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Article

Constitutional Abeyances: Reflecting on EU Treaty Development in Light of the Canadian Experience

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Abstract
The concept of constitutional abeyances, originally proposed by Foley (1989), describes aspects of a political system that are left deliberately ambiguous. Foley suggests that the maintenance and management of such areas of "settled unsettlement" are indispensable to prevent and resolve conflict about a polity's constitutional order. The concept of constitutional abeyances has been used productively to analyze constitutional development in Canada, especially the country's constitutional crises in the 1980s and 1990s. However, with very few exceptions, it has not been applied to analyze the EU and its treaty development. This article leverages the comparison to Canada to argue that a focus on constitutional abeyances, and their successful or unsuccessful institutional reproduction, provides fresh perspectives for analyzing European integration, including insights into the emergence of the EU's current crises and principles that might guide a political response.

Keywords
Canada; constitutional abeyances; EU; historical institutionalism; institutional development

Issue
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1. Introduction

Historical arguments loom large in the recent political science literature on the state of the EU. Two of the most widely debated contributions published over the past year, Kelemen and McNamara's (2022) analysis of EU institutional development through the lens of state-building and De Vries' (2022) analysis of EU foundational narratives and their contemporary impact, portray the EU's current crises, in large part, as the result of historical trajectories established early in the integration process. For Kelemen and McNamara, the fact that the EU's development was driven by market integration rather than by a military logic has led to an "uneven and unstable institutional architecture" (Kelemen & McNamara, 2022, p. 965), which explains the EU's difficulties in responding to challenges like the eurozone and refugee crises. For De Vries, the continuing importance of the EU's original narratives—that European integration is a peace project, forged in crisis, in which economic interdependence and legal integration trump politics—has made the EU ill-equipped to expand democratic participation, come to terms with increasing societal diversity, and address the populist threat (De Vries, 2022, pp. 4–11). Both contributions revive earlier discussions about the potential of historical institutionalism (HI) to explain European integration (Meunier & McNamara, 2007; Pierson, 1996). However, they shift the focus of EU-related HI scholarship from mid-range theorizing about specific EU policies, where the approach has been most productively applied in recent years (see Christiansen & Verdun, 2020), back to the realm of grand theories about the EU polity and its institutional development.

There is no question that the analysis of historical processes can make important contributions to our understanding of European integration and the state of the EU today. Nevertheless, there are two related weaknesses in the approach taken by Kelemen and McNamara (2022) as well as by De Vries (2022). First, as other

authors have pointed out, their arguments risk presenting an overly teleological interpretation of history that overlooks political contingencies and ongoing institutional adjustment (Eilstrup-Sangiovanni, 2022; Genschel, 2022; for a response see McNamara & Kelemen, 2022). Thelen (1999) advised HI scholars more than two decades ago to avoid models that are too open in their understanding of initial choices (*critical junctures*) and too deterministic in their conceptualization of subsequent institutional developments (*path dependency*). She emphasized that HI scholarship must instead focus on mechanisms of institutional reproduction—ongoing political processes through which historical institutional choices are reaffirmed or revised. Second, like many HI analyses of European integration, Kelemen and McNamara (2022), as well as De Vries (2022), focus primarily on decisions at critical junctures that positively resolve institutional questions in a particular fashion, for instance by setting up an EU body with certain competences or by establishing a certain integration narrative. By contrast, they do not put much emphasis on institutional questions that have been left unresolved in the EU's architecture. If they discuss such issues at all, these are presented as evidence of a deficit. This perspective overlooks that decisions to leave institutional issues unresolved may be made intentionally, and may be necessary to enable integration in the first place. HI analyses of European integration remain incomplete unless they also focus on such areas of institutional ambiguity and the mechanisms of their reproduction.

In this article, I make the case that these weaknesses can be addressed by introducing the concept of constitutional abeyances to the EU studies literature. The concept was initially developed by Foley (1989) in his analysis of British and American constitutionalism to describe aspects of a political system that are left deliberately ambiguous. As former European Commission President Jacques Delors hinted at when he described the EU as an "unidentified political object" (as cited in Commission of the European Communities, 1985, p. 8), the institutions of European integration, set up in a way that avoided conventional state- or international-organization-based political templates, contain many such ambiguities. Given these institutional characteristics, it is surprising that, except for a few isolated references in discussions of the EU's failed constitutional project (Baier, 2005; Hurrelmann, 2007), the concept of constitutional abeyances has not been systematically applied to the EU and its institutional development (the word "abeyance" as such does sometimes appear in EU policy, most prominently in the Stability and Growth Pact, but not in the sense in which it was used by Foley). By contrast, Foley's concept of constitutional abeyances has been used constructively to analyze Canadian constitutional development, especially the emergence and eventual pacification of Canada's constitutional and national unity crisis in the 1980s and 1990s (Bickerton, 2018; Cameron, 2015; Erk & Gagnon, 2000; Thomas, 1997). Following the logic of this thematic issue, this article leverages the comparison to Canada to argue that a focus on constitutional abeyances, and their successful or unsuccessful institutional reproduction, can make important contributions to EU studies as well. As I will try to show, this approach provides original perspectives on EU institutional and treaty development, including insights into the EU's recent crises and principles that might guide a political response.

