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**APPROACHES TO NATIONAL STANDARDS IN
FEDERAL SYSTEMS**

A Research Report Prepared by

the Institute of Intergovernmental Relations

for the Government of Ontario

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EXECUTIVE SUMMARY

Many Canadians are concerned a decentralization of constitutional powers would adversely affect **national standards** in social programs and other policy areas. They are worried that reduced central authority in Canada could mean reduced access to public services, a reduction of public entitlements and reduced enjoyment of consistent regulation of economic and social affairs. This research report examines how other federations have dealt with these problems of attempting to maintain national standards while also enjoying the benefits of a decentralized system of government.

The study looks at national standards in four other federations: the United States, Switzerland, Australia and Germany. National standards are defined as being **ways by which standards, norms, objectives and similar expressions of policy harmonization can be achieved on a federation-wide basis**. This report mainly examines how this is done in ways which maintain the responsibility for regulation or for the implementation of programs at the level of constituent units (i.e. provinces, states, Lander, etc.) of the federation.

It is important to understand the institutional context within which national standards are achieved in the federations under review. Part II of this report provides a concise summary of the basic features of each of the four federations of United States, Switzerland, Australia and Germany, with Canada included to allow for quick comparisons. Institutional features which have an important influence on the climate for achieving national standards are then compared across all five federations. These are:

(1) the distribution of legislative jurisdiction, (2) financial arrangements, (3) the form of the executive, (4) the role of constituent units in federal institutions, (5) charters of rights and (6) judicial review.

How national standards are actually achieved is surveyed in Part III. The attached table provides a number of illustrative examples of the findings of the report for all five federal systems.

The report identifies that the following **principal instruments** are employed to achieve national standards:

- conditional grants from the federal to provincial level of government;
- revenue equalization payments of various kinds to poorer provinces to enable them to better meet national standards;
- concurrent legislative jurisdiction of various types which enable the federal legislature to play a role in legislated standards;
- charters of rights to establish clear entitlements to standards, or to establish general principles to be followed;
- ways by which provinces (or states, Lander etc.) can agree among themselves to provide national standards; and
- transferring constitutional authority to the federal government from the provinces in key areas where national standards are desired.

This report also examines the **processes** by which national standards are **negotiated and mediated** in other federations. These include:

- executive federalism as practiced in Australia, Germany and Canada;
- lobby of federal legislatures by state or cantonal governments as primarily occurs in Switzerland and the United States;

Illustrative Examples

Executive Summary

	Canada	United States	Switzerland	Australia	Germany
Principal Instruments	conditional grants Charter of Rights interprovincial agreements	federal categorical grants congressional preemption of concurrent powers uniform state laws Bill of Rights	transfer of constitutional authority conditional grants "Concordat" (voluntary agreement between cantons)	specific purpose grants (s.96) interstate agreements	extensive concurrency "framework provisions" "joint tasks" conditional grants interländer "treaties" Basic rights
Enforcement Bodies	Parliament Courts	Congress Courts	Federal Assembly Federal Social Insurance Bureau initiative and referenda	Parliament High Court	Bundesrat Social Courts Federal Constitutional Court
Enforcement Measures	financial penalties legislation/regulation	financial penalties legislation/regulation threat of preemption	financial penalties legislation/regulation	financial penalties legislation/regulation	legislation/regulation
Processes	executive federalism interprovincial relations	state lobby of Congress interstate relations	cantonal lobby of the Federal Assembly intercantonal relations referenda, initiative	executive federalism federal unilateralism	executive federalism Bundesrat interländer relations
Subject Matters (examples)	Medicare income support environmental protection revenue equalization civil rights	Supplemental Security Income (SSI) civil rights drinking age environmental protection nuclear energy uniform state laws (e.g. child custody, commercial law)	social insurance, including -old-age insurance -disability insurance -unemployment insurance -accident insurance -family allowances revenue equalization	environmental protection interstate transportation unemployment insurance revenue equalization	social insurance hospitalization fees living conditions (Art. 72) education environmental protection "new media" (cable and satellite television) political rights and duties (Art. 33) revenue equalization

- 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 provincial governments concerning national standards, and enforce constitutional principles which provide standards where there are charters of rights and similar constitutional codes or provisions; and
- popular control whereby in Switzerland the people can directly enforce (or impede) national standards through the use of initiative and referenda.

The subject matter of national standards in other federations reflects similar concerns in Canada. The policies identified include civil and political rights, major social programs such as health, education and social assistance, and regulatory areas such as transportation and the environment.

The choice of instrument and the process for exercising that instrument, and the particular subject matter for which national standards are established all depend upon the individual political, social and economic circumstances of the country at hand. There are a variety of approaches used as a whole, and no one approach is used in any one country. Based on the survey of possible means of achieving national standards, this

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 for greatest optional use;

Financial Arrangements:

4. The continued use of conditional grants from the federal parliament to provinces in selected subject areas, including provision for opting-out;
5. Consideration of an independent arm's length process for the determination of fiscal need for equalization purposes;

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;
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, further study of their detailed use elsewhere is recommended. Nonetheless, it remains clear that comparative experience demonstrates a wide range of possible options for Canadians to consider in attempts to improve the constitutional and institutional conditions for national standards.

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I. INTRODUCTION

Canadians are in the midst of a broad-ranging debate about the future of their federal system of government. The failure of the Meech Lake Accord has precipitated in Quebec a comprehensive review of Canadian federalism. However, other provinces and many other sets of interests and players have also been reassessing the effectiveness of current constitutional and other arrangements. The thrust of many proposals from Quebec and elsewhere has been to disentangle and decentralize the federation. Such constitutional change could occur by decentralizing legislative powers and other governmental responsibilities to all of the Canadian provinces or only to Quebec.

Regardless of the approach, many Canadians are concerned that constitutional decentralization would adversely affect citizens' access to public services, their rights to certain public entitlements and their enjoyment of consistent regulation of economic and social affairs. In particular there has been concern that with weakened central authority in Canada, "**national standards**" in social programs and other policy areas could be eroded or eliminated. There is a view that potential constitutional changes could reinforce the effects of recent deficit-conscious fiscal policy, of international market forces, and of policy changes such as the free trade agreement.

These concerns were highlighted during the debate over the spending power provisions in the proposed Meech Lake Accord, when some Canadians feared that they would lose such social entitlements as universal access to health care, income security

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, educational and other policies in order to improve Canada's capacity to compete globally.

Other federations face similar problems of attempting to maintain national standards while also enjoying the benefits of a decentralized system of government. This report examines the issue of "national standards" in five federal systems: Canada, the United States, Switzerland, Australia and Germany. This comparative survey reviews the means for establishing and enforcing national standards in these federations in order to draw out ideas and options which may be applied to Canada.

A. Definition of National Standards

"National standards" are defined in this study as *ways by which standards, norms, objectives and similar expressions of policy harmonization can be achieved on a federation-wide basis*. These national standards can be achieved in two general ways: (1) by the direct responsibility and control of the federal order of government; or (2) by ways which maintain essential responsibility for the implementation of programs or regulation at the level of the constituent units of the federation.¹

¹In this report, the terms constituent units or constituent governments will be used as a generic term for those governments which are the constituent members of the federation, and which share power with the federal government. The central government, which has independent and coordinate jurisdiction in the territory of all of the constituent units in the federation, shall in this report be called the federal government. When individual

This report focuses in particular on the latter means of achieving national standards. In Canada this has meant achieving national standards without infringing unacceptably upon provincial jurisdiction. It can also mean, in its broader sense, how one can achieve the benefits of national citizenship or policy harmonization without losing the benefits of more effective and efficient program delivery by the provincial or local levels of government. The value placed upon harmonization differs among federations. Some federal systems are well designed for and disposed towards policy harmonization, while others are less so.

The determination of national standards as primarily the responsibility of the federal order of government is common in all federations. This form of national undertaking is often one of the chief rationales for federating in the first place. Therefore, where national standards are achieved in other federations simply by having exclusive federal control over them, this will be noted in this report.

National standard-setting through clear federal jurisdiction does not always work well in practice. The notion of governmental responsibilities changes over time, and it is often impossible to clearly demarcate responsibilities for policy fields. Governments are increasingly interdependent for the effective implementation of policy results, no matter how universally accepted the policy objective. In all federations, increased interdependence has meant increased recourse to a great variety of means of achieving national standards.

Table 1.1 provides an illustration of this variety of approaches. From this one can see that national standards are achieved by a number of instruments: - funding arrangements, entrenched constitutional rights, intergovernmental agreement, concurrent jurisdiction, and constitutional amendment, among others. The predominant

federations are being discussed, the specific term given to constituent units (i.e. provinces, states, Länder, cantons) will be used.

use of any one instrument varies by the federal system, but the important lesson is that more than one instrument is simultaneously in use in any given country.

The negotiation and enforcement - in other words, the process of establishing national standards - involves the full spectrum of governmental branches in federal systems: the judiciary, the legislatures, and the executive, including the bureaucracy of administrators. The role of the legislature as compared with the executive, in turn depends on the nature of the system of intergovernmental relations as a whole: for example, the emphasis in parliamentary federations on "executive" federalism. Thus some ways of achieving national standards cannot be transferred from one system to another. As this report will emphasize, those devices used in parliamentary federations will be more feasibly adapted to Canadian use.

The subject matter of national standards is a familiar list: civil and political rights, living standards, major social programs such as health, education and social assistance, and regulatory areas such as transportation and the environment. There is a clear commonality in terms of the types of matters where local control is important, but consistency of national benefits is also valued.

The choice of instrument, the process for using the instrument, and the subject matter of national standards employed, all depend crucially upon the contemporary political context in the country at hand. The value of comparative analysis is that it can provide a broader perspective on the potential range of choices available. The ultimate choice will nonetheless come down to solutions carefully tailored to the current Canadian context. This report, having surveyed the range of possible means of achieving national standards, will select those for further Canadian consideration which are both more effective and more feasible than others.

The remainder of this report consists of the following parts: Part II provides the overall institutional context for the establishment of national standards in the five

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 effecting such standards, (3) the processes by which standards are negotiated or mediated, and (4) the means by which they are enforced.

The final part of this report applies the comparative experience to the current Canadian context. This analysis summarizes the options under the major avenues of reform in the current constitutional debate.

This report is intended partly to provide for quick reference to both the institutional context and the various stages of process in national standard-setting. The reader may therefore find some minor repetition of institutional detail in parts II and III.

II. THE INSTITUTIONAL CONTEXT FOR ESTABLISHING "NATIONAL STANDARDS"

The United States Constitution of 1789 introduced the innovation of federalism: a form of government which divides sovereign authority between a general or federal order of government and regional orders or constituent governments. These two spheres of government were originally designed to be both independent and coordinate, although in this century, federalism has usually entailed increasing

partnership among governments.² The institutional context for the achievement of "national standards" across the constituent units in a federation therefore includes both the original constitutional design of a federation, as well as the practical adaptation of constitutional and political institutions to shifting social, economic and political forces.

A. Basic Features of Federal Systems Reviewed

The five federations of Canada, the United States, Switzerland, Australia and Germany all differ in the practice of their federal systems. However, as advanced industrial economies and established democratic polities, they share some common characteristics. A brief description of the basic features of each of these five federations provides a preliminary setting for the comparative analysis of national standards which follows in this report.

United States

The "original federation", the United States of America adopted the innovation of federalism as an organizing principle for its structure of government in 1789 after the failure of a 13-year experiment with a confederal form of government. Originally composed of 13 colonies, the United States has evolved into a union of 50 states and various associated units. As the most enduring federation in the world the U.S. has naturally become an important reference point for any study of comparative federalism.

²Two theoretical texts on federalism which expound, in the former, the classical definition of federation as providing strictly divided roles, and in the latter, an emphasis upon cooperative partnership are K.C. Wheare, *Federal Government* (4th ed.) (London: Oxford University Press, 1963) and Daniel J. Elazar, *American Federalism: A View from the States* (3rd ed.), (New York: Harper and Row, 1984).

Basic features of the U.S. federation include:

- separation of powers among the executive, legislature and judiciary at both the state and federal level;
- distribution of legislative powers by means of an exclusive list of federal powers and a concurrent list of state and federal powers, with the residual power assigned to the states;
- a federal legislature (Congress) with two houses: the House of Representatives, elected on the basis of state population; and the Senate, elected on the basis of equal representation of two seats per state;
- both state and federal Supreme Courts are fully independent under state and U.S. constitutions. The Supreme Court of the United States is the final court of appeal for constitutional matters;
- the first 10 amendments to the U.S. Constitution constitute a Bill of Rights, providing since 1791 a strong protection of individual rights as an underlying institutional feature;
- the means of achieving national standards among the states in the U.S. system are greatly affected by the separation of powers, and the existence of concurrent jurisdiction.

At its inception, the U.S. Constitution represented an important compromise between those who wished to avoid the dangers of centralized power and those who wanted a means to promote national interests more effectively. The federal distribution of powers, the separation of powers between executive, legislative and judicial branches, and the enshrining of individual and state rights all contribute to a "checks and balances" federal system.

The mature U.S. federation is both relatively more centralized and less standardized than many other federations. Over time many concurrent powers have been preempted by Congress, and judicial review of the Bill of Rights and the commerce power, among others, has provided a strong degree of uniformity, especially

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 the preference for private sector delivery of many services. In the 1980s, President Reagan's "New Federalism" served to halt the fiscal centralization to a degree. In any case, the federal system is a vital component of domestic U.S. politics.

