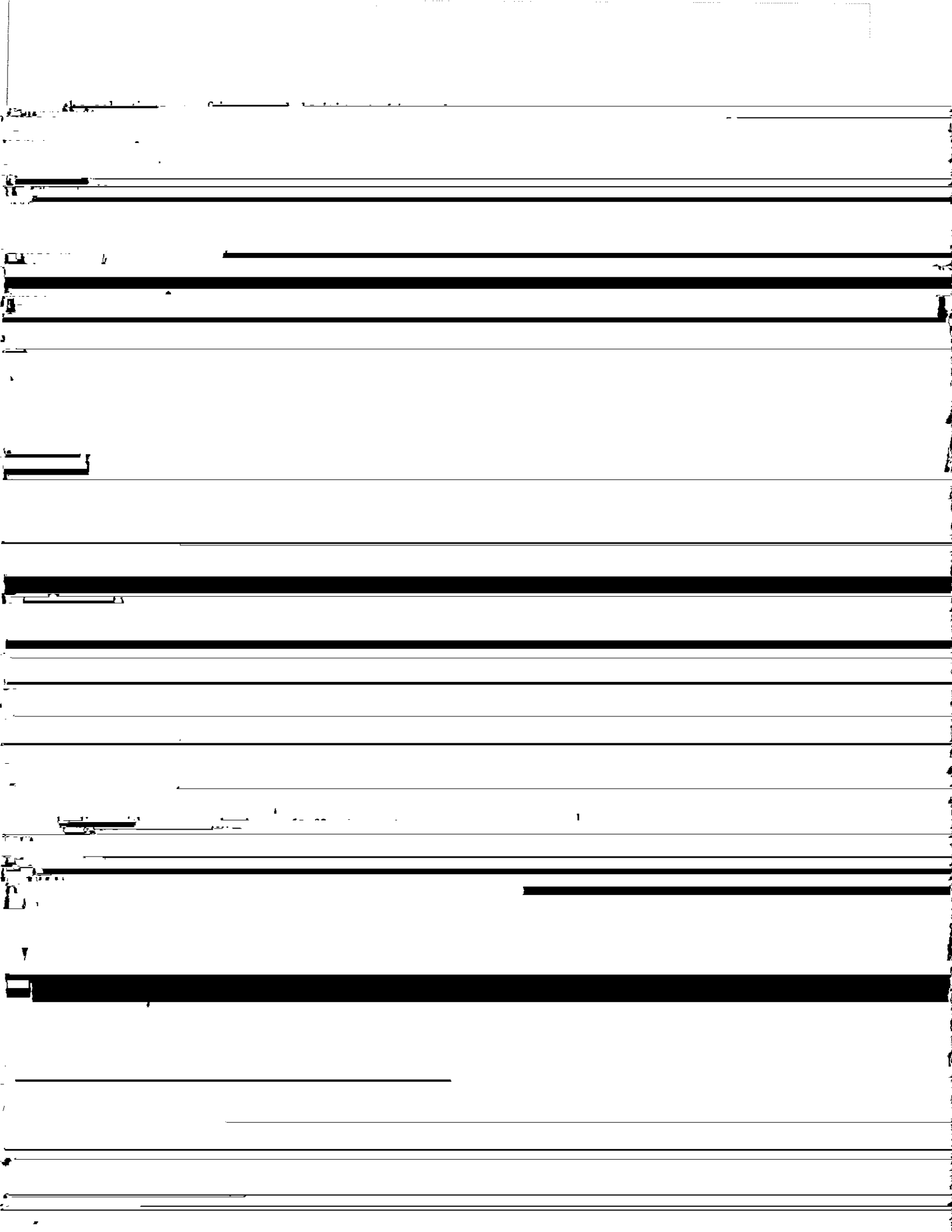
covers such social and economic rights in only a very partial way (s. 6 on mobility rights).

