

Kingston, Ontario

THE UNIVERSITY OF CHICAGO

PHYSICS DEPARTMENT

1954

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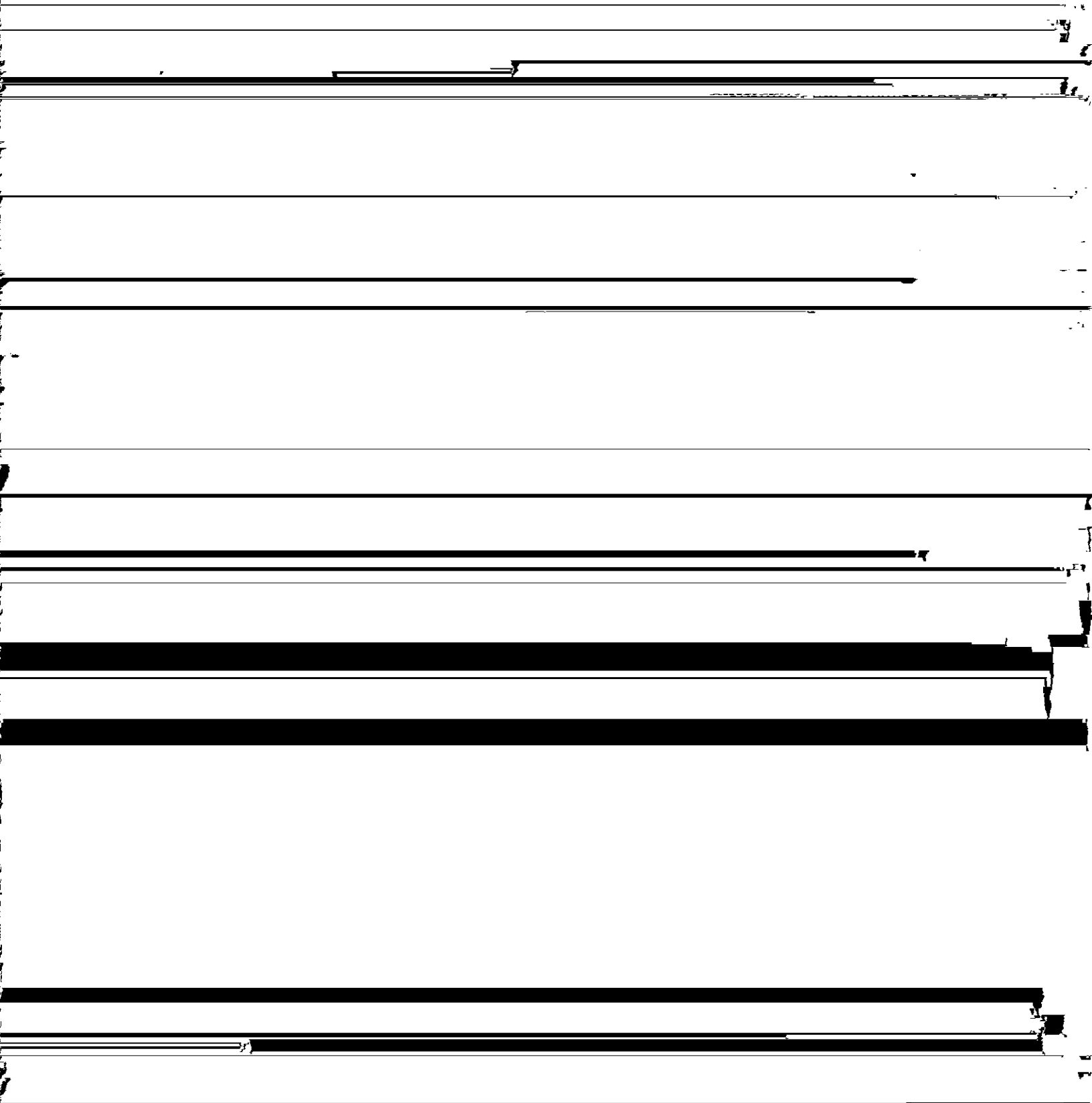
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constitutional conventions. The third section briefly outlines the experience of other countries with this approach to constitution-making. The fourth section offers a detailed comparison of the cases based on a set of specific criteria relating to the background and origins of constituent assemblies, their structure and mandate, operating procedures, results and the broader contextual factors in which the assemblies have