Switzerland

The second federation to come into existence, Switzerland adopted a federal constitution in 1848. It is a small country currently comprised of 26 regional units called cantons, of which 6 are considered "half cantons". The Swiss federation is notable for its significant degree of linguistic and religious diversity. Three official language groups (German, French and Italian) and two dominant religions (Catholic and Protestant) are present in the country. These cultural and linguistic groups are geographically concentrated to a degree in individual cantons, but they are also dispersed across many cantonal boundaries.

Basic features:

- like the U.S. Constitution, Switzerland has a separation of powers between the executive and legislative branches. The executive is collegial, with a seven member Federal Council elected for a fixed four-year term. The Chairmanship rotates annually, with minimum representation required for each of the three linguistic groups;
- a distribution of powers with two basic categories: exclusive federal jurisdictions, and powers held concurrently by the federal and cantonal legislatures. Some federal legislative jurisdictions require cantonal administration (i.e. a degree of "administrative federalism");
- the federal legislature (Federal Assembly) has two houses: the lower house (National Council) is elected according to population and

members may also be elected to Cantonal legislatures; the upper house (Council of States) is elected, with two seats for each canton;

- there is limited provision for judicial constitutional review; the highest court, the Federal Tribunal, may rule on the validity of cantonal, but not federal legislation. The federal legislature itself may determine the constitutional validity of its laws. Alternatively the people, through a process of initiative, may directly require a referendum to determine the constitutional appropriateness of a federal law;
- in practice, the Swiss federation continues to be comparatively decentralized, with less value placed upon federation-wide harmonization. National standards are thus more dependent upon cantonal agreement. This cantonal role is affected, as in the United States, by the existence of separated executive and legislative powers, and by a concurrent list of legislative powers.

The Swiss political culture holds dearly to decentralization and democratization. The European concept of "subsidiarity" is well entrenched so that cantons only assume those responsibilities which the communes (local governments) cannot manage, and in turn, the federal government only assumes those responsibilities which the cantons cannot manage. Local responsibility is enhanced by several features of direct democracy such as communal voting as opposed to representative democracy at the local level; allowing communal and cantonal representatives to also be members of the federal legislature; and the use of referenda and initiative at the cantonal and federal level. A general ethic of practicality also prevails which tends to eschew the entrenchment of principles in favour of more pragmatic policies.

Canada

Geographically the largest of the established federations, Canada became a federation in 1867. Originally a union of four provinces, the federation expanded to ten provinces and two northern territories. A vital characteristic of the Canadian polity is the existence of a large francophone minority (in national terms) which is

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);
- three lists of legislative powers: exclusive federal, exclusive provincial and concurrent (the latter list very short by comparison). The residual power lies with the federal Parliament;
- the federal Parliament has two houses: the lower House of Commons is elected on the basis of provincial population; the upper house, the Senate is appointed by the federal cabinet with seats apportioned on a provincial basis, weighted towards the more populous provinces;
- the final court of appeal for judicial review of constitutional matters is the Supreme Court of Canada, whose nine members are appointed by the federal cabinet;
- a Charter of Rights and Freedoms was added to the Constitution in 1982, well over a century after the original founding of the federation;
- the fusion of parliamentary and federal forms of government have created the conditions for intergovernmental coordination in the form of "executive federalism". National standards have most often in Canada emerged from the institutions of executive federalism.

Conventional analysis pegs Canada as among the most decentralized federations in the world, despite the centralist design of its original constitution. The existence of the french-speaking minority comprising a majority in only one province has introduced an element of asymmetry to the federation to a degree not found elsewhere. This has been a factor in checking the centralizing trends of other federations. While parliamentary government is well entrenched in Canada, the overall political culture is heavily influenced by the American society, economy, media and mass culture.

Australia

Australia began as a number of self-governing colonies which eventually united under a federal constitution in 1901. Today, the federation is comprised of six states and two mainland and several offshore territories. Like Canada, Australia is a parliamentary federation. As a federation it combines features found in the American, Canadian and Swiss constitutions.

Basic features:

- a distribution of powers modelled on the U.S. Constitution with enumerated federal powers, some of which are concurrent with the states, and the residual power to the states;
- the Commonwealth Parliament has two houses: the lower House of Representatives is elected on the basis of state population; the upper house (Senate) is elected with equal representation for each state. Senate elections are normally held with the state elections;
- A seven-member High Court is appointed by the federal cabinet, and has authority for judicial review of the Constitution;
- Australia shares the Canadian characteristic of "executive federalism" as a means of achieving national standards, but also exhibits some features common to U.S. practice due to the concurrent exercise of state powers.

The Australian federation has emerged as even more centralized than the U.S., especially in financial terms. This may be due to such factors as a common language and culture. Despite its continental breadth, the population is heavily concentrated in two states, even more so than in Canada. Australia is currently engaged in a process to review its own approach to national standards, through a series of special Premiers Conferences.

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 eleven constituent units or Länder. In a series of rapid developments, reunification of East and West Germany was achieved in 1990, resulting in five new Länder plus a united Berlin as a new Länd. While the basic features of the original constitution remain intact in the reconstituted German federation, there were some constitutional changes including revision to the composition of its parliamentary upper house (the Bundesrat).

Basic features:

- Germany is marked by a predominance of "administrative federalism", in which the implementation and administration of most federal laws are the constitutional responsibility of the Länder;
- the general distribution of powers includes an exclusive federal list, an exclusive Länd list (comparatively short), and an extensive concurrent list. There are also federal powers to legislate "framework provisions" in certain areas where detailed legislation is left to the Länder, and "Joint Tasks" powers for joint federal-Länd undertakings;
- the federal parliament has two houses: the lower house, the Bundestag is elected on the basis of population; the upper chamber, the Bundesrat consists of delegates of the Länder, the Ministers-President (premiers) of the Länd governments and other cabinet members, with representation biased towards the less populated Länder;
- the Bundesrat provides for the direct representation of the Länder in federal policy-making. Länder elections can change the nature of Länd delegations in the Bundesrat, thereby affecting national politics and the federal legislative agenda;
- Germany's "administrative federalism" also gives the Bundesrat an important role in achieving national standards;
- the Constitution entrenches a comprehensive set of basic civil, political, equality and mobility rights.

Germany is among the most highly standardized of the federations reviewed here, in terms of the uniformity of conditions and standards which prevail across the country. Unlike Canada, the United States and Switzerland, there is much less tolerance of basic differences in the public welfare and government services in Germany. This is reinforced by a division of responsibility between the federal and constituent governments which is delineated more in administrative than in legislative terms. The governing ethic, strengthened by a cultural and linguistic homogeneity has tended to make Germany practically a "unitary federation". However, the means by which uniformity is attained are also significant. No other federation has as many institutions and processes for intergovernmental cooperation, consultation and consensus-building, and none involve the constituent units so integrally in federal decision-making.

B. Comparisons of Institutional Features

The way in which the individual federations achieve national standards can be more effectively examined by comparing key institutional features. The following features are reviewed: (1) the distribution of legislative powers; (2) financial arrangements; (3) the form of executive; (4) the role of constituent units in federal institutions; (5) Charters of Rights; and (6) judicial review.

(1) Distribution of Legislative Features

The constitutional provision for legislative jurisdiction varies according to the following:

- how powers are listed, and whether they are specified generally or in detail;

- 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 systems in major social policy fields, i.e. whether a policy field is the domain of exclusive federal jurisdiction, exclusive constituent government jurisdiction, or concurrent jurisdiction. In some cases all three types of powers are applied to a given policy field.

Table 2.1: Distributions of Power in Federal Systems

<i>policy field</i>	Canada	United States	Switzerland	Australia	Germany
education	S	S	CS	S	S
higher education	S	FS	C	FS	C*
hospitals	S	S	S	FS	C
public health	S	S	C	S	-
unemployment ins.	F	FS	C	C	C
income security	FS	C	FC	C	C
social services	S	S	C	C	-
pensions	C	F	C	C	-

S = state jurisdiction (constituent governments)

F = federal jurisdiction

C = concurrent

- = not enumerated in constitutional text

* = Concurrency includes "framework provisions" - see text, Part III.

(Note: If there is a mixture of jurisdictions, this is noted as FS or FC)

On closer examination of the information summarized in this table, a more complicated picture emerges. Primary and secondary education is indeed a constituent authority in each of the federations, but in Switzerland, some federal law is authorized in this field to be administered by the cantons. Similarly in Germany, the Länder administer federal laws related to all of the policy fields listed in Table 2.1, except for primary and secondary education where there are no federal laws. Unemployment insurance is an area where a strong federal role has only emerged over time. In some federations such as Canada and the United States, important fields such as income security are not mentioned at all in constitutional lists of powers (not surprising given the vintage of their original constitutions of 1867 and 1789 respectively).

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). These developments do not detract, however, from the basic importance of jurisdiction in setting the stage for the achievement or not of national standards.

Apart from the use of exclusive jurisdiction, two other types of legislative arrangements are important in achieving national standards. These are concurrent jurisdiction and "administrative federalism".

Concurrent powers are those where both legislatures may pass laws in certain areas, but where, in the case of conflict, one legislature's laws (in most cases the federal) are paramount. The basic model is the American system where the federal powers are listed first, followed by those where power is concurrent between the state and federal legislatures, with the residual power lying with the states. This model has been essentially followed in Switzerland and Australia. The constituent governments of these federations derive their power from residual powers, from what remains of concurrent powers not occupied by the federal level, and from any special powers granted to the constituent governments. In the United States, judicial rulings and the fourteenth amendment to provide due process and equal protection of the law, have significantly reduced state rights over time. Canada is unique among the five federations reviewed here in having so few concurrent powers, in fact in only three areas - agriculture, immigration and pensions.

The effect of extensive concurrent powers, particularly in the U.S. and Australia has been to have the federal legislatures gradually preempt fields of jurisdiction from the legislatures of the constituent units. Concurrency also provides for gradual and even temporary occupation of federal jurisdiction as circumstances

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 little room left for constituent legislatures to act. Apart from actually occupying a field, the threat of full or partial preemption of concurrent laws also provides an important instrument for achieving national standards across the constituent units in these federations.

Germany, which among the federations reviewed here has the longest list of enumerated concurrent powers, also has a list of "joint tasks". This may be considered as a variant of concurrency whereby the federal legislature defines the broad principles for joint undertakings in certain matters (such as infrastructure for postsecondary education, regional development and agricultural programs). The detailed definition of programs is left to the Länd legislatures, but the planning and implementation of programs is achieved cooperatively with the federal government. Germany also has a category of legislative jurisdiction known as "framework provisions", where the general principles of policy may be set down in matters related to legal status, higher education, the media and regional planning, among others. Apart from enunciating the general principles, the federal government has no further role under these categories.

Another important way of exercising legislative jurisdiction is the administrative federalism of Germany and Switzerland. By this device, the federal government passes laws covering the whole country, which then are administered by the constituent governments, thereby allowing considerable diversity in implementation. The most striking example of this is Germany where, unless otherwise specified, all federal law is administered by the Länder. This Länder role, reinforced by their direct role in the federal legislative process through the Bundesrat, helps to provide a measure of decentralization to an otherwise centralized distribution of jurisdiction. Although not as extensively as Germany, Switzerland also provides for cantonal administration over certain aspects of federal law. In Canada, there is only one instance of what is essentially the same practice. That is where the federal

parliament legislates the provisions of criminal law, but the administration of justice is the responsibility of the provinces. Administrative decentralization also occurs in other federations where concurrency is common (e.g. the United States and Australia). Here the constituent units still control administrative detail in many program areas because federal legislation has only partially preempted state legislative authority.

(2) Financial Arrangements

A second important institutional factor is the financial ability of constituent unit or federal governments to exercise their governmental authority as allocated by the constitution. The power of finances can moderate or even vitiate the legislative jurisdiction stipulated in a constitution, and has played an important role in the development of national standards related to the welfare state in this century.

If each order of government is to deliver the programs and services for which it is responsible, it is obvious that sufficient fiscal resources must be made available to that government to do so properly and effectively. Financial arrangements in federal systems have been designed to meet the task of matching fiscal capacities to jurisdictional responsibilities. A more recent consideration is the need to provide a degree of control over the economy for macroeconomic management. In this respect *de facto* taxing and spending capabilities are as important as constitutional features in governing intergovernmental financial arrangements.

In nearly all federal systems most major revenue sources have been placed under federal authority. This began with customs and excise taxes, but expanded to include corporate and personal income taxes and, more recently in some federations, value-added or sales taxes of various kinds. Concurrent or shared jurisdiction for personal income tax occurs in all of the five federations under review. Only in Switzerland is sales and corporate tax an exclusive federal power. However, in each of the federations, the federal government is better able to effectively tax the national

of the federations, the federal government is better able to effectively tax the national economy, and is therefore a more effective tax collector. For these reasons, there has arisen a classic imbalance in all modern federations between the centralized taxing capacity of the federal governments and the decentralized spending patterns of the constituent unit governments.

All federations thus face two sorts of fiscal imbalances. "Vertical" imbalance occurs when there is a fiscal imbalance between the concentration of revenue in federal hands and a concentration of expenditures in the hands of the constituent units. This imbalance has been made worse by the rapid expansion of the welfare state in areas which are primarily in constituent government jurisdiction. "Horizontal" imbalance occurs when the fiscal or expenditure concentration among constituent units differs, usually due to differences in wealth and income but also due to differing social needs. In all of the federations here reviewed intergovernmental fiscal transfers are employed to alleviate vertical and horizontal fiscal imbalances. These arrangements are a vital means of establishing national standards -- especially in areas involving substantial public expenditure.