The virtue of charter options in a federal constitution is that they confer constraints or obligations upon both orders of government. Achieving agreement on such a charter might be very difficult, given the current difficulties with Quebec being unwilling to accept the existing Charter of Rights and Freedoms. This is a

4. *Intergovernmental Relations*

The processes of executive federalism could provide an effective means for the achievement of national standards by the constituent governments acting in concert -

Executive federalism has



5. Federal Institutions

If national standards are to be achieved in ways which maintain essential implementation by the provinces, the role of the provinces in federal institutions may be an important part of that process. Two types of institutions stand out in this respect,

the Canadian Senate and the system for constitutional judicial review

implementation or administration; to approve any use of the federal spending power (including any conditions for asymmetrical application); to review and approve the reports and recommendations of any arm's length bodies such as an independent commission on equalization; to ratify federal-provincial agreements; to ratify

6. *Asymmetrical Applications*

In Canada, schemes of legislative jurisdiction may need to address the unique requirements of Quebec, and its traditional demands for special status or powers to promote the economic, social and cultural development of its francophone majority. All federations must deal with varying degrees of asymmetry among their constituent units. Apart from language, Canada has tremendous asymmetries in the size,

powers are much increased over the territories (which, however, cannot be considered as constituent governments as defined in this report).

The difficult issue for Canadians may well be whether they can accept that certain types of standards may be achievable only without the participation of Quebec. Nine-province "national" standards could be achieved by the use of any of the devices summarized in this part, or by the continuation of means already employed in Canadian constitutional and political practice (e.g. s. 94A on pensions; opting out of tax collection agreements; the family allowance program; parts of the Established

• charters of rights and similar constitutional codes may provide for

~~_____ "standards" provisions and other methods of~~

In summary form, the following institutional and constitutional innovations drawn from comparative experience appear to be both effective in their use elsewhere, and more feasibly adapted to the Canadian federal system:

Legislative Jurisdiction:

The explicit constitutional recognition of a federal court of appeal

[REDACTED]

Mechanisms for Intergovernmental Relations:

9. Entrenching the role of important intergovernmental bodies, including the consideration of explicit decision-making rules for their operation;
10. Providing for enforceable intergovernmental agreements, including agreements on the application of legislative powers;

Federal Institutions:

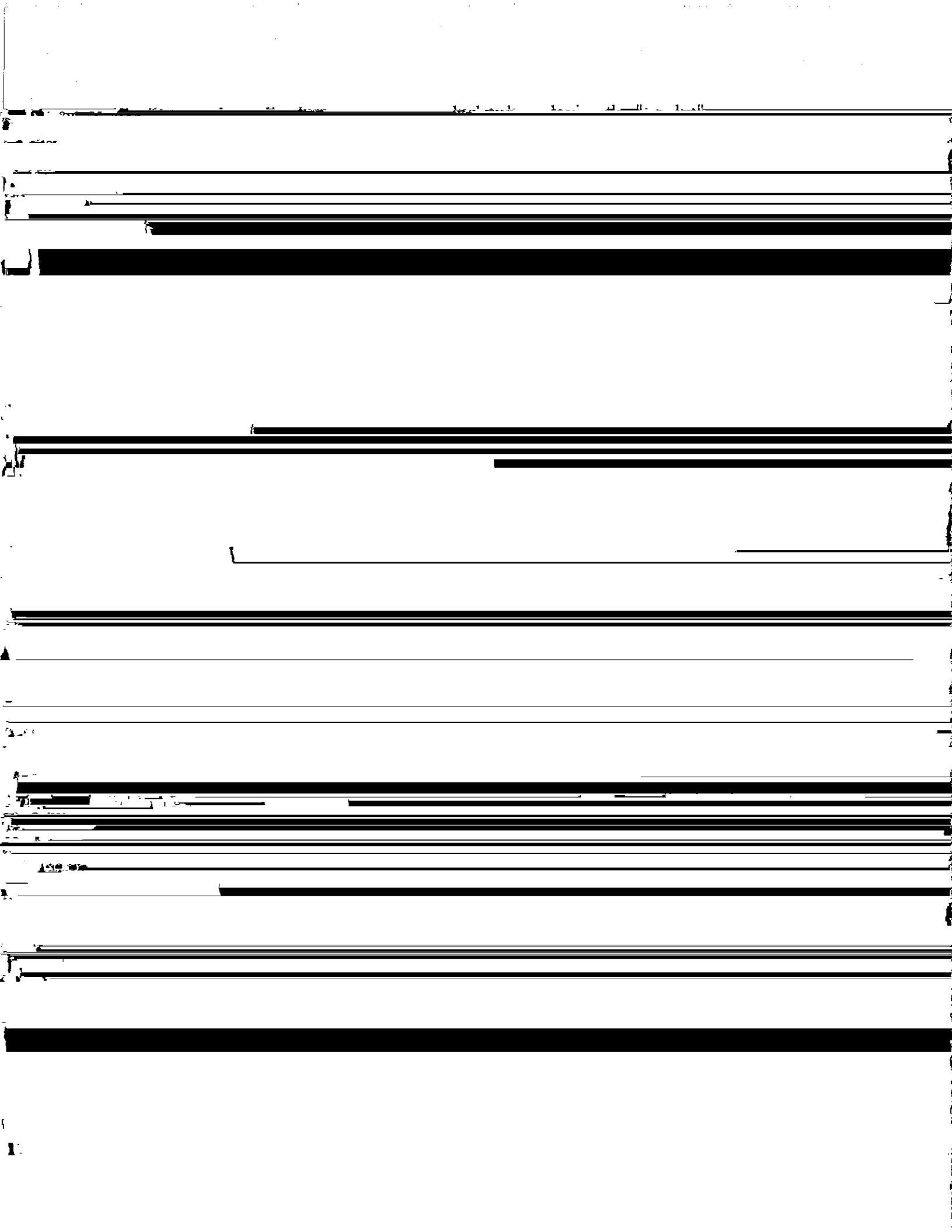
11. Reforming the Senate to require it to perform specific roles related to encouraging, approving and enforcing national standards; and
12. Consideration of new types of adjudicative bodies, and of clarifying the role of existing courts, with respect to the enforcement of national standards.