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<sup>1</sup> Government of Canada, *Amending the Constitution of Canada: A Discussion Paper* (Ottawa: Federal-Provincial Relations Office, Dec. 1990).

1984.



negotiation discussion may take place through the operation of committees,

and/or legislative debates, the early deliberations in a constituent assembly, or as in the case of Switzerland through the processes of the popular initiative. The negotiation of the basic framework for a new constitution or proposed amendment may be worked out by intergovernmental executive diplomacy (as was the case at Meech Lake on April 30, 1987, for example), by a process of parliamentary debate following the introduction of a proposed amendment (as, for instance, in the normal procedures for constitutional amendment in the United States, Switzerland, Australia, Germany and India), or by a constituent assembly. The further stage of working out the legal text for a new constitution or amendment may occur in one or other of these bodies, or be delegated

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<sup>2</sup> R.L. Watts, *New Federations: Experiments in the Commonwealth* (Oxford: Clarendon Press, 1966), pp. 123-4.

new constitution.

included even though they do not fit under the criteria above.

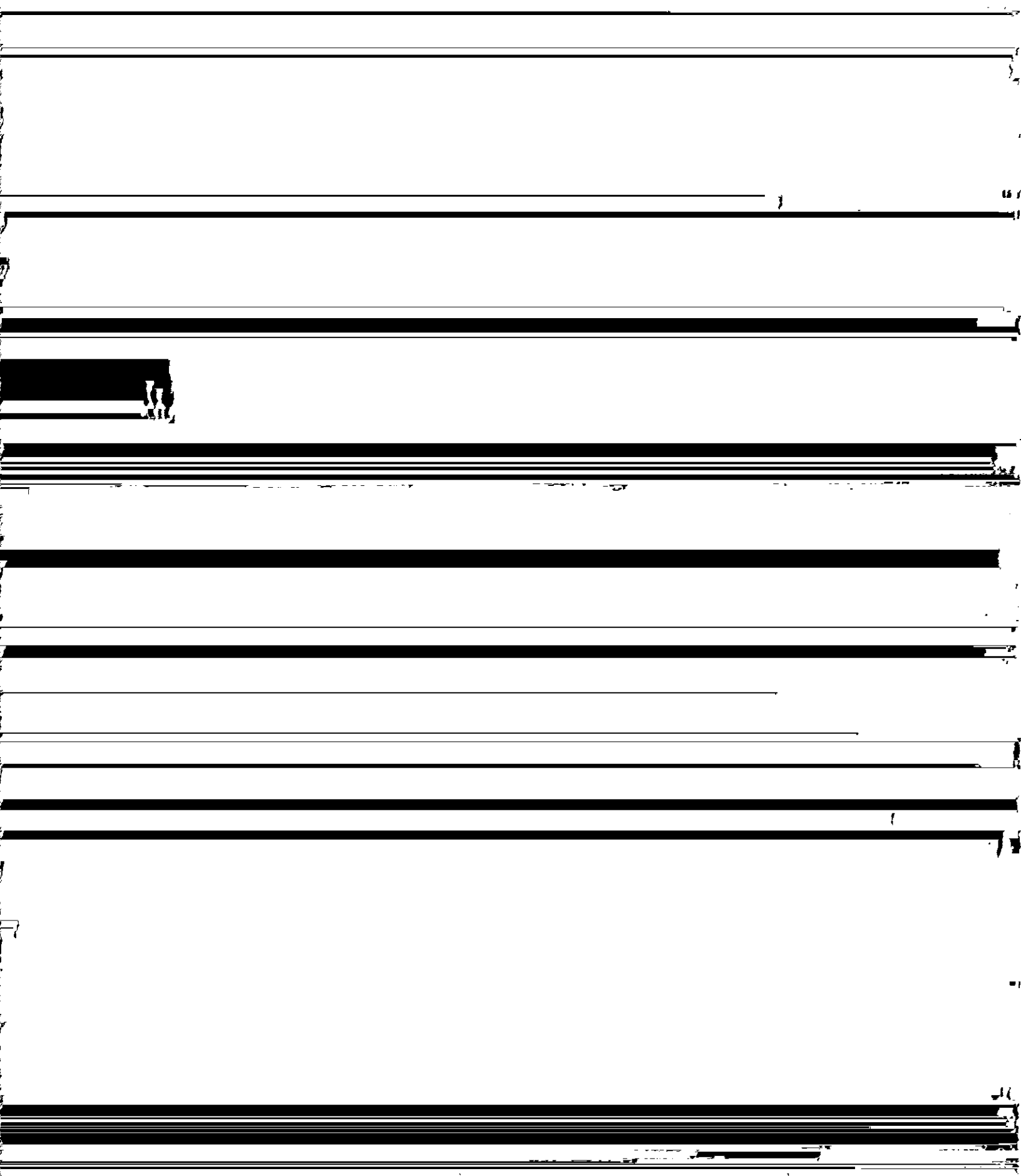
BEFORE EMBARKING ON A DETAILED COMPARISON AND ANALYSIS OF ALL OF THE CASES, THIS section briefly describes the experience of each country with constituent assemblies, constitutional conventions and constitutional inquiries, task forces and expert