The arrangements for access to revenues or for the transfer of resources to those who must expend them change constantly, as governments' revenue and expenditure patterns change. In none of the federations reviewed here have the fiscal arrangements remained constant over the life of their federal systems. Some federations, such as Germany, however, do provide a more explicit constitutional framework for fiscal relations. The details of the financial arrangements in the federations under review are provided in the next section of this report.

Finally, it is often assumed that the authority to make expenditures follows from the authority to make laws in a given subject area. However, in some federal systems, the federal government possesses a *general* spending power which permits it to pursue objectives not otherwise possible through ordinary legislation. The spending

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 jurisdiction.

In federations where a federal spending power has been employed, it has not always been explicitly identified by the constitution. This is the case in the U.S. and Canada, whereas in Australia, there is a limited constitutional provision for federal spending in state jurisdiction (see details in Part IIIB below). Elsewhere the exercise of the power has been determined in part by judicial review. While the degree of latitude may vary, constitutional umpires in these federations have nonetheless recognized that the taxing and spending powers of the federal government can be used to affect a field of activity beyond the confines of its normal legislative powers.

(3) The Form of Executive

A third institutional factor is the constitutional form of the executive branch. This is especially important in determining the character of intergovernmental relations, which in turn greatly affects the prospects for achieving national standards.

In systems where there is a strict separation of powers between the executive and the legislature, such as the United States and Switzerland, the executive is responsible for administering but not passing laws. The executive maintains intensive relations with the legislature and these relations can have a marked influence on lawmakers. However, the focal point for legislated national standards (or norms, objectives, conditions, etc.) is the federal legislative branch. In the United States, state

and local governments lobby Congress as does the federal executive and many private interests. Congress in turn maintains relations with diverse and often uncoordinated state interests (state administrators, state governors, state legislators), because each state is also affected by a separation of powers. Intergovernmental relations in the U.S. (and also in Switzerland where a similar separation of power occurs) thus takes place across a matrix of actors of federal and state executives and federal and state legislators. There is no concentrated focus for intergovernmental relations, such as the First Ministers meetings in Canada. The powerful representation of state interests in the Senate reinforces the Congress as the focal point of this matrix in the United States.

This system contrasts sharply with the fused executive and legislative functions of parliamentary responsible government. In federations such as Canada, Australia and Germany, the executive remains in power so long as it enjoys the confidence of a majority in the lower house of parliament. If the parliamentary support is stable, the executive can follow a determined legislative agenda. Therefore, the prime ministers and other cabinet ministers of parliamentary federations can represent with authority both the legislative and executive branches of their governments. This creates the conditions for "executive federalism" where intergovernmental relations are dominated by the executives -- either Ministers or senior bureaucrats. The intergovernmental relations thus become more akin to international diplomacy than to the political interest group relations more characteristic of the separation of powers (i.e. congressional) system.

Within the parliamentary federations, the style of intergovernmental relations varies considerably, as detailed below. For example, the German parliamentary system includes some election by proportional representation, which creates the need for coalitions of parties to form governments. This feature contributes to consensus-building within the system as a whole. Parliamentary federations tend to deliver more cohesive and more unified standardization schemes than do congressional systems

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.

The representative role can be direct or indirect. As noted above, the upper 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 be administered by the Länder. In practice, the Bundesrat provides -- especially through its committees and more informal channels of negotiation -- an extensive opportunity for the constituent units to influence federal law and policy. This is an important element in achieving and sustaining national standards. Other federations as noted above, represent constituent unit interests in a more indirect way, through the election of upper house members by the people of the constituent units, usually on the basis of an equal number of members for each state.

The formal powers of the upper house in relation to the lower house in these federations differs somewhat. The upper houses in the U.S. and Switzerland have powers generally equal to the lower houses. In the parliamentary federations where the executive (cabinet) is responsible only to the lower house, the constitutionally defined powers of the upper house are in most cases similar, but the *de facto* exercise of those powers has in practice been more limited. In Germany, the veto power noted above has been of potential consequence to about one-half of all bills in recent years.

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 -- provide a forum for the detailed negotiations of those standards with constituent governments.

(5) Charters of Rights

A fifth institutional feature which can have a significant effect on national standards in a federal system is the existence of an overarching set of constitutional rights. Such rights can constrain governments by restricting their ability to limit the liberty of citizens or by imposing standards of due process. Rights also place obligations on governments for more affirmative expressions of equality in broader economic and social terms. Such rights can therefore automatically constitute effective national standards as they normally impinge upon federal and constituent governments equally.

The first such set of rights, the U.S. Bill of Rights (the first 10 amendments to the U.S. Constitution), was in effect part of the initial federal bargain to achieve the ratification of the Constitution in 1787-91. The Bill of Rights served to provide assurance that the new United States government would not restrict the liberty which Americans had so recently fought to attain. It is now so entrenched in the American federal system that Americans find it difficult to conceive of a federal system without one.

Parliamentary federations have no comparable tradition of entrenched civil rights. The British constitutional tradition which has been part of the Canadian and Australian federations, leaves the protection of individual liberties to the conventions of common law and to parliaments.

Despite the British parliamentary traditions, Canada decided to graft an entrenched statement of rights to its constitution in 1982. Canada's Charter of Rights and Freedoms provides individual legal, civil, equality and mobility rights, as well as collective rights with respect to official language minorities and aboriginals.

Australia continues in the British parliamentary tradition without an entrenched bill of rights, despite considerable debate in recent years on its merits. The Australian debate has included much discussion of national citizenship rights which may go beyond the civil and political rights enshrined in Canada's Charter of Rights and Freedoms, to encompass guarantees of access to benefits and services. Australian Labour governments have made a number of attempts since 1973 to introduce a constitutional bill of rights, only to be rebuffed by the Australian Senate and by the public through referenda. The main reason for the failure seems to have been a fear that a bill of rights would further centralize an already heavily centralized federation.

Switzerland, despite its separation of powers, has shown a reluctance similar to parliamentary federations in adopting a constitutional bill of rights. The Swiss system would appear to rely on its legal traditions, the protection of its federal system and its institutions of direct democracy and decentralized political authority to protect individual liberties.

Germany's constitutional rights are comparable to those in Canada and the United States. Although Germany is a parliamentary democracy, the issue of parliamentary supremacy versus constitutional rights has not been a source of conflict. The first section comprising 19 articles of the German constitution (the *Basic Law*)

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.

Germany is also a signatory since 1961 of the European Social Charter under the auspices of the Council of Europe. This Charter codifies specific citizen rights to just and safe work conditions, collective bargaining, protection against child labour, maternity provisions, health care, training, social security and social services. There is however no mechanism for direct enforcement. Germany, as other members of the Council of Europe, is occasionally monitored by Council bodies, but there is no means of making Council recommendations binding, nor for redress to courts.

Germany's membership in the European Community, however, provides more practical protection of rights through the development of Community social policy. In particular the European Community Social Charter of 1989 guarantees a similar set of social rights as the Charter of Europe. Implementation of the 1989 Charter depends upon Community directives, developed by the European Commission, approved by the Council of Ministers and passed into national law by the member states. It is a long and cumbersome process, but once in place the law can be enforced through the European Court of Justice. In terms of a model for a social charter, this represents a recent and important development, but one which could take some time to have a significant impact upon the German federation. (In any case it would have deeper implications for member countries without any constitutionally entrenched rights, such as the United Kingdom or Spain.)

In general Charters can have a very different effect upon national standards depending upon the legal construction, scope and enforcement mechanisms for the codified rights and obligations. These features are detailed below in Part III.

(6) Judicial Review

The last institutional feature bearing upon national standards is the role of judicial review. This review is especially important where national standards are codified in law. Courts can also play a role in national standards due to their function as an umpire in federal systems, where the constitutional responsibilities and rights of the federal and constituent governments are adjudicated.

The United States and Australia both have constitutionally entrenched Supreme Courts which have taken on the role of resolving constitutional disputes. Jurisprudence in the U.S. has been dominated by constitutional issues surrounding the Bill of Rights. Indeed in its 1985 judgement on the Garcia case, the U.S. Supreme Court went as far as indicating that the Court no longer had a function to protect state jurisdictions, and that the best protection for states' rights was in their representation in Congress.

Canada's Supreme Court plays an undisputed role in judicial review. It has continued the practice of the Judicial Committee of the (United Kingdom) Privy Council to maintain a vigilant balance in the federation between federal and provincial jurisdiction. It is too early to tell if Charter jurisprudence will erode an emphasis on provincial rights as has occurred in the United States.

As part of a highly standardized and integrated legal system, Germany has a specialized court to deal only with constitutional matters. The court has over the years played a role as a guardian of German federalism. However the court has not been so zealous as to disallow pragmatic intergovernmental arrangements that might technically stretch constitutional provisions.

Finally, Switzerland is unique in having a one-sided provision for judicial constitutional review. The highest court, the Federal Tribunal may rule on the constitutional validity of cantonal legislation but not on federal legislation. The

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 jurisdictional powers, the type of financial arrangements, the form of executive, the role of constituent units in the federal legislatures, the existence of charters of rights and the role of judicial review.³ The complex interaction of these features in any given system may at first be bewildering and provide few clues for Canadians seeking models for reform. However, the result of this complexity is a variety of many types of ways of achieving national standards in many different circumstances.

This variety provides an important element of choice, as well as an important lesson that there is more than one way to achieve a desired result. This part of the report has provided reasons for how such means arise. The next part details how the means work in practice.

³Certainly other factors, such as the degree of cultural homogeneity, regional diversity, class inequality and so on, are also important. They are beyond the scope of this report, but are important to bear in mind.

III. SURVEY OF APPROACHES TO THE SETTING OF NATIONAL STANDARDS

In none of the federations is there a single exclusive mode for achieving national standards. The basic features of each system will determine predominant methods (e.g. preemption under concurrent jurisdiction in the United States). However, from the experimentation, exceptional cases, and newer and more pragmatic devices used across the five federations, emerge a number of useful cases. These are summarized in Part III in four sections: (a) the categories of subject matters in which national standards have been attempted; (b) the principal instruments which have been employed (or in some cases proposed) to effect national standards; (c) the processes for negotiating and establishing national standards; and (d) the various bodies and mechanisms for national standards enforcement and adjudication.

A. Categories of Subject Matters

There are three broad categories of matters which have been the subject of national standards in federal systems. The first, *spending programs*, refers to publicly-provided or publicly-assisted services or programs, most of which are typically (although not exclusively) delivered at the constituent level and which often are partially funded by the federal government. The main examples of national standards in such programs are found in the fields of health, education, income security and social services. The second, *regulatory fields*, refers to the regulation or supervision of activity (mostly private) rather than the financing or delivery of particular services. Examples include the regulation of the environment, transportation, nuclear energy, water resources and broadcasting. Third, there is the category of *revenue equalization* which is concerned with equalization payments and similar schemes found in federal countries. The purpose of such fiscal arrangements is to provide constituent governments with a "sufficient" or "reasonable" revenue base in relation to a legislatively-defined standard or formula. Table 3.1 provides an overview of sample

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

Table 3.1: Categories of Subject Matters

<i>subject categories</i>	Canada	United States	Switzerland	Australia	Germany
Spending Programs	Medicare social assistance (CAP) unemployment insurance	Medicaid social assistance (AFDC) Supplemental Security Income unemployment insurance	social assistance - old-age ins. - disability ins. - unemp. ins. - accident ins. education	education roads unemployment insurance	postsecondary education infrastructure "living standards"
Regulatory Fields	environmental protection political and civil rights mobility rights	transportation drinking age environmental protection nuclear energy family law		transportation food and drug standards environmental protection	environmental protection broadcasting basic rights "living standards"
Equalization	federal-provincial transfers	no systematic arrangement	federal-cantonal transfers	federal-state transfers	federal-Länd transfers inter-Länd transfers

B. Principal Instruments

In the five federal systems under examination, a variety of instruments in a broad range of policy fields has been employed to affect and maintain "national standards", as previously defined. This report summarizes the basic features, with a few illustrative examples, of those instruments which have been successfully used in some or all of the federations reviewed. These are (1) use of the federal spending

power; (2) revenue equalization; (3) legislative concurrency; (4) Charters of Rights; (5) interstate mechanisms; and (6) constitutional amendment. Table 3.2 summarizes which of these six principal instruments have been employed in individual federations.

Table 3.2: Principal Instruments

<i>principal instruments</i>	Canada	United States	Switzerland	Australia	Germany
conditional grants	✓	✓	✓	✓	✓
revenue equalization	✓		✓	✓	✓
concurrency provisions		✓			✓
Charters of Rights	✓	✓			✓
interstate agreements	✓	✓	✓		✓
constitutional amendment	✓	✓	✓	✓	

1. Federal Spending Power

One of the most frequently utilized instruments for achieving national standards in programs or services typically delivered by constituent governments -- at least in Australia, Canada, and the United States -- is the federal spending power. Broadly defined, this general spending power enables the federal government to spend in areas which are not specifically within its legislative jurisdiction and to attach conditions to the expenditure of these funds. Such conditions are generally defined as "any requirement or circumstance that will qualify or disqualify a [state or province] from a federal program."⁴ The conditions are attached to the grant either explicitly in the

⁴ D. Mizerk, "The Coercion Test and Conditional Federal Grants to the States", *Vanderbilt Law Review*, October 1987, 40(5), p.1166.

federal act itself or else under power conferred by the act, and they may relate to procedural concerns (e.g. accounting and reporting procedures) or more substantive concerns (e.g. minimum or standardized benefit levels). A variety of terms have been employed in different federations to describe such conditional grants -- for example, categorical grants (United States) and specific purpose transfers (Australia) -- but for our purposes we will use the term conditional grants to describe all such arrangements.