My argument proceeds in five steps: Section 2 introduces the concept of constitutional abeyances, drawing on Foley (1989), and links it to the HI literature. Section 3 reviews how the concept has been used to make sense of Canada's constitutional history. Section 4 demonstrates that the constitutional abeyance perspective can also be fruitfully applied to EU treaty development. Section 5 returns to the EU's current state of affairs. It highlights how an analysis of constitutional abeyances helps us understand the EU's crises; it also discusses which lessons the abeyance perspective holds for the EU's crisis response.

2. The Concept of Constitutional Abeyances

Constitutional abeyances, according to Foley (1989, p. 129), are "settled unsettlements" in a polity's constitutional order. They refer to issue areas in a constitution on which "constitutional finality" (Foley, 1989, p. 57) has not been reached, but political actors have developed a tacit consensus to keep these unsettled questions in a state of irresolution to avoid constitutional conflict. Foley points out that such abeyances exist both in "unwritten" constitutions like the United Kingdom's and in codified constitutions like the United States'. What is important about constitutional abeyances is that they are recognized but not publicly communicated by political elites:

> Abeyances should not be thought of as empty constitutional "gaps" to be filled through the normal course of legal interpretation and political development. Neither should they be seen as constitutional "deals" by which particular issues are attended through a conscious form of mutual accommodation between contending parties, nor as "conventions" demarcating expected behaviour through informal but generally obligatory agreements. On the contrary, abeyances should be seen as akin to barely sensed disjunctions lodged so deeply within constitutions that, far from being susceptible to orderly compromise, they can only be assimilated by an intuitive social acquiescence in the incompleteness of a constitution, by a common reluctance to press the logic of arguments on political authority to conclusive positions, and by an instinctive inhibition to objecting to what is persistently omitted from the constitutional agenda. (Foley, 1989, p. 10)

Constitutional abeyances, in this understanding, rely on a combination of constitutional ambiguity with specific forms of elite behaviour, comparable perhaps to those commonly associated with the idea of consociational democracy, which serve to keep disagreements over constitutional matters from openly unfolding in society. The concept acknowledges what legal scholars have more recently come to call "constitutional pluralism," namely the existence of competing constitutional interpretations and claims within the same polity (Maduro, 2012; Walker, 2002). Yet while constitutional pluralists tend to applaud an open, "agonistic" deliberation between these different interpretations, a constitutional abeyance perspective argues that the stability of constitutional orders requires that the most fundamental constitutional disagreements are approached with deliberate strategies of conflict avoidance. In the words of Foley (1989, pp. 28, 82), these strategies consist of a "generally accepted protocol of inattention and evasion" through which "the sleeping giants of potentially acute political conflict are communally maintained in slumber."

Foley (1989) develops his understanding of constitutional abeyances in case studies of the British and American constitutions in periods of constitutional crisis: the conflict between royal and parliamentary rights under King Charles I in the United Kingdom, which led to the English Civil War (1642–1651), and the conflict between presidential and congressional rights in the United States during the Nixon presidency (1969–1974), which ended with the president's resignation (Foley, 1989, pp. 15–58). Foley interprets both constitutional conflicts as emerging from the head of state's disrespect of established constitutional abeyances and attempts to push executive powers into areas on which no constitutional settlement had been established (Foley, 1989, 59–82). He points out that, in both the United Kingdom and the United States, the established system of abeyances was resurrected after the end of Charles I's and Nixon's reign, as subsequent heads of state refrained from attempts to exploit patterns of "constitutional inexactitude and indeterminacy" (Foley, 1989, p. 58) to their political advantage.

While Foley (1989) does not use the language of HI, his analysis of constitutional abeyances is very much in line with the understanding of critical junctures, path dependency, and institutional reproduction presented by Thelen (1999) and widely adopted by HI theorists today. His first major insight is that, at critical junctures in which constitutional settlements develop, there also tend to be constitutional questions that are deliberately left unsettled, in abeyance, because any attempt at an authoritative resolution would risk undermining societal acceptance of the constitution. Secondly, he reminds us that, just like aspects of the constitutional order that have been authoritatively resolved, constitutional abeyances develop a path dependency, meaning that they become an essential element of a political system's functioning in the period after the original constitutional settlement. Thirdly, he emphasizes that this path dependency is not a mechanical process, but one that depends on political leaders, and societies more broadly, understanding the foundational abeyances on which their political system depends and intentionally working towards their preservation.