Quebec Conference, and the D.N.A. was declared in effect on 1 July 1987.

The negotiation of subsequent efforts at major constitutional amendment were largely the product of intergovernmental diplomacy. The most notable examples were the First Ministers' Conference in 1981 which laid the basis of the *Constitution Act*,

Law which after ratification by the legislatures of the Länder became the constitution of the Federal Republic of Germany. In the early 1960s the West German government appointed a commission to examine Bund-Länder relations. The work of the Troeger Commission which reported in 1966 eventually led to a series of constitutional



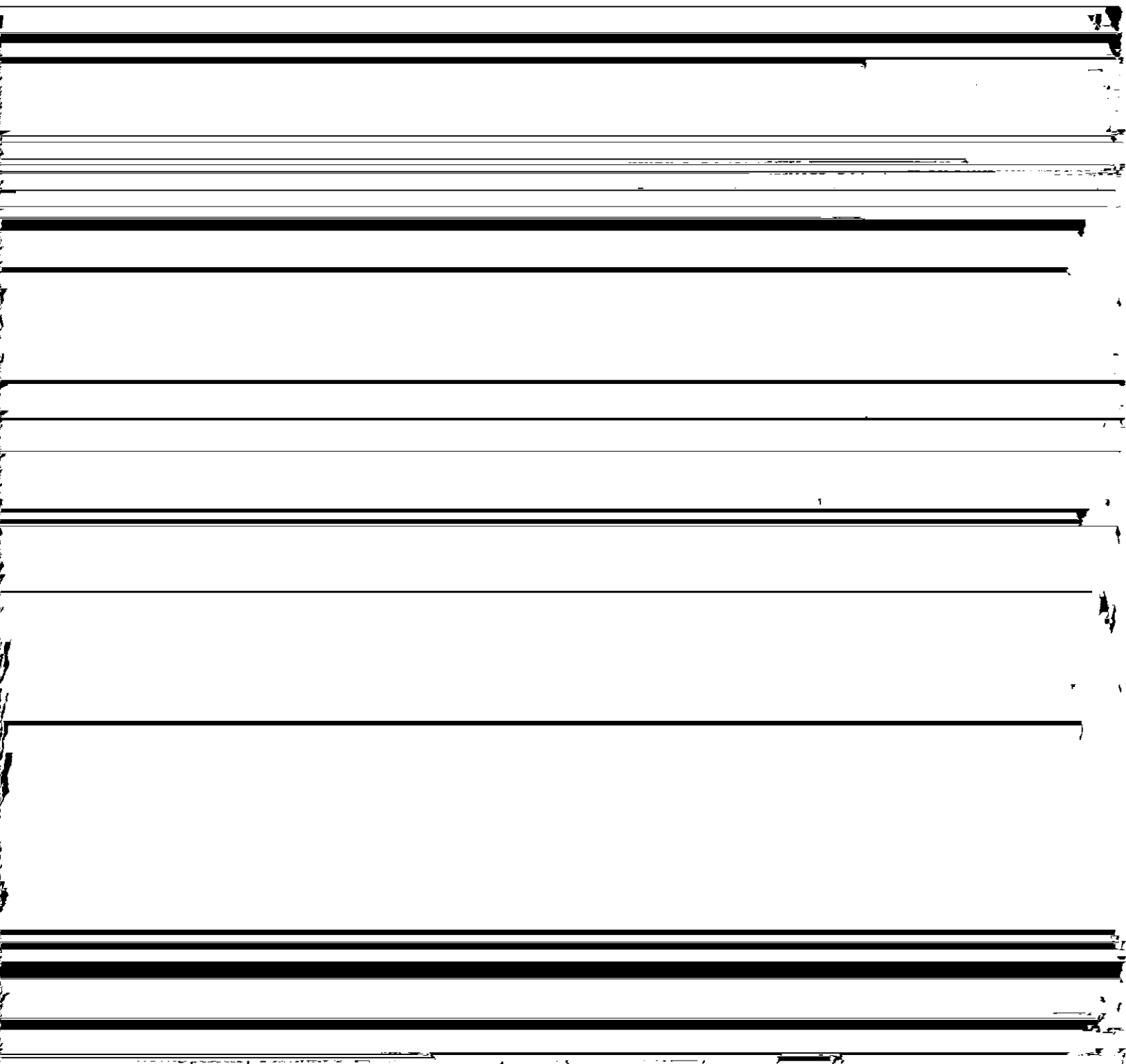
1957, was produced by committees consisting of  
governments, the major political parties and the rulers in the states.

In October 1961 when the federation of Malaya was being expanded into the  
Federation of Malaysia, the British and Malayan governments jointly named a

The constitution of the Federation of Rhodesia and Nyasaland that was established in September 1953 was drafted by constitutional conferences under the aegis of the British Colonial Office. Indeed, the constitution of the new federation guaranteed that

First, a constituent assembly is called to draft a new constitution after a referendum

constituent assemblies will come from acting quickly ... following on some great political



CONSISTED OF 50 TO 60 MEMBERS. SIMILAR IN SIZE WAS THE FUNCTIONAL & DISCIPLINARY COMMISSION



politicians but also prominent jurists, constitutional experts and academics, among others.

significant feature of these was that the British Colonial office was included in the representation.

general pattern is that they are named by the central government with little or no consultation with the national parliament or state governments. For example, the Pepin-Robarts Task Force was appointed by Prime Minister Trudeau with little or no consultation with the provinces. Similarly, the Constitutional Commission created in

parliamentary Council varied from a single delegate from the city-state of Bremen to a total of 17 delegates from North-Rhine Westphalia and 13 delegates from Bavaria. A similar approach was used to elect the delegates to the Nicaraguan constituent assembly

suggest that any special or formal efforts have been made to ensure that women, ethnic minorities or particular economic or class interests have been separately represented among the delegates or commissioners. Nevertheless, minority interests have usually had significant representation, but only as a result of inclusion by a state within its

delegation. In the case of the relatively small Diet Drafting Committee of 1848 there was a representative balance between French- and German-speaking members and between the Protestant and Roman Catholic members reflecting the different cantonal majorities.

require ratification by other bodies, the legislatures of the states in the Australian case,

into a unitary constitution. The French task force was a good example of a public  
inquiry in which the mandate is limited to public consultation. This ten-member Task  
Force was appointed by the Swiss Government in 1967 and was asked to collect opinions  
and information relative to the desirability of constitutional review and to identify the

the cantons, the major political parties, the universities and nine major interest groups.