It is through the federal spending power that the Canadian federation has established its most significant example of a true national standard. It also stands out as among the clearest examples of the use of this instrument among the federations. Medicare -- the publicly provided, federation-wide system of health care whose services are delivered solely by the provinces but are funded by both levels of government -- is based on five broad principles which are largely enumerated in the *Medical Care Act, 1966* but are also supplemented by other legislative provisions found in the *Established Programs Financing Act, 1977* and the *Canada Health Act, 1984*. These principles are: (1) comprehensiveness (the plan has to provide comprehensive coverage for all medically required services); (2) universality (health care must be universally available to residents); (3) portability (health care services or benefits must be portable from province to province); (4) public administration (the plan has to be administered publicly on a strictly non-profit basis); and (5) accessibility (access to services should not be inhibited by such practices as the charging of hospital user fees or extra-billing by physicians).

Although federal funding for Medicare has been accomplished solely through an "unconditional" block transfer (EPF) since 1977, these five principles have come to be interpreted in varying degrees as conditions or uniform standards. In particular, the principle of accessibility was identified as a strict condition for federal funding when the *Canada Health Act, 1984* was introduced. Under the terms of the legislation, provinces which allow the practices of extra-billing and the charging of user fees are subject to a financial penalty (deducted from the federal transfer) equivalent to the

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 care, even though the private sector plays a much more prominent role in insuring health services relative to Canada. Medicaid, for example, is a federal conditional grant designed to assist elderly people who are not eligible or are not sufficiently covered by private insurance schemes. The program includes numerous conditions and standards relating to such things as eligibility and allowable procedures.

There have also been several attempts to introduce uniform standards in the realm of welfare policy. Aid to Families with Dependent Children (AFDC) is a broad-ranging welfare program delivered by the states but funded substantially by the federal government through conditional grants. The original legislation, enacted in 1935, provides that "[federal] grants ... be made conditional on passage and enforcement of mandatory State laws and on the submission of approved plans assuring minimum standards in investigation, amounts of grants and administration."⁵ Over time, these conditions have been developed and expanded to include such matters as who can benefit from the program and the types of benefits and support that can be received. Indeed as the program has evolved, regulations have been detailed on virtually every aspect of the program except benefit levels, for which there continues to persist significant variations across the states.

Beginning in the 1960s, successive U.S. administrations attempted to address the problem of disparities in state benefit levels under this program through proposals for a mandated national minimum benefit. The most prominent of these was President Nixon's Family Assistance Plan (FAP), a comprehensive package of broad welfare

⁵ *Congressional Record*, 17 January 1935, p. 548.

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. The legislation, introduced in Congress in April 1970, passed first reading several months later after being studied by the House Ways and Means Committee. However, it was ultimately defeated largely by a conservative coalition from the south opposed to any centralization of the welfare state. The issue resurfaced in 1988 with the introduction in Congress of the Family Support Act, a reform minded package which included minimum benefit levels. While the Act eventually obtained passage, the provisions relating to benefit levels were defeated.

In Germany the federal spending power was tamed by constitutional amendment in 1970. The federal government is allowed to spend money in certain areas of Länder responsibility (i.e. the "Joint Tasks" in Article 91 and explicit provision for shared financing in article 104a). The programs financed under the federal spending power thus are shaped to some degree by the federal government, although they are wholly delivered by the Länder. Any new exercise of the federal spending power requires the consent of the Bundesrat. (Joint tasks are further discussed below under "legislative jurisdiction".)

In Australia, "specific purpose transfers" is the term applied to conditional grants which have as their purpose, among other things, the provision for more uniform, federation-wide standards in areas of state jurisdiction. A federal spending power draws its legal authority from section 96 of the constitution: "... the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit." Grants under this authority have been made to the States in a broad range of areas including education, health, roads, housing and local government. However, there does not appear to be, as in Canada, any tradition of legislated and enforceable standards attached to such payments apart from the description of the specific purpose for which the funds are intended. The threat of non-renewal can of course act as an enforcement mechanism of last resort.

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 grants has been a matter of debate in Australia for some time. Recent events, including a series of Special Premiers Conferences in 1991, appear to mark a trend away from tied funding and towards reduced "vertical imbalance" (i.e. increasing state taxing authority and reducing Commonwealth fiscal transfers).

In summary, the use of a federal "spending power" is a very significant and widely used instrument in other federal countries. Canada has made as great, if not greater strides in using federal funding to achieve national standards as has any federal system, most notably with medicare. By comparison, the U.S. system is unable or unwilling to deliver as comprehensive a set of health or other social policy standards through this mechanism. The Australian experience parallels Canada's, but does not produce any compelling examples of national standards by this route.

2. Revenue Equalization

Federation-wide objectives or standards in relation to the revenue-raising capacities of constituent governments are inherent in the instrument of fiscal arrangements such as equalization payment schemes. A commitment to the basic principle of equalization is often explicitly identified in federal constitutions, as in the case of Canada and the Federal Republic of Germany. Canada's *Constitution Act, 1982*, for example, commits Parliament and the federal government to the principle of providing equalization payments "... to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation" (Section 36(2)). Germany's *Basic Law* seeks to "... ensure a reasonable equalization between financially strong and financially weak Länder" (Article 107(2)). Beyond the enumeration of broad principles such as

"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 scheme attempts to achieve complete revenue parity amongst the constituent units), it does *not* ensure that state governments will produce such standardized programs. It is possible, and perhaps likely, that constituent governments will establish widely varying programs, even at comparable costs. So too may individual constituent governments decide that they would rather use the proceeds from revenue equalization to reduce levels of taxation within their jurisdiction than improve the quality or expand the scope of their legislative programs.

Of the five federations, the United States is alone in having no formal or systematic equalization scheme, although there are a number of equalizing features in the categorical grants transferred to the states (usually based on per capita criteria). In Australia for the period 1933-82, equalization payments from the central to the state governments were based on a determination of the actual fiscal needs of the claimant states by the independent Commonwealth Grants Commission. Canada and Switzerland have also developed formal equalization schemes, both of which are based on relatively complex formulas taking into account a variety of different factors. Germany's federal constitution is unique in providing for the transfer of revenues *amongst* the constituent units themselves. An interstate revenue pool exists in which the richer Länder pay in and the poorer Länder draw out according to a specified formula. Supplementing this interstate system of equalization payments is a federal scheme in which payments from the central government to the poorer Länder are funded by a fixed percentage of the proceeds of the centrally administered value added

tax (for a concise description of how the German equalization system works, see Appendix 1).

3. Legislative Jurisdiction: Concurrency

The exercise of concurrent legislative jurisdiction is another instrument enabling the establishment of national standards in federal systems. As noted above, concurrency occurs when both orders of government are allowed to legislate in the same field of jurisdiction (or in different but related aspects of that field). Two federal systems are examined here, Germany and the United States, to demonstrate how this instrument works.

The German federal Constitution is one in which concurrency is extensively employed to distribute government powers. However, as noted earlier, this device operates somewhat differently than in most other federations. The system of "administrative federalism" is applied to all fields of concurrent jurisdiction, so that the Länder are required to implement and administrate any federal legislation under a concurrent jurisdiction. The other important feature of the German federal system is the role played by the Bundesrat in providing direct representation of the Länd governments in the national policy-making process. The bureaucratic expertise of the Länder comes to bear in the Bundesrat and through other intergovernmental mechanisms to have a significant influence on federal legislation passed in concurrent fields of jurisdiction.

Germany's *Basic Law* in fact provides for three different types of concurrency. Article 74 enumerates 24 different categories of subjects which fall under general concurrent legislation, including such matters as public welfare, nuclear energy, regulation of hospitalization fees and environmental concerns. A second type of

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 postsecondary education system. It then becomes the responsibility of the Länd governments to fill in the necessary detail through subsequent enactments. Framework legislation, which is subject to the uniformity provisions of Article 72, has the potential to serve as an important instrument for achieving national standards.

In practice, however, experience thus far with this variant of concurrency has proven it a somewhat ineffective instrument in achieving such results. Federal enactments for public service conditions have had some standardizing effects, but these have been rather limited in scope. Initiatives relating to regulation of the university system, notably those passed in 1976, have been even less encouraging in terms of achieving uniform standards or norms. The single greatest obstacle to achieving such standards remains the failure of federal initiatives to achieve Bundesrat approval.

Another route to the establishment of national standards in Germany, particularly in the area of postsecondary education, is through the "Joint Tasks" approach enumerated in Article 91(a) and (b). These constitutional provisions enable the federation to participate in the discharge of Länd responsibilities in relation to, for example, the extension and construction of postsecondary infrastructure as well as cooperation in educational planning and the promotion of research. Such federal involvement or "participation" is warranted when these joint tasks are deemed "important to society as a whole and ... federal participation is necessary for the improvement of living conditions." Again, such initiatives are subject to Bundesrat

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 distribution. National standards are typically enacted in state policy or regulatory fields through the practice of congressional "preemption". State legislation in a concurrent field remains of full effect unless Congress decides to enact conflicting or "preemptory" legislation. Under U.S. constitutional rules of paramountcy, federal legislation always prevails over conflicting state legislation.

There are three variants to such preemption: (1) *indirect federal preemption* refers to a situation in which Congress attaches conditions to a categorical grant limiting state discretionary authority (these conditions usually relate to only procedural aspects); (2) *partial direct federal preemption* occurs when Congress assumes responsibility in part for a regulatory area or establishes national minimum standards; and (3) *total preemption* has the effect of removing all legislative authority from the states.

Examples of recent national standards enacted through the practice of partial preemption include: licensing requirements for commercial vehicle operators (Commercial Motor Vehicle Safety Act, 1986); uniform, federal appliance-efficiency standards (National Appliance Energy Conservation Act, 1987); and several environmental standards. Under the practice of total preemption, standards or uniform measures were enacted for such matters as: truck length, weight and width (Surface

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 -- to the federal government, leaving Congress to set standards of need and eligibility and to finance and deliver benefits directly to recipients. Prior to 1972, although the federal government contributed to the financing of such payments through grants-in-aid (which were accompanied by some conditions), the essential responsibility for standards of eligibility and benefit levels remained with the state governments.

In summary, concurrent jurisdiction provides many opportunities for exercising federal jurisdiction in ways which could promote national standards. The selection of some of the above examples may, without excessive system change, provide a flexible instrument in Canada.

4. Charters of Rights

A broad-based and potentially very powerful instrument to effect national standards in federations is a constitutionally entrenched charter of rights. The courts are normally the sole interpreters of these various constitutional provisions, and can play a prominent role in adjudicating and enforcing "national standards" as they may arise. (This concept is reviewed above, pp. 19-23). While there can be no denying that constitutionally entrenched rights can standardize through the rule of law, they do so in a way which constrains equally both federal and constituent governments.

Typically, constitutional charters are primarily (although not exclusively) concerned with the protection of political and civil rights. As noted the American Bill of Rights, for example, guarantees basic rights relating to freedom of expression and religion, search and seizure, certain types of criminal and civil cases, and a fair trial. The Canadian Charter of Rights and Freedoms -- a much more contemporary document than the 200 year old American Bill of Rights -- adopts a comprehensive approach and includes such matters as fundamental freedoms, democratic, mobility and equality rights. The notion of standards or uniformity is most readily apparent, however, in the equality provisions of Section 15, which guarantee that all citizens have the right to "equal protection and equal benefit of the law" without discrimination.

The issue of standards, norms or objectives also arises in relation to economic and social rights. While not explicitly stated in the constitutional charters of the federations under consideration, rudiments of such "social charter" provisions are nonetheless evident in two federal constitutions. Canada's *Constitution Act, 1982*, for example, speaks of "promoting *equal opportunities* for the well-being of Canadians" and "providing essential public services of *reasonable quality*" to all citizens (Section 36(1)(a) and (c); italics added). Germany's Basic Law assigns the federal government with the right to legislate in order to maintain "uniformity of living conditions" (Article 72(2).3), and in Article 21 regarding the equality of opportunity in political participation.

A crucial aspect of a "social charter" is the extent to which particular provisions are justiciable. Section 36 of the Canadian Constitution is generally considered by constitutional scholars to be non-justiciable due to the vague and political nature of its drafting. In any case, it has never been tested in the courts so it remains unclear whether its provisions have any legal force. The German Constitutional Court, on the other hand, has often resorted to the "uniformity" principle in its judgements advocating the maintenance of federation-wide minimum

standards or greater policy harmonization amongst the Länder. For example, in a 1986 case governing cable TV and satellite transmission, the German court invoked article 72 of the Basic Law and called upon the federal and Länder governments to put aside their differences and reach agreement on a common approach to the "new media". The court's decision was not binding but may have helped to improve the climate for the "State Media treaty" signed by all Länder governments the next year.