Much of Foley's (1989) analysis is, indeed, about the institutional reproduction of constitutional abeyances. He points out that the survival of a political system's abeyances is "ultimately attributable to [a] society's ability to contrive ways of coping with constitutional gaps without resorting to the precipitous strategy of trying to fill them" (Foley, 1989, p. 128). Yet while he provides historical examples of successful and unsuccessful reproduction of a political system's abeyances, he does not develop a systematic conceptualization of political strategies of abeyance management. He mentions that "the preservation and cultivation of abeyances" require political elites who understand their importance and the need to maintain them "not out of any self-denying sense of collective obligation, but out of a sophisticated grasp of self-interest" (Foley, 1989, p. 112). Somewhat vaguely, he also hints at the fact that abeyance management depends on the "political temper of the community" (Foley, 1989, p. 91). However, it is clear that, if one wants to understand how the institutional reproduction of constitutional abeyances occurs and under which conditions it can be successful, it is necessary to examine a greater number of constitutional orders from a comparative perspective.

3. Constitutional Abeyances in Canadian Constitutional Development

Canada is an instructive case study in this respect. The concept of abeyances enjoys considerable popularity in analyses of Canadian constitutional development (Bickerton, 2018; Cameron, 2015; Erk & Gagnon, 2000; Thomas, 1997). "It is Canadians," writes Hart (2001, pp. 164–165), "who have most enthusiastically adopted Foley's concept of constitutional abeyances, endorsing in their scholarship what seems to have worked, perhaps uniquely, in their practice."

The British North America (BNA) Act of 1867, which established the Canadian state, was based on an arrangement negotiated by the political leaders of the British North American colonies at the conferences of Charlottetown and Quebec in 1864. Its basis was the agreement on a federal system of government, which constituted an unfamiliar addition to a constitutional order otherwise modelled after the British Westminster system (Russell, 2004, pp. 12–33). The BNA Act contained detailed provisions on the division of legislative powers between the federal and the provincial level of government but left other crucial constitutional questions unresolved. Thomas (1997, pp. 60–71) lists 14 "unsettled problems," including, most importantly, the question of whether the francophone province of

Quebec has a special constitutional status compared to the other provinces, including a veto over constitutional amendments. This "great abeyance" (Thomas, 1997, p. 67) concerned the very nature of the Canadian state as either a compact between two founding nations—English and French Canadians—or a singular entity of (initially) four provinces with equal constitutional status. Indigenous nations and their rights were not considered in this context.

The institutional reproduction of the foundational constitutional abeyances occurred relatively successfully—that is, without leading to constitutional conflicts that threatened the architecture of the Canadian state—for more than a century, until about the 1970s. Scholars of Canadian constitutionalism have identified crucial mechanisms of abeyance management that explain this success. These include Canada's *institutional framework*, especially the system of dual federalism in which provinces can exercise their powers relatively independently from the federal government and in which federal-provincial interactions occur in informal and highly flexible settings. As Erk and Gagnon (2000, p. 99) put it, this system allowed for the maintenance of constitutional abeyances "not despite the absence of formal rules, but because of the absence of formal rules." It enabled "non-constitutional asymmetry" between provinces at the policy level, for instance on matters of immigration, which put Quebec in a position to implement policies designed to protect its distinct identity without explicitly raising the question of special constitutional status (Thomas, 1997, pp. 93, 115).

These factors were supplemented by patterns of *political leadership*. Over the first century of the Canadian state, federal and provincial leaders developed mechanisms of elite accommodation that served to counter disintegrative tendencies. These included the rotation between English and French-Canadian governor generals and other forms of proportionality in political appointments (Thomas, 1997, pp. 95–96). As Thomas (1997, pp. 95–99) explains, this system was protected by political leaders who understood the importance of abeyance maintenance—he singles out Prime Ministers John A. Macdonald, Wilfrid Laurier, and William Lyon Mackenzie King—and was propped up by patronage, which served as "the lubricant of the whole machine" (Thomas, 1997, p. 97). It was conducive to the emergence of what Erk and Gagnon (2000, p. 94) call "federal trust," "a feeling of confidence between federal partners that they will work together in good faith" even in the absence of constitutional clarity or consensus on policy issues.