In the application of any of these reforms in Canada, the detailed practice in other federations is worth examining. The strengths and weaknesses apparent in other systems may not always transfer to Canadian practice. For any given means suggested,

APPENDIX 1: FISCAL EQUALIZATION IN GERMANY¹¹

The German system of fiscal equalization has captured the attention of scholars and

quarter of a Länd share to be granted to Länder whose per capita
revenue from Länd taxes and from the income and corporation taxes is



APPENDIX 2:

THE AUSTRALIAN COMMONWEALTH GRANTS COMMISSION

[Excerpt from Commonwealth Grants Commission *Fifty-Fifth Report 1988*

Commonwealth Grants Commission Act 1973, the Commission may still receive a reference concerning a matter relating to the making of a grant of assistance to a State for local government purposes.

1.4 Also in 1978, changes were introduced which required the Commission

of the distribution between the six States of the amount of

Legislation

1.8 The responsibilities of the Commission derive mainly from the provisions of the *Commonwealth Grants Commission Act 1973*, a copy of which appears at Appendix I. Under specific sections of that Act the Commission is required to inquire into and report upon the following:

- (a) an application by any State for a grant of special financial assistance and any matters relating to the making of a grant of financial assistance

10 Under the provisions of the *Income Tax (Arrangements with the States)*

1.11 Regardless of the fact that the Commission is not necessarily obliged by its terms of reference for particular inquiries to present its findings in terms of the total level of Commonwealth financial assistance required to achieve fiscal

1.13 For the purpose of determining the standardised revenue for a State (or Territory), separate calculations are made for each category of recurrent revenue by applying, in turn, the revenue-raising effort of each State which is being used to determine the standard to the revenue base of the State being assessed, and taking the appropriate (population-weighted or simple) average of the separate calculations. The

the actual expenditure of the State is a measure of the policy and efficiency differences referred to above. The difference between the State's standardised expenditure and the standard expenditure, which is calculated as the product of the State's population and the average of the per capita expenditures incurred by the standard States, is described by the Commission as the expenditure needs of the State. These needs also may be either positive or negative.

Sosin, Michael R. "Legal Rights and Welfare Change, 1960-1980." in Danziger, Sheldon H. and Daniel H. Weinberg, eds. *Fighting Poverty: What Works and What Doesn't*. Cambridge: Harvard University Press, 1986, p. 260-83.

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