The question of justiciability and enforcement are more difficult with international or multi-state social charters. The *International Covenant on Economic, Social and Cultural Rights* was first signed in 1966 under the auspices of the United Nations. The signatory member states, which currently total 80, commit themselves to guaranteeing rights relating to such matters as "reasonable limits on working hours" and an "adequate standard of living". The *European Social Charter* is an international agreement signed in 1961 under the auspices of the Council of Europe. Fifteen member-states have since ratified the Charter which includes such rights as minimum age of admission to employment, and rights to social security benefits and welfare services. Finally, the *European Community Social Charter* was adopted in 1989 and essentially defines the fundamental rights of EC citizens, especially workers. Perhaps more significant is the social policy strategy of the Community associated with this Charter, concerned as it is with the creation of minimum standards to prevent the phenomenon of "social dumping" from South to North. For now, such standards are limited to the areas of health protection and occupational safety.

5. Interstate Agreements or Mechanisms

National standards can be achieved solely by the constituent governments acting together. These interstate instruments are therefore distinguished from other instruments in that they do not require the direct involvement of the federal government (although limited forms of consultation may occur between the two orders

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 as an instrument to *promote* national standards, it has in fact been used by the cantons on occasion to *prevent* the establishment of national standards. For example, in the late 1960s there was a proposal to introduce a number of basic standards in the Swiss primary and secondary education system, including such matters as standardizing the start of the school year, the period of compulsory attendance, the age at which children should start school, and a minimal agreement on basic text books. The proposal, supported by the electorate in a popular referendum, was rejected by the cantons, which employed the Concordat *not* to agree and thereby defeat the initiative.

Another form of interstate instrument is the interländer "*state treaty*" found in the German federal system. Essentially, the prime ministers of two or more Länder enter into a "treaty" on matters which fall predominantly under the legislative jurisdiction of the Länder, but require a degree of country-wide coordination. A recent example is the 1987 State Media Treaty, signed by *all* Länder prime ministers, which provides for uniformity of regulations concerning satellite broadcasting. This interländer treaty was a response to a decision of the Federal Constitutional Court a year earlier. In that decision the Court appealed to the Länder governments to reach agreement referring to the provisions of the *Basic Law* calling for the "maintenance of uniformity of living conditions beyond the territory of any one Länd" (Article 72(2).3) and emphasized the importance of this principle in relation to a uniform system of broadcasting.

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 are proposed and either approved for recommendation or rejected at annual meetings of the National Conference of the Commissioners on Uniform State Laws, a body which is composed of representatives selected by the state governors (either alone or with state legislature approval). Successful proposals are then passed along to the state governments for their consideration.

From a federalism perspective, the basic rationale for the work of this Conference was best expressed at the time of founding by the American Bar Association:

[A] state which unites with other states in framing such general and uniform laws in matters affecting the common interests of all the states yields, in so doing, nothing whatever of its state sovereignty. On the contrary, the proposed method of voluntary state action takes from the general government any excuse for absorbing powers now confined to the states, and therefore directly tends to preserve intact the independence of the states.⁶

Uniform legislation proposals which have been adopted in the past by virtually all state legislatures include matters relating to child custody jurisdiction and the establishment of a uniform commercial code. Uniform state laws which have been promulgated more recently but by considerably fewer state legislatures have dealt with

⁶ As cited in Kim Quaile Hill and Patricia A. Hurlley, "Uniform State Law Adoptions in the American States: An Explanatory Analysis", *Publius: The Journal of Federalism*, 18(1), p.119.

such matters as class action law suits, no fault automobile insurance, premarital property rights agreements, reparations for crime victims and standing to sue in cross-state pollution disputes. The uniform state law movement continues to play an important role in the development of national legal standards.

6. Constitutional Amendment

Finally, there is the instrument of formal constitutional amendment. Rather than attempting to introduce and maintain national standards for programs such as social security which had traditionally fallen under provincial jurisdiction, several federations have instead opted for not only central legislative control but also central administration and delivery of such programs. In the evolution of the Swiss federal system, for example, social security programs such as sickness and accident insurance (1890), old-age and survivors' benefits (1925), family allowances (1945), and unemployment insurance (1947) were gradually "passed up" from cantonal to central authority through formal constitutional amendment.⁷ Similar amendments were effected in Canada (unemployment insurance, 1940; old age pensions and supplementary benefits⁸, 1951) and Australia (unemployment insurance and family allowances, 1951). One of the underlying rationales for these transfers of jurisdiction was to allow for the provision of a standardized or minimum level of benefits across the country.

⁷ Note however that even after a new social security system was proposed and accepted at the national level, some Swiss cantons continued to operate their own social security programs.

⁸ In the case of old age pensions and supplementary benefits, provision was made for concurrency with implied provincial paramountcy rather than exclusive federal jurisdiction.

C. Processes of Negotiation and Mediation

The processes by which national standards are initiated and implemented in federal systems are, in most cases, directly linked to such factors as the form of the executive and the nature of representation for constituent interests in central institutions in particular federations. Reviewed here are the following processes: (1) executive federalism; (2) state or cantonal lobby of federal legislatures (separation of powers regimes); (3) inter-state relations and institutions (i.e. no direct federal involvement); (4) the unique role of the Bundesrat as a forum for negotiation; and (5) the mechanisms of initiative and referendum as employed in the Swiss federation.

Table 3.3: Negotiation and Mediation Processes

<i>processes</i>	Canada	United States	Switzerland	Australia	Germany
executive federalism	✓			✓	✓
state lobby of legislatures		✓	✓		
interstate relations	✓	✓	✓		✓
second chambers					✓
referenda and initiative			✓		

1. Executive Federalism

The concept of "executive federalism" refers to the "processes of intergovernmental relations that are dominated by the executives [political and bureaucratic] of the different governments within the federal system."⁹ Executive

⁹ Ronald L. Watts, *Executive Federalism: A Comparative Analysis*, Research Paper, No. 26 (Kingston: Institute of Intergovernmental Relations, 1989), p. 3.

federalism is the dominant process for negotiations and consultations relating to national standards in the parliamentary federations of Australia, Canada and the Federal Republic of Germany (see below for the added significance of the Bundesrat in such relations in the German federal system). A number of formal institutions accommodate this type of intergovernmental negotiation. The Australian Premiers' Conference, for example, is a meeting of the state premiers and the prime minister held annually to discuss matters of national or federation-wide importance (as do First Ministers' Conferences in Canada). While formal decision-making rules do not apply, the purpose of these conferences is nonetheless to develop a broad consensus on certain policy issues in order that coordinated or nonconflicting legislative action may be undertaken.

Another formal institution is the Loan Council, an intergovernmental body unique to Australia which has a constitutionally defined mandate to make decisions about the terms and levels of borrowing of the state and federal governments -- matters which necessarily involve an examination of federal and state works programs. Although its composition is the same as the Premiers' Conference, the Council operates somewhat differently in terms of decision-making rules. Each state government has one vote while the federal government has two votes as well as a casting or chairperson's vote. Most decisions are effected on the basis of a simple majority.

There also exists a multitude of federal-state committees in the parliamentary federations. The purpose of these committees is to facilitate communication and consultation between line departments in both orders of government which have common, specialized interests in a particular policy or program. Such committees may be composed of department officials or ministers, and they may meet on a regular basis or only occasionally as circumstances arise. An example of such a committee in the Canadian federation is the Federal-Provincial Advisory Committee on Institutional

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 extensive in federal systems where institutions are organized on the basis of a separation of powers -- executive, legislative and judicial -- such as in the United States and Switzerland. The processes for negotiation and mediation in such federations have been described as a matrix or as a network of arenas within arenas. In this matrix, multiple centres of power and decision-making interact through a variety of relationships within and among the two orders of government in a very diffuse policy environment. This matrix provides a great variety of flexible responses, but it also provides a multiplicity of veto points for a truly national set of standards.

In such federations, national legislatures such as the United States Congress and the Swiss Federal Assembly come to play the dominant role in mediating intergovernmental issues. Lobby of these legislatures has been an important mechanism for the process of establishing programs funded in part by federal conditional grants and administered by state or cantonal officials. Any proposal for improved national standards at the federal level is also subject to intense lobbying by the constituent governments - both in the executive and legislative branches - with representatives of these national legislatures.

3. Interstate Relations and Institutions

Just as there are instruments which are used solely by constituent governments to achieve national standards, processes to initiate and implement national standards

need not always directly involve the federal government. Such interactions can lead to the development of policy harmonization, which can include federation-wide standards.

In Canada, for example, the Annual Premiers' Conference (not to be confused with the Australian Premiers' Conference, which *does* include the Prime Minister) provides a forum for provincial premiers to discuss various matters such as the dismantling of interprovincial barriers to trade. There is also a number of interprovincial committees of ministers or officials which are organized around certain policy fields in provincial jurisdiction. The Council of Ministers of Education, Canada (CMEC), for example, has for many years been promoting a standardized approach to certain features of education such as the portability of credits and curricular development. It recently introduced a proposal to implement a system of standardized evaluation tests for schools across the country.

In Australia, there are over 40 such interstate committees or "Ministerial Councils". As in Canada, one of the most prominent of these is the Australian Education Council, which is currently in the process of developing a proposal for national curriculum standards.

Organizations representing private and public interests at an interstate level are much more common in the American federal system than in parliamentary federations. In particular, there are several umbrella organizations which are akin to public interest groups, with the important distinction that they represent governments rather than private actors in their lobbying before Congress. For example, there is the National Governors' Association, the National Conference of State Legislatures, the Council of State Governments, the U.S. Conference of Mayors, the National League of Cities, and the National Association of County Officials -- all of which have Washington offices and permanent staffs. Such interstate organizations perform an important dual role of representing their collective interests before Congress as well as providing information to the federal government on behalf of their membership. As regards the latter,

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 Bundesrat, which has an ultimate veto over any federally proposed "national standards" emanating from the Bundestag. The veto power is seldom exercised. Rather its existence creates conditions for extensive consultation and consensus-seeking in the legislative drafting stages. In this respect, the Bundesrat is the visible tip of a larger iceberg of intergovernmental consultation. This institutionally entrenched representation of the Länder in Germany's national policy-making body means that the Bundesrat, in conjunction with the Bundestag, can play an important role in developing a consensus for the achievement of national standards. Other institutions and mechanisms to facilitate such negotiation are relied upon to a considerably lesser extent than in other federal systems.

5. Referendum and Initiative

Finally, Switzerland provides the unique example of two devices of direct democracy -- the initiative and the referendum -- which can facilitate the introduction and ratification of national standards. An initiative allows voters to propose a legislative measure (statutory initiative) or a constitutional amendment (constitutional initiative) by filing a petition bearing a required number of valid citizen signatures. A referendum, on the other hand, refers a proposed or existing law or statute to voters for approval or rejection. As noted earlier, a statutory initiative was employed to

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 two orders of government and other affected interests. Often the result is not a negotiated agreement on a particular national standard, but rather a unilaterally imposed federal initiative. In any event, once a national standard has been established, a critical issue of concern is how it is enforced and by whom.

Generally, enforcement and adjudication mechanisms are conditioned by two features of a national standard: the choice of instrument for effecting the standard and the definitional nature of the standard itself. First, instruments may vary in relation to whether they have a statutory basis, explicit constitutional protection or *de facto* authority. They may also vary in relation to the degree of coercion across jurisdictions. Second, national standards that are defined in highly quantitative terms (e.g. minimum benefit level) through primarily quantitative means (e.g. financial transfers) are likely to be more enforceable than those standards with qualitative definitions. The exception to this rule would appear to be justiciable rights which, though often expressed in highly qualitative terms, can be very effectively enforced through judicial interpretation.

Three types of control are: (1) legislative; (2) judicial; and (3) popular.

Table 3.4: Enforcement Bodies and Measures

	Canada	United States	Switzerland	Australia	Germany
Enforcement Bodies					
a) legislatures	✓	✓	✓	✓	✓
b) courts	✓	✓		✓	✓
c) referenda/initiative			✓		
Enforcement Measures					
a) financial penalties	✓	✓	✓	✓	
b) judicial sanctions	✓	✓		✓	✓
c) preemption		✓			

1. Legislative Control

Control by federal legislatures involves two instruments: conditional grants, especially in the area of spending programs; and federal preemption in regulatory areas.

Since federal legislatures are ultimately responsible for the conditions inherent in grant schemes designed to achieve national standards, it is not surprising that they are also the principal enforcement body. At the most basic level, enforcement of a national standard achieved through a conditional grant scheme is impossible should a constituent government decide to not accept the grant. Once accepted, however, federal governments are able to exercise leverage on the basis of the funds that have been transferred. Essentially two options are available at the federal level: either deduct from future payments a portion of the transfer relative to the degree of non-compliance (e.g. financial penalty, as provided for in the *Canada Health Act, 1984*); or revoke the grant entirely.

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 national standards. Should the state governments fail to comply with the provisions relating to national standards, Congress always has the option of totally preempting state regulatory authority. In the United States there is also what amounts to a mixed approach of both financial and regulatory sanction, for example regulatory objectives such as speed limits are attached to highway funding to state and local governments.