DEPENDENCY AND FACILITATION OF PROPOSED CONSTRUCTION BY THE REQUIRED TIME FRAME

group, the process of proportional representation virtually guaranteed the Congress Party both a huge working majority on the floor of the Assembly and control over the

WORKING OF THE NUMEROUS COMMUNITIES, AND THE CONGRESS PARTY HAS BEEN



people have often exercised a disproportionate influence on the operations of the assembly

In most of the cases under review, public consultation in the drafting of a constitution was not a priority although popular ratification of a final text either through a referendum (Switzerland and Australia) or directly elected state conventions (USA) has occurred in a number of instances. Until very recently, the dominant political

general public in the process of drafting a constitutional text. For example, there is



generalization, however.

beginning of the process. Due to the tripartite nature of the assembly, the Secretariat was further subdivided into four secretariats:

earlier assemblies were funded by the various provincial and state governments that sent

delegations. These funds could be notoriously late in coming, however. In the case of the Philadelphia Convention, a case is recorded where one delegate, frustrated by delays in state funding for his delegation, put up the necessary funds himself. In the more recent assemblies of India and Pakistan, costs were borne out of general revenues. This arrangement was likely a reflection of the dual constitutional and legislative roles carried on by these two assemblies. In the case of India, for example, funds were voted

Except for the smallest constitutional inquiries with limited mandates, almost all of the constituent assemblies and constitutional conventions under review have resorted to a committee system of one kind or another to achieve their ends. In the earlier

committee of three legal experts who worked on the wording of the constitutional text.

Finally, there are several examples of executive committees of one form or another which were responsible for the overall organization and procedures of the convention or assembly. For example, the constitutional convention which met in Australia from 1973-1985 elected a steering or executive committee of 16 delegates which was expanded

regimental. Once within the assemblies, decisions were made by simple majority of delegates, each of which had one vote. In the case of India, all elections in the



1.1 PROCESS OF ESTABLISHMENT OF THE CONSTITUTION OF AN EXISTING CONSTITUTION

Broadly speaking constituent assemblies can be divided into two categories: (1) those recommending a new constitution and those recommending revision to an existing constitution.

effect when New Hampshire became the ninth state to ratify it in June 1788 and by May 1790 conventions in the four remaining states had also assented to it.<sup>6</sup>

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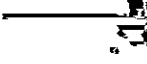
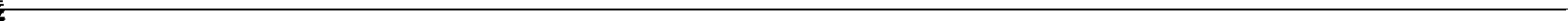
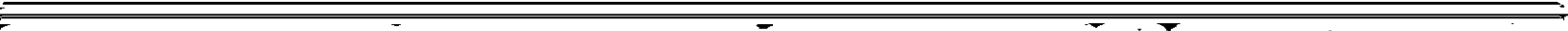
<sup>6</sup> For a full discussion of the ratification process please refer to R.L. Watts, D.R. Reid and D. Herperger, *Parallel Accords: the American Precedent* (Kingston: Institute of Intergovernmental Relations, 1990).

deal with by the normal procedure set out in the constitution for ordinary legislation.