2. Judicial Control

The courts too can play an important role in the enforcement and adjudication of national standards, particularly when such standards are either explicitly identified in the text of the constitution or else codified in ordinary legislation. Judicial review has been most effective in the determination of basic rights such as in the U.S. Bill of Rights and, more recently the Canadian Charter. Positive judicial activism is however limited, especially in the confines of the types of procedural rights that have thus far been enshrined. The U.S. Supreme Court has been the most active in terms of mandating positive social standards, with particular effect through its desegregation of school, but also to other social entitlements. One of the most significant achievements of the U.S. courts has been to establish a firm legal entitlement to welfare benefits. This has resulted in a standardization if not overall improvement of benefit levels under such programs as the AFDC (Aid to Families and Dependent Children). Among other uniform standards are that residency requirements are no longer allowed and a right to appeal has been made universal. Whether courts will undertake a similar role with respect to broader social and economic rights remains to be seen.

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.

3. Popular Control

As noted above, the Swiss federation provides the most pervasive example of a device of direct democracy -- the popular initiative -- which can contribute not only to the negotiation of national standards, but also to their enforcement. Under a popular initiative, legislative proposals can be put forth in the form of a constitutional amendment which then has to be voted on by the cantons and the citizens in a referendum. In order for the proposal to be valid, it must contain 100,000 signatures which must be collected in a particular period of time. The subject matter of the legislative proposal is not restricted, and could include measures to strengthen cantonal compliance with national standards. In addition, even if the popular initiative is not employed, the threat of its use can serve as an effective means of enforcing federal legislation providing for national standards.

V. NATIONAL STANDARDS IN CANADA: APPLYING COMPARATIVE APPROACHES

A. Comments on Effectiveness and Feasibility

The application of approaches used in one political system to another is a difficult and complex task. For Canadians to consider changes to their own federal system to better achieve national standards, two types of tests should be applied to comparative experience. First, is the instrument or process in place elsewhere an

effective means of achieving national standards? Second, how feasible is the transferability of the instrument or process to Canada? While a detailed and empirical assessment of the effectiveness and feasibility of the approaches used in other federal systems is beyond the scope of this report, the following comments are drawn from the findings presented in Part II and III above.

Of the six instruments reviewed above, the most effective in achieving national standards would appear to be: (1) constitutional amendment to pass jurisdiction to the federal government; (2) conditional fiscal transfers; and (3) preemption of constituent legislature law in the case of concurrent powers. Somewhat less effective because of their more indirect nature or more than limited use are the instruments of revenue equalization, charters of rights, and interstate instruments such as agreements or uniform laws.

Of the processes for negotiation and enforcement of national standards, the most effective and fruitful processes would appear to be (1) any process where judicial control and decisions can be exercised, and (2) the kind of fluid negotiating and bargaining environment such as exists in congressional systems where the federal legislature is the focal point of a matrix of players in a federal system. The processes of executive federalism in parliamentary federations do not seem in recent years to have been as effective overall in achieving national standards, except where they are directly fused with the federal legislative process, as occurs with the German Bundesrat. Also less effective largely due to their infrequent use would be interstate control mechanisms, and mechanisms of popular control such as referenda and initiative.

Of the above instruments and processes, which can feasibly be transferred to Canada? To answer such a question one must assess the political acceptability of small or large changes to our current federal system. Canadians may already have made implicit or explicit choices which preclude certain options. Other options could

only be acceptable if they are well explained and understood by voters. Regardless of political feasibility, some options would require much more fundamental change in our constitutional framework and political culture than others. In general terms, the more radical departures from our current system must be considered as less feasible, at least at the outset.

Of particular significance in this report has been the finding that parliamentary federations deal with intergovernmental relations (and therefore with approaches to national standards) in fundamentally different ways than do non-parliamentary systems. Another major systemic difference is whether constituent government powers are expressed in exclusive terms, or whether they are concurrent. Many effective means of achieving national standards must therefore be deemed as less feasible in the Canadian context because they would require a radical institutional change, such as much more extensive provision of concurrent powers, or change to a congressional system of separated powers, in order to be wholly effective. (Although some progress in this direction could occur with reform of House of Commons practices).

These points noted, the rest of this part draws out options from the preceding text, applies them to the current Canadian constitutional context and makes an assessment of their feasibility. These options are organized into six general categories for constitutional or political reform: (1) legislative jurisdiction; (2) financial arrangements; (3) Charters and statements of principles; (4) intergovernmental relations; (5) federal government institutions; and (6) asymmetrical applications.

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 Canada. The greater use of concurrency can contribute to many flexible ways of achieving national standards. The candidates for concurrent powers could come from both the current federal and the current provincial lists of exclusive powers. For example, unemployment insurance could be listed as concurrent in order to allow a province such as Quebec to adopt a single legislative regime regarding income security

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 could be made an explicitly concurrent field (as it is in Germany). This approach may be too unsettling to adopt on an extensive basis, but could be achieved in partial ways, as detailed next.

- *Concurrency with federal paramountcy* - Increased use of this type of authority could be reserved for those areas of jurisdiction where national standards do not now exist but need to be developed over time. The federal legislature would gradually preempt provincial law as a national consensus for such standards develops as has occurred in the United States. This approach might be preferred for national economic regulation.

- *Concurrency with provincial paramountcy* - This form of concurrency is not used in any of the federations reviewed here. It might best be reserved for those areas of jurisdiction where greater flexibility or decentralization is desired by some but not all of the provinces, e.g. unemployment insurance, manpower training. This would allow for a differentially decentralized system, at least in practice, while all provinces would in juridical terms have the equal option of legislating in the given field.

- *Functional partition of jurisdiction* - Jurisdictional matters could be divided into federal and provincial roles according to functions in the policy process. For example, policies, programs and program implementation are three distinct stages of the policy process. In the United States through partial preemption, or in Germany through "framework provisions", general policy objectives are laid down by the federal legislature, leaving the constituent legislatures to pass laws to implement specific programs. In Canada such an approach could provide for federally legislated standards without encroaching upon provincial legislative jurisdiction for program implementation.

A more extensive version of this approach would be to apply the practices of administrative federalism as followed in Germany and Switzerland. Canada's only experience with this device is the provincial authority to administer federal justice legislation. To be effective, extensive use of this form of partial jurisdiction should be accompanied by means to achieve intergovernmental agreement or the involvement of the provinces in the federal legislative process. (These institutional options are reviewed below).

- *Constitutionally mandated joint tasks* - This device as applied in Germany has not been overwhelmingly successful, and may in practice detract from the independence and accountability of individual governments. However, it may be preferable as a means of controlling the use of the federal spending power, i.e. to make its use conditional upon specified joint decision-making processes.
- *Explicit recognition of the federal spending power including provisions regarding its use in fields of provincial jurisdiction.* - Australia and Germany explicitly empower their federal governments to offer general financial assistance to the constituent governments. In Canada, the Meech Lake Accord would have created a new section 106a of the Constitution Act, 1867 to expressly permit the federal government to enter into national shared-cost programs in areas of exclusive provincial jurisdiction, and to permit a province to opt-out of that program with reasonable compensation if its program was compatible with national objectives. There was much debate over the merits of this proposed amendment, and at least three issues would still have to be addressed in reconsideration of a constitutionally entrenched federal spending power. These are the scope of the power in terms of existing cost-shared programs, the essential nature of the national norms, standards, objectives, etc. which could be imposed by such a power, and the flexibility regarding its coverage across the country (i.e. opting out).

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 in the current Canadian context.

More feasible:

- the explicit constitutional recognition of a federal spending power;
- the establishment of partial federal jurisdiction in a limited number of fields to allow for federally legislated standards;
- the limited use of concurrent powers with provincial paramountcy (providing for optional use);

Less feasible:

- extensive use of concurrent powers;
- concurrent powers with federal paramountcy;
- constitutional joint tasks;

2. Financial Arrangements

Comparative review of financial arrangements demonstrates that no set of arrangements lasts for long. Thus it seems prudent that there be as few constitutional barriers as possible to the flexible adoption - and adaptation - of taxing and expenditure powers by both the constituent and federal orders of government.

Canada has tried most forms of federal-provincial fiscal transfers and other arrangements used in other federations. The significant exception to this rule is the set of congressional-tailored grants-in-aid which emerge out of the U.S. system, where variegated state and local interests lobby for specific conditional grants for very specific purposes. Few of the U.S. grant-in-aid programs are sufficiently comprehensive in scope to impose truly national standards. In any case, Canada's parliamentary system, and our intergovernmental relations concentrated in cabinet

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

The more appropriate comparisons for Canada are the types of federal-provincial transfers in parliamentary systems such as Germany and Australia. The use of conditional grants to achieve national standards has been in decline in Canada for the past two decades. They are still used extensively elsewhere. Reform of instruments and devices apart from basic fiscal instruments are likely to have more impact in terms of improving the chances for a return to the use of conditional grants as the instrument of choice, than is fiscal tinkering per se. These other instruments include the constitutional status of the federal spending power (discussed above) and intergovernmental relations mechanisms (discussed below).

Canada stands alone in the use of block, unconditional funding as the primary means of intergovernmental finance. The trend over recent years in Canada to cut back on the federal transfers for block funding has led to expenditure restraint in "mature" national systems such as health care and the universities. As a result block funding in general has come under considerable scrutiny. Federal politicians do not think that EPF gives them as much accountability as federal taxpayers deserve, and provincial consumers feel there are not sufficient penalties to prevent the erosion of standards at the provincial level.

If current trends continue, Canada will become even more disentangled and decentralized in its fiscal arrangements. Many proposals currently advocate that federal transfers to the provinces for provincial expenditure responsibilities be phased out and that related tax room be vacated accordingly. The long-term view would dictate, however, that constitutional arrangements not preclude a return to a strong federal role in transfers if for example the federal deficit situation improves, or if the political, economic and social conditions change.

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.

Two important ideas emerge from the German and Australian systems for 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 equalization come from a fund contributed by the richer Länder treasuries. If Canada is to consider the merits of decentralization, it might also consider an interprovincial equalization scheme. All other things being equal, its chief difference from the current scheme in Canada is that it would require taxpayers only in the richer provinces to contribute to the scheme. Currently, by virtue of federal taxation, a taxpayer in St. John's contributes as much to equalization as does a taxpayer of equal wealth in Toronto. If the taxpayer in St. John's was relieved of that burden, there would be correspondingly more room for the provincial government to raise its own tax revenues. In the current Canadian context, the political will for an interprovincial scheme, whatever its merits, does not appear to be strong. Such a scheme had been recommended by some in the early 1980s with respect to resource revenues, but was not acted upon.

The other noteworthy feature of the German equalization system is that its constitutional provisions are much more precise and detailed (Article 107 of the Basic Law) than the comparatively vague and general commitment in section 36 of the Constitution Act, 1982 in Canada.

In Australia, the Commonwealth Grants Commission provides a significant example of a system of equalization payments which differs from Canada's in two

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 operates totally at arm's length, and makes a relatively objective appraisal, divorced from intergovernmental negotiation, of spending needs across the Australian states. Over its fifty-eight year history the Commission has achieved a high level of technical distinction in developing equalization formulas, and has taken on challenges - such as attempting to compare relative costs across state jurisdictions - which no similar body elsewhere has attempted. The Commission is nonetheless advisory and its recommendations are not always accepted. In more recent years as fiscal deficits have strained federal-state relations, the final political determination of fiscal grants has become more difficult.

In summary, the options are:

More feasible:

- continued flexible use of conditional grants from the federal Parliament to provinces, including provision for opting-out as required;
- consideration of an independent arms' length process for the determination of fiscal need for equalization purposes;

Less feasible:

- consideration of an interprovincial equalization scheme.

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 contribute to the achievement of national standards in Canada.

The first, provisions for the economic union, has not been the focus of detailed examination in this report. However, the adoption of a general set of economic union principles, or a directly justiciable code of economic integration, could significantly improve the harmonization of economic policy in Canada.

Canada is unique among the federations here reviewed in having a legislative power over commerce which has been so limited by judicial review. The commerce powers in the United States, Australia and German constitutions have been granted, by comparison, much more scope in integrating those national economies. Clearly one option for Canada is to adopt a stronger and more explicit commerce power as an exclusive federal jurisdiction. Such a positive integrative measure may not be as acceptable, however, as the "negative" integrative effects of a code of economic union binding equally on both federal and provincial governments. (In fact, economic analysis suggests that interregional trade barriers imposed in Canada by the federal government have had as much impact as those imposed by the provinces.) For these reasons, the European Community's comprehensive process towards economic integration through the negotiated development of community-wide directives and enforced by the European Court of Justice may provide a useful model to consider.

The second type of charter to consider is one of social and economic rights. The use of such charters have been summarized in sections II and III, and have found their most complete expression in such documents as the European Community's Social Charter. An important consideration will be the nature of obligations to be conferred by such a social charter. The current Charter of Rights and Freedoms

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

The types of rights included in the "social charter" type of code include such entitlements as the right to work, to safe work conditions, to health care, education, training, social security and so on. There is not extensive comparative experience in enforcing such rights, in particular in justiciable constitutional codes. In the European community for example, the social charter exists chiefly to compel the member states to enter into a process whereby national laws match community directives for the practical application of these rights. It is not clear how this might work in the Canadian context, but a set of non-justiciable principles might be entrenched in the constitution. This could be accompanied by a process by which federal and provincial governments could be required to review their laws and to apply the principles to them. Such a process could incorporate the views of an independent watchdog or advocate agency.

Alternatively a justiciable social charter could provide direct relief through the courts to groups or individuals who consider that their entitlements under the charter have not been met. Such a process could have profound effects on the current system of government, although some may argue no more than has occurred or will occur from the existing Charter since its introduction in 1982.

Yet another means to build in elements of a social charter could be to expand upon existing provisions such as found in section 36. These provisions might be expanded or made more explicit. Article 72 of the German Basic Law which promotes the uniformity of living conditions is one such example, although this may not be appropriate for a country with the territorial scope and regional diversity of Canada.

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 latter obstacle, it can be argued, may be overcome by meeting directly Quebec's need to protect certain collective rights for language and culture. However, another option may be to have what are in essence two social charters, or one where Quebec could opt in over time.

In summary, the options are:

More feasible:

- Adoption of a general set of economic union principles within the Constitution;
- A general constitutional statement of social objectives;
- Enlargement and strengthening of equity commitments in Section 36 of the Constitution Act, 1982.

Less feasible:

- Adoption of an enforceable code of economic principles to entrench the economic union;
- Addition of enforceable social and economic rights to the Charter of Rights and Freedoms;

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 - with or without the participation of the federal government. Executive federalism has come under some fire in recent years as not sufficiently democratic, representative or accountable to the public. These criticisms may ultimately be answerable only by emphasizing other methods of achieving national consensus. If the choice is to work with executive federalism, however, there are means to make these processes more open - although these are beyond the scope of this report. There are also a number of devices from comparative experience which can make intergovernmental relations in Canada more effective.

The most effective example of institutionalizing intergovernmental relations in the policy-making process is the German Bundesrat, outlined below. Germany also provides many examples, as does Australia, of long-standing intergovernmental fora. The specific roles of the Australian Loans Council and Germany's Bund-Länder Commission for Educational Planning have been constitutionally enshrined. Canada might consider entrenching the role of certain key intergovernmental bodies in order to give them more legitimacy, as well as to provide the basis for other reforms of intergovernmental relations, suggested below.

One of the chief difficulties with interprovincial or federal-provincial bodies in Canada is that they have no decision-making rules apart from unanimity or general consensus. This restricts these bodies from making agreements which could be binding on all signatories, or by developing policy which could in essence become national standards. The European Community, since the adoption by all member states of the Single European Act in 1986, has a system of weighted majority voting which frees the Council of Ministers from the tyranny of the unanimity requirement, and has led to a much more productive decision-making process. There may be scope in Canada for

the selective use of improved decision-making rules to provide intergovernmental bodies with more authority and effective capacity.

Intergovernmental agreements in Canada are not now, except in a few rare cases, given any legal force in Canada. The constitutional provision for the enforcement of intergovernmental agreements (both interprovincial and federal-provincial) by a judicial body such as the Federal Court of Canada could provide an important instrument for achieving national standards. For example, enforceable federal-provincial agreements could be a means of implementing types of concurrent powers as described above, such as "framework provisions" or "joint tasks". They could govern the details of any opting out or opting in to other concurrent regimes, or of administrative agreements and financial arrangements. Such agreements could cover also a process of reviewing and ultimately of enforcing social and economic rights. Finally they could be a means for implementing the detailed use of the federal spending power. Two obvious difficulties arise: if standards are dependent solely on the achievement of intergovernmental agreement, they may require back-up authority. Also, enforceable agreements would certainly be more constraining on all governments than the current practice where most agreements are essentially political, but such coercion may be preferable to other more intrusive and less predictable methods.

In summary, the following options are all in the "more feasible" category:

- entrenching the role of important intergovernmental bodies, including the provision of explicit decision-making rules; and
- allowing a broad range of enforceable intergovernmental agreements, including providing a role for such agreements to govern the use of certain types of federal and provincial legislative powers.

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, a reformed Canadian Senate, and the system for constitutional judicial review.

The general rationale for representation of constituent units in federal institutions, in particular their direct or indirect representation in upper houses of federations is not the focus of this paper. However, the federations here surveyed - apart from Canada - have all provided a strong role for constituent interests to play in the federal legislative process, thus strengthening the political legitimacy of any federal legislative role in those federations in the achievement of national standards. Canadian reform to more effectively represent the provinces in the Senate could have a similar effect.

A more specific role of upper houses in establishing national standards leads to the example of the Bundesrat, as detailed in this report. The Bundesrat helps to achieve national standards in a number of ways: by being an essential part of the process of administrative federalism in Germany; by having a mandated role to approve the use by the federal government of concurrent powers, including the framework provisions and joint tasks; and by providing a legitimate, permanent and effective forum for intergovernmental negotiation and agreement. It also has a role (as does the U.S. Senate) in ratifying international treaties and agreements, which helps to legitimize the adoption of standards through the route of international charter or convention.

In Canada the Senate could play a direct role in the process of establishing national standards as defined in this report. Such a role could include the following functions: to approve (or veto) any legislation which required provincial

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 international agreements; to monitor progress towards the achievement of specific non-justiciable principles or rights (e.g. s. 36, elements of a social charter, or principles regarding the economic union); and finally, a more general monitoring role regarding the maintenance and enforcement of national standards in Canada.

Finally, if constitutional reform related to national standards requires a greater enforcement and adjudicative role of the courts and other such institutions in Canada, there will be debate concerning the appropriateness of existing institutions. It would appear that the presently constituted Supreme Court of Canada has adequately absorbed a major new role since the adoption of the Charter of Rights and Freedoms in 1982. However, in recent years there have been consistent calls for reform of its composition, if not role, especially from Quebec.

If Canada wishes to have independent judgements expressed on constitutional rights which are not as legally enforceable as the current Charter, new sorts of adjudicative institutions may be more appropriate.

In summary, the following options are in the "more feasible" category:

- Reforming the Senate to require it to perform specific roles related to encouraging, approving and enforcing national standards;
- Considering new types of adjudicative bodies, and of clarifying the role of the Supreme Court of Canada and other adjudicatory bodies with respect to their role in enforcing national standards.

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, population and wealth of its provinces. Canada's existing constitution includes a number of provisions which are asymmetrical not only towards Quebec but to other provinces as well. (For example ss. 93(2) on denominational education, s. 133 on language, s. 129 on civil law, s. 94 on uniformity among certain provinces, and ss. 22 and 23 regarding Senate representation, among others, in the Constitution Act of 1867, and provisions in the various provincial Terms of Union or constitutional acts.¹⁰)

None of the other federations reviewed in this report exhibit any degree of asymmetry in the allocation of formal legislative jurisdiction. Among federations generally, Malaysia is the chief example of a federation which since its founding in 1963 has provided greater relative jurisdictional authority to Singapore (which was however expelled from the federation two years later) and the Borneo states of Sarawak and Sabah. In the latter two states the state legislature has authority for matters such as native citizenship, communications, shipping, and fisheries. In the area of immigration, the federal law may prevail only with the consent of the state legislatures in these two Borneo states. Other federal arrangements apart from Malaysia exist where the jurisdiction of the federal government is somewhat less reduced over an associated state or dependency. In both Canada and Australia federal

¹⁰ See David Milne, "Equality or Asymmetry: Why Choose?" in R.L.Watts and D.M.Brown (eds.) Options for a New Canada (Toronto: University of Toronto Press, 1991), pp. 285-307.

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 Programs Financing Program).

When considering financial arrangements, the ability for Quebec to opt out has been used extensively especially from the early 1960s to the mid-1970s, and continues in many current arrangements. Quebec is not the only provincial government which has objected to conditional transfer programs, but a case can clearly be made that nine-province programs would proceed more smoothly if acceptable opting-out arrangements were devised for Quebec.

Overall, an examination of the instruments and processes surveyed in this report point to a number of mechanisms which lend themselves to optional use -- i.e. opting out or opting in. In summary these methods are as follows:

- opting-out of shared-cost programs, with or without financial compensation;
- voluntary opting-in to uniform legislation;
- concurrent jurisdiction providing potential optional choice regarding occupation of a jurisdictional field. Concurrence with provincial paramountcy would be the most effective in this respect;

- charters of rights and similar constitutional codes may provide for escape clauses, "notwithstanding" provisions and other methods of provisional application; and
- interstate agreements could promote partial national standards by not having every constituent government sign on.

C. Conclusions

The comparative examination of institutions and processes for the achievement of national standards across constituent governments in federal systems provides many useful approaches for Canadians to consider.

What is clear is that no one approach is used exclusively by any of the federations. They all employ a variety of instruments to match varying circumstances and policy needs. The best approach to the problem thus seems to be holistic -- to consider the operation of the federal system as a whole and to consider constitutional and institutional reform across a broad range of constitutional agenda topics.

While current constitutional proposals are not uniformly decentralist much of the thrust of current ideas is to sustain and perhaps greatly increase the fiscal and legislative power of the constituent governments in the Canadian federation. If this is so, greater emphasis will have to be placed on flexible and varied means of allowing the constituent units to act among themselves or with the federal government, to maintain and enforce national standards. An agenda to achieve these means may involve the consideration of a number of adjustments to constitutional and institutional features.

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:

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 limited, but not extensive use of concurrent powers, with provincial paramountcy for greatest optional use;

Financial Arrangements:

4. The continued use of conditional grants from the federal parliament to provinces in selected subject areas, including provision for opting-out as required;
5. Consideration of an independent arm's length process for the determination of fiscal need for equalization purposes;

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;
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, a full understanding of their use elsewhere is recommended. Nonetheless, it remains clear that comparative experience demonstrates a wide range of possible options for Canadians to consider in attempts to improve the constitutional and institutional conditions for national standards.

APPENDIX 1: FISCAL EQUALIZATION IN GERMANY¹¹

The German system of fiscal equalization has captured the attention of scholars and policy-makers in other federal systems primarily because of its unique arrangements providing for the sharing of revenues not only between the central and constituent governments (as is typical in most federations), but also *amongst* the constituent units themselves. The purpose of this appendix is to briefly describe the constitutional basis and the practical implementation of the German system of equalization, which essentially translates into a two-tiered scheme: one tier comprised of federal-Länd transfers or revenue-sharing; the other, of strictly interLänd transfers.

(a) Federal-Länd dimension:

Fiscal arrangements in Germany are marked by a significant degree of revenue-sharing between the federal and Länd governments, the constitutional basis for which is found in Article 106 of the *Basic Law*. In practice, a federal statute (which is subject to Bundesrat approval) defines the percentage of income tax revenues which are to be shared between the federal, Länder and even local governments. While a limited degree of equalization is evident in these arrangements (mostly arising from standard per capita provisions), equalization objectives for federal-Länd transfers are achieved primarily through the sharing of sales tax revenue.

Revenues arising from the sales tax, chiefly the value-added tax (VAT), are distributed according to a formula set by federal statute, again subject to Bundesrat

¹¹ The information in this appendix is drawn largely from an account provided in Chapter 3 of Richard M. Bird, *Federal Finance in Comparative Perspective* (Toronto: Canadian Tax Foundation, 1986).

approval. The federal share is roughly two-thirds of total proceeds from the VAT, leaving one-third for distribution amongst the Länder. Of this latter amount, 75 percent is distributed to individual Länder on an equal per capita basis. The remaining 25 percent is allocated to the "financially weak Länder" in a manner which brings their total taxable capacity (including own-source and other shared revenues) to a level comparable to 92 percent of the national average. These VAT transfers account for less than 10 percent of all equalization payments to the Länder.

In addition, since 1974 the federal government has been transferring an additional 1.5 percent of its own share of VAT revenues to the financially weak Länder. These federal "supplementary payments" are distributed amongst these Länder according to a politically negotiated formula, and account for nearly 30 percent of all equalization payments.

(b) Inter-Länd dimension

The second and more innovative aspect of the German equalization scheme is the system of "horizontal" transfers which occurs between the Länder themselves (i.e. without the involvement of the federal government). The constitutional basis for this form of interstate equalization is found in Article 107 of the *Basic Law*, which states:

(1) Revenue from Länd taxes and the Länd share of revenue from income and corporation taxes shall accrue to the individual Länder to the extent that such taxes are collected by revenue authorities within their respective territories (local revenue). A federal statute requiring the consent of the Bundesrat may provide in detail for the delimitation as well as the manner and scope of allotment of local revenue from corporation and wage taxes. Such statute may also provide for the delimitation and allotment of local revenue from other taxes. The Länd share of revenue from the turnover tax shall accrue to the individual Länder on a per capita basis; a federal statute requiring the consent of the Bundesrat may provide for supplementary shares not exceeding one

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 below the average of all the Länder combined.

(2) Such statute shall ensure a reasonable equalization between financially strong and financially weak Länder, due account being taken of the financial capacity and financial requirements of communes or associations of communes. Such statute shall specify the conditions governing equalization claims of Länder entitled to equalization payments and equalization liabilities of Länder owing equalization payments as well as the criteria for determining the amounts of equalization payments. Such statute may also provide for grants to be made by the Federation from federal funds to financially weak Länder in order to complement the coverage of their general financial requirements (supplementary grants).

The actual provisions of this interLänd equalization scheme are defined by a federal statute, the *Financial Settlements Act*. Calculation of actual equalization payments for individual Länder is achieved through a three-stage process. The first step is to calculate the "tax potential" of each Länd, which is defined as actual Länd taxes plus the proceeds from approximately half of standardized local taxes. There is also a provision to reduce the taxes for particular Länder to allow for historic "special burdens" such as harbour maintenance in Bremen, Hamburg and Lower Saxony.

The next step of the process is to compare "tax potential" with "tax need" of individual Länder, which will yield either a "surplus" or a "deficit". The "tax need" component is not linked directly to the costs incurred by Länd governments to provide particular services (as is the case with the Australian Grants Commission's determination of "fiscal need"), but rather is calculated on the basis of average national tax revenue per capita. This per capita proxy of "need" is then weight according to both population size, population density and a special city-state element for Hamburg and Bremen.