<sup>7</sup> Coddig, *The Federal Government of Switzerland*, p.32.

in the examination of the role and operation of [redacted]

analyzing them as mechanisms, there is a risk that they [redacted] be  
misconstrued. Attention therefore is drawn to contextual factors that may have an  
important impact on their functioning.



the continent, and in Nicaragua and Namibia. In other cases, as exemplified in the

by the imminence of political independence and the need to establish more viable political entities. In still other cases, as in the United States in 1787, a sharp deterioration in the operation of an existing constitution provided a strong incentive for a constitutional convention to agree upon a new constitutional structure. By contrast, the protracted deliberations of the Australian conventions over the decade of the 1890s,

and the failure of the Australian and Swiss efforts to achieve substantial constitutional

Second, what are the options for the structure (e.g. size, selection and distribution of members) and the mandate of a constituent assembly? Third, what are the possibilities with respect to the operating procedures for the convention? Finally, what considerations should be brought to bear on the question of how the work of a constituent assembly or constitutional convention should be linked to the existing mechanisms for negotiating and ratifying constitutional amendments

### **Why a Constituent Assembly?**

Perhaps the biggest advantage associated with a constituent assembly is that it responds to many of the critics of executive federalism who see the current approach to constitutional amendments as being elitist and exclusionary. A constituent assembly would potentially make the process of constitutional reform more open and respond to the participatory, democratic impulse which seem to have arisen in the last decade. However, as we have noted, not all constitutional conventions or constituent assemblies

text. However, because Canada already has an operative constitution, two questions

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<sup>8</sup> Catherine Drinker Bowen, *Miracle at Philadelphia: The Story of the Constitutional Convention May to September 1787* (Boston: Little, Brown and Company, 1966), p. 140.



interests and concerns (e.g. women, aboriginals, ethnic minorities, etc.). A second

or the delegates can be 'elected' by Parliament and the provincial legislatures.

The first option would appear, at first glance, preferable if the objective is to make the process of constitutional reform more 'democratic'. However, the experience in other countries suggests that an elected constituent assembly is quite rare (Namibia 1989, Nicaragua 1984) and that such an assembly will compete with Parliament for authority and legitimacy (assemblies in Nicaragua, India and Pakistan assumed to themselves a legislative role). The 'democratic impulse' has sometimes been met in

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<sup>9</sup> Russell, "Towards a New Constitutional Process."

political parties can bring to the process without making the constituent assembly a partisan affair. The emphasis must be on the functions that parties can perform in the assembly process - leadership, interest aggregation, elite accommodation. The challenge, of course, if parties cannot perform these roles, becomes one of finding other mechanisms to meet these functional requirements.

constituent assembly is the issue of voting. The general pattern of other constituent assemblies is that a modified form of parliamentary procedure is adopted allowing for three or four separate votes on the draft constitutional text, individual votes on the articles of the text, elaborate procedures for amendment, etc. This would seem to be directly applicable to the Canadian situation, especially if the delegates include members drawn from Parliament and the provincial legislatures. Finally, it is important to note that, among the cases we have reviewed, there are no examples of a system of weighted voting. In some instances, however, for example the Philadelphia Convention and the German Parliamentary Council, each state delegation had only one vote and, therefore,

limit the mandate of the constitutional convention to act as an advisory body to First Ministers who themselves would have to approve and ratify a new constitutional text.

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10 Ibid.

the general population - has been extremely rare in practice; directly-elected constituent assemblies were convened, for example in Nicaragua (1984) and in Namibia (1990). More

been indirectly elected or appointed by the constituent units in federations or confederations. Also surveyed in this study have been a variety of experiences with task forces, committees and commissions appointed to propose or to consult on matters of constitutional revision.

The uses of a constituent assembly, setting aside the important issues of how its members are selected, vary in comparative practice. They can be used at any of four separate stages of a constitutional revision, or serially through some or all of these stages:

divisions is not more but this phenomenon extends in particular to the

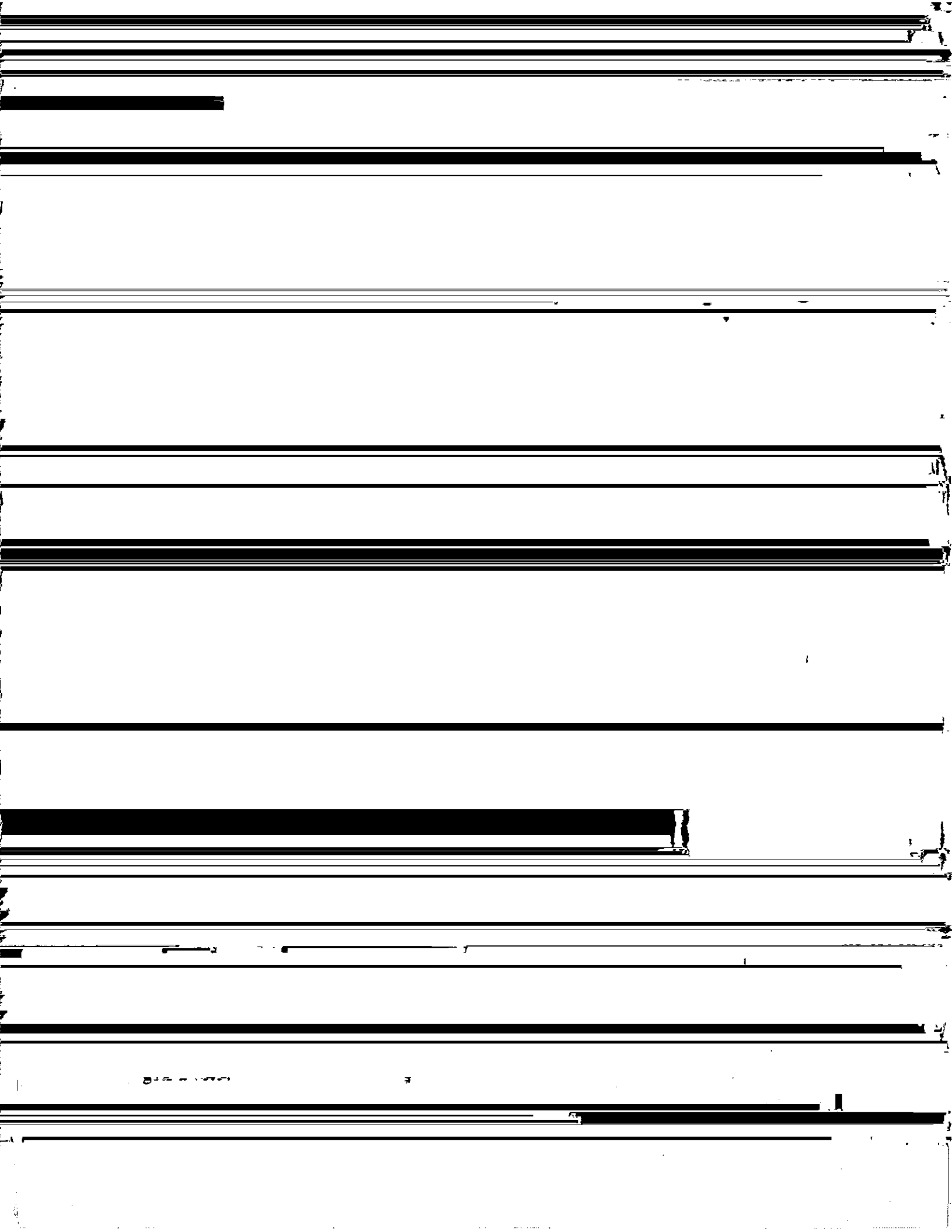
these bodies. This experience suggests that a citizen's nonpartisan forum established to draft a new constitution may not be successful in eliminating partisan debate. Democratic societies and processes seem always to gravitate towards partisan camps.

the comparative experiences surveyed in this study, tentative conclusions for the current Canadian context. The use of special bodies -

commissions - have been used extensively and hold some potential for providing a more open and participatory process of constitutional reform.

The success of these bodies depends crucially on the nature and degree of public consensus about basic constitutional objectives, a situation which, it may be argued, does





On such significant matters of process will not be easy and may pose an insurmountable  
initial hurdle for Canada to cross on its way to constitutional renewal.