Finally, actual equalization payments are calculated employing the "surplus" or "deficit" amounts determined for individual Länder. This is done by adjusting the magnitude of these amounts by the percentage difference between the "tax potential" and the "tax need" factors. Ultimately, the goal of the interLänd equalization scheme is to bring the per capita revenues of all Länder up to at least 95 percent of the average per capita tax revenue (the "tax need" factor). As part of the entire system of fiscal equalization in Germany, interLänd transfers comprise over 60 percent of all payments made.

On a final note, the disparities across the Länder in West Germany were moderate as compared to Canada. The addition of the five new Länder and the addition of East Berlin to the West Berlin Länd will place much greater strain on fiscal arrangements, given the destitute state of the economy of the former East Germany. It is unlikely that fiscal arrangements which worked relatively well up to 1989 will last intact without significant adjustment to reunification.

APPENDIX 2:

THE AUSTRALIAN COMMONWEALTH GRANTS COMMISSION

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

Canberra: Australian Government Publishing Service, 1988, pp. 1-6.]

The Role of the Commission

1.1 The Commonwealth Grants Commission was established in 1933 for the purpose of making recommendations upon applications by States for grants of financial assistance (so-called special grants) from the Commonwealth under section 96 of the Constitution. Until 1981-82, grants to certain States (the so-called claimant States) were paid by the Commonwealth as recommended by the Commission, the number and composition of the claimant States changing from time to time. Since 1981-82, as a result of arrangements agreed at Premiers' Conferences, no State has sought such a grant.

1.2 In 1973 legislation was enacted to provide for the Grants Commission to inquire into and report upon applications by local government authorities throughout Australia for financial assistance from the Commonwealth. Following a change of government at the end of the 1975, the Commission's role of recommending grants for individual councils was taken over by a local government grants commission in each State. However, the Commonwealth Grants Commission was still required to advise on the overall distribution between the States of the amount allocated for financial assistance to local government under tax sharing arrangements, and two reports on this subject were produced in 1976 and 1977. The Commission's role in relation to the determination of State entitlements for local government purposes, which was provided for in the *Local Government (Personal Income Tax Sharing) Act 1976*, was terminated, with effect from 1 July 1986, by the enactment in June 1986 of the *Local Government (Financial Assistance) Act 1986*. However, pursuant to section 17 of the

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 to undertake a review of the distribution between the six States of the amount of general revenue funds allocated to the States by way of what were then called tax sharing entitlements. Following presentation of its First Report on this matter in 1981, and in response to subsequent references from the Commonwealth Government, the Commission presented further reports on the distribution of State tax sharing entitlements (later called tax sharing grants) in May 1982 and March 1985 respectively. At the Premiers' Conference of 30 May 1985, it was agreed that the tax sharing grants would be replaced by financial assistance grants and that tax sharing relativities assessed by the Commission would be applied to the distribution of the financial assistance grants for the three years from 1985-86 to 1987-88. On 20 March 1986, the Special Minister of State made a reference to the Commission requiring it to undertake a further review of the per capita relativities to apply to the distribution of basic general revenue grants after 1987-88. Basic general revenue grants were defined to include the identified health grants and certain special revenue assistance grants in addition to the financial assistance grants. The report on this inquiry was presented to the Minister for Administrative Services on 30 March 1988. The substance of the inquiry is outlined in Chapter 2 of this report. At the Premiers' Conference of 12 May 1988, it was agreed that the triennial process of Commission reviews of per capita relativities should be replaced by a new arrangement under which the Commission would be asked to update its relativities annually, with comprehensive inquiries involving reviews of methodology and new relativities at five-yearly intervals.

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 to a State that are referred to the Commission by the Minister (section 16);
- (b) an application by the Northern Territory for a grant of financial assistance and any matters relating to the making of a grant of financial assistance to the Northern Territory that are referred to the Commission by the Minister (section 16A);
- (c) any matters relating to the financing of works and services provided in respect of the Australian Capital Territory that are referred to the Commission by the Minister (section 16B);
- (d) any matters relating to the making of a grant of financial assistance to the Territory of Cocos (Keeling) Islands that are referred to the Commission by the Minister (section 16C); and
- (e) any matters relating to the making of a grant of assistance to a State for local government purposes that are referred to the Commission by the Minister (section 17).

1.9 Under the provisions of the *Income Tax (Arrangements with the States) Act 1978*, each State has the right to derive or forgo revenue from personal income tax by imposing a surcharge on, or granting a rebate of, income tax levied by the Commonwealth on persons resident within that State. Section 79 of that Act provides that if any State, except New South Wales or Victoria, imposes an income tax surcharge the Commission shall report to the Government upon any additional assistance that should be paid to that State to take account of its lower capacity to raise income tax relative to New South Wales and Victoria. As no State has passed legislation to impose an income tax surcharge, the Commission has not been called upon to exercise this function.

Principles and Methods

1.10 The Commission has generally adopted the principle of fiscal equalisation as the basis of its various inquiries. Irrespective of the purpose to which it is applied, the principle of fiscal equalisation is intended to ensure that the level of Commonwealth financial assistance assessed for a State or Territory will make it possible for that State or Territory to provide a standard level of services to its citizens provided it also makes a standard revenue-raising effort. A State or Territory is not obliged to adopt these standards, but is free to set its own revenue and expenditure policies. The principle of fiscal equalisation as applied by the Commission is thus concerned with fiscal capacity, not fiscal performance. Departure by a State or Territory from the revenue or expenditure standards as applied by the Commission does not affect its assessed level of financial assistance; any resulting net financial benefit or cost to the State or Territory is not brought into the assessment process. The application of the principle of fiscal equalisation requires the Commission to take into consideration only the differential capacities of the States and the Territories to raise revenues and the differential costs they would have to incur to provide a standard level of services.

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 equalisation, this measure forms the basis of the methodology that is used in all relevant inquiries. For this purpose the Commission assesses the amount of revenue a State or Territory could raise from its own sources, and the level of expenditure it would incur, if it adopted the revenue and expenditure policies taken as the standard. These amounts are defined as standardised revenue and standardised expenditure respectively. It then determines, by reference to the difference between its assessments of standardised expenditure and standardised revenue, an overall level of Commonwealth financial assistance (general revenue funds and relevant specific purpose payments combined), which would be required to place the State or Territory in the position where its per capita budget result was equal to the standard per capita budget result. Various standards have been adopted in the Commission's inquiries, such as a standard based on the population-weighted average experience of the six States and the Northern Territory in the 1988 review of per capita relativities undertaken to assess State and Northern Territory shares of Commonwealth general revenue grants, and a standard based on the simple average of the actual experience of New South Wales and Victoria in past inquiries relating to applications for grants of special financial assistance to individual States or Territories.

1.12 The Commission adopts the concept of a standard budget to identify the range of recurrent revenues and expenditures included in its comparisons. The Commission generally determines the composition of the standard budget by reference to recurrent revenues, including Commonwealth specific purpose payments, and expenditures which regularly have an impact on the Consolidated Revenue funds of all or most States. However, in some inquiries the Commission's terms of reference have directed it to expand the coverage of the standard budget to include additional functions, such as metropolitan water supply and sewerage services, which are not usually financed from State recurrent budgets.

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 sum of the standardised revenues so calculated for the respective categories gives the State's total standardised revenue. The difference between the standardised revenue of the State being assessed and its actual revenue is a measure of the difference from the standard in the State's revenue-raising policies and in the efficiency of its revenue collections. The difference between the State's standardised revenue and the standard revenue, which is calculated as the product of the State's population and the appropriate average of the per capita revenues raised by the standard States, is described by the Commission as the revenue needs of that State. These needs may be positive or negative.

1.14 In a similar manner the Commission determines the standardised expenditure for a State (or Territory) by making separate calculations for each expenditure category by reference, in turn, to each State being used as the standard. Generally, these calculations involve the application of a series of factors, which take account of differences in the number of units of service which need to be provided and the unit cost of the service as between the State being assessed and the standard State, to the per capita cost of providing the service in the standard State. These differential costs of providing the service may be attributable to demographic or other factors affecting the demand for services, and to scale, dispersion, environmental or other factors which are beyond the control of the State or Territory being assessed, but do not include any cost differentials arising from differences in policy or levels of efficiency as compared with the standard States. The separate calculations for the category are then averaged in the appropriate manner and the results for the respective categories are summed and multiplied by the population of the State being assessed. The difference between the State's total standardised expenditure so determined and

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.

1.15 The net expenditure derived for each relevant State (or Territory) by subtracting its standardised revenue from its standardised expenditure is then adjusted by the amount of the standard budget result. This adjustment is made to ensure that the State being assessed will receive a level of financial assistance which, under standardised conditions, will enable it to achieve the per capita budget result that is reflected in the budgets of the standard States. The adjustment is calculated by multiplying the standard per capita budget result, that is the appropriate average of the per capita budget results of the States that are being used to determine the standard, by the population of the State being assessed. The budget results used for this purpose are derived by taking into consideration those recurrent revenues and expenditures which are included by the Commission in its standard budget and which are therefore brought into its comparisons. They include general revenue grants and relevant specific purpose payments received from the Commonwealth.

1.16 The resulting assessments of total Commonwealth financial assistance requirement are further adjusted, as the need arises, in accordance with the requirements of the terms of reference for each particular inquiry. In the case of reviews of the per capita relativities to apply to the distribution of general revenue grants, the level of Commonwealth general revenue assistance required by each State and the Northern Territory to achieve fiscal equalisation is assessed by subtracting from the assessed amount of total Commonwealth financial assistance the actual amount of relevant Commonwealth specific purpose payments received by the State or Territory. The resulting amounts, one for each State or Territory, are called the

standardised deficits in the Commission's Reports. These amounts are converted to per capita figures and, subject to an adjustment for any difference in the sum of the standardised deficits and the total amount of general revenue funds available, are then expressed as relativities of the per capita amount assessed for Victoria. The adoption of the Commission's assessed per capita relativities will thus provide a basis, along with State and Territory populations, for the distribution of general revenue funds among the States and the Northern Territory in future years. In the case of inquiries relating to applications for grants of special financial assistance to States or the Northern Territory, the assessment of total Commonwealth financial assistance is reduced by the amount of Commonwealth general revenue funds and relevant specific purpose payments already received by the State or Territory, to derive the Commission's assessment of the special financial assistance required by that State or Territory to achieve fiscal equalisation. In the case of inquiries into the financing of the Australian Capital Territory, no adjustment to the assessed level of total financial assistance is required because the Territory has not been a party to normal Commonwealth-State financial arrangements and did not receive specific purpose payments until 1988-89. The Commission's charter in these inquiries has been to assess the level of financial contribution which the Territory should make in respect of its services and the level of Commonwealth subvention required to achieve fiscal equalisation for the Australian Capital Territory.

Bibliography

- Australia. Special Premiers' Conference. *Communique*. Sydney, 30/31 July 1991.
- Bird, Richard M. *Federal Finance in Comparative Perspective*. Toronto: Canadian Tax Foundation, 1986.
- Codding, George Arthur. *The Federal Government of Switzerland*. Boston: Houghton Mifflin, 1961.
- Elazar, Daniel J. *American Federalism: A View From the States*. 3rd ed. New York: Harper & Row, 1984.
- "Federalism and Intergovernmental Relations in West Germany: A Fortieth Year Appraisal." *Publius: The Journal of Federalism*, 19, 4 (1989 Fall): 1-235.
- "Federalism in Australia." *Publius: The Journal of Federalism*, 20, 4 (1990 Fall): 1-159.
- Galligan, Brian. ed. *Australian Federalism*. Melbourne: Longman Cheshire, 1989.
- Hill, Kim Quaile and Patricia A. Hurley. "Uniform State Law Adoptions in the American States: An Explanatory Analysis." *Publius: The Journal of Federalism*, 18, 1 (1988 Winter): 117-26.
- Huber, Hans. *How Switzerland is Governed*. Zurich: Schweizer Spiegel Verlag, 1968.
- Johnson, Nevil. *State and Government in the Federal Republic of Germany: The Executive at Work*. 2nd ed. Oxford: Pergamon Press, 1983.
- Lane, P. H. *An Introduction to the Australian Constitution*. 3rd ed. Melbourne: The Law Book Company, 1983.
- Leslie, Peter M. *Federal Leadership in Economic and Social Policy*. Reflections, No. 3. Kingston: Institute of Intergovernmental Relations, 1988.
- Mizerk, Donald J. "The Coercion Test and Conditional Federal Grants to the States." *Vanderbilt Law Review*, 40, 5 (1987 October): 1159-95.
- Peterson, Paul E. and Mark C. Rom. *Welfare Magnets: A New Case for a National Standard*. Washington: Brookings Institution, 1990.

- 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.
- Watts, R. L. *New Federations: Experiments in the Commonwealth*. London: Oxford University Press, 1966.
- Watts, Ronald L. *Executive Federalism: A Comparative Analysis*. Research Papers, No. 26. Kingston: Institute of Intergovernmental Relations, 1989.
- Watts, Ronald L. and Douglas M. Brown, eds. *Options for a New Canada*. Toronto: University of Toronto Press, 1991.
- Wheare, K. C. *Federal Government*. 4th ed. London: Oxford University Press, 1963.