These patterns of abeyance management reached their limits in the 1970s, due both to societal transformations and the rise to power of a new generation of political leaders (Bickerton, 2018, pp. 242–247; Russell, 2004, pp. 72–126; Thomas, 1997, pp. 137–173). The Quiet Revolution in Quebec challenged traditional power structures—including patterns of patronage—in that province and led to the emergence of a sovereignty movement, the election of separatist provincial governments for much of the following three decades (1976–1985 and 1994–2003), and two referendums on independence (1980 and 1995). At the federal level, Prime Minister Pierre Trudeau responded to the rise of Quebec separatism with a strategy designed to counter sub-state nationalism with a focus not on collective, but on individual rights (McRoberts, 1997). This approach culminated in the "patriation" of the Canadian constitution in 1982, a reform that included the creation of explicit rules for constitutional amendments and the addition of the Canadian Charter of Rights and Freedoms. This major constitutional transformation was explicitly opposed by the Quebec government and a majority of that province's parliament.

While not legally significant, Quebec's opposition was perceived as a stain on the legitimacy of the new constitutional arrangements (Cameron, 2015). This perception motivated Trudeau's successor, Prime Minister Brian Mulroney, to launch two further attempts at constitutional reform, the Meech Lake Accord of 1987 and the Charlottetown Accord of 1992 (Russell, 2004, pp. 127–189; Thomas, 1997, pp. 174–218). Negotiated between the federal government and all provincial governments, both accords can be seen as attempts by political elites to find formal constitutional resolutions for many of the issues kept in abeyance in the BNA Act and the 1982 reform, most importantly by drafting language to define a more explicit balance between the status of Quebec (which was to be recognized a "distinct society") and the equality between provinces (which was to be maintained by several across-the-board decentralization measures). The result of this compromise was constitutional documents that could easily be attacked from various angles; Meech Lake failed due to opposition in some provincial parliaments and Charlottetown was rejected in a national referendum. At the end of this era of "mega constitutional politics" (Russell, 2004, p. 72), the Canadian state narrowly avoided the breakup in the 1995 independence referendum in Quebec, in which 49.4% of the province's voters endorsed the separatist option.

What is remarkable from the perspective of abeyance management is that, after the divisive developments of the 1980s and 1990s, Canada found a way to escape further disintegrative dynamics in the following decades. The strategy that achieved this success can be described as one of updating Canada's constitutional abeyances. First, while the federal governments of Prime Ministers Jean Chrétien, Stephen Harper, and Justin Trudeau all ruled out comprehensive constitutional reforms, they made important institutional adjustments using strategies that circumvented veto players and avoided large-scale public debate (Bickerton, 2018, pp. 248–254; Lazar, 1998; Russell, 2004, pp. 237–273). This was done through ordinary legislation (e.g., the 1996 Constitutional Amendments Act, which indirectly

granted Quebec a veto over most constitutional changes), federal-provincial agreements (e.g., the 1999 Social Union Framework Agreement), treaties between the federal government and Indigenous nations (e.g., the 1999 creation of Nunavut), parliamentary resolutions (e.g., the 2006 House of Commons resolution symbolically recognizing Quebec as "a nation within a united Canada"), and through the creative use of constitutional provisions that make parts of the constitution which only affect one province relatively easy to change (e.g., the Trudeau government's acquiescence to Quebec's 2022 language law). Measures such as these resulted in important changes, including expanded accommodations for Quebec, while leaving Canada's foundational constitutional abeyances formally intact. Second, a new layer of abeyances was added through the 1998 Supreme Court's Secession Reference and the Chrétien government's subsequent Clarity Act (2000), which recognized a province's secession as a constitutional possibility, while leaving the process and the majority requirements deliberately murky (Bickerton, 2018, pp. 250–253; Erk & Gagnon, 2000, pp. 92–93; Russell, 2004, pp. 240–246). These changes seemed to address the controversies that dominated the era of "mega constitutional politics," and hence could be touted as constitutional progress, but their most important effect was that they provided a pretext for returning the question of secession to the realm of constitutional abeyance.

All this required, of course, a renewal of the tacit consensus among Canadian elites and broader society that large-scale constitutional engineering was to be avoided. Among elites, the near-death experience of the 1995 referendum, but also the realization within Quebec that a decisive societal majority for independence would not be forthcoming, contributed to this shift in perspectives. Among citizens, more than two decades of intensive engagement with constitutional questions resulted in a desire to move on to other issues of political debate which were arguably more directly relevant to people's lives and well-being. As Russell put it:

> There may be intellectuals who are keen to continue a political conversation about the great questions of who we are and who we could be, but most Quebecers, like most Canadians everywhere, have had enough of this stuff for the time being. (Russell, 2004, p. 247)

This brief review of the recent Canadian constitutional experience allows us to draw four key conclusions on the institutional reproduction of constitutional abeyances. First, the Canadian case suggests that abeyance management is facilitated by an institutional structure that minimizes interdependencies and maximizes flexibility in the interactions between different levels of government or centres of political power. Second, abeyance management requires political elites who are willing to engage in strategies of conflict avoidance, but it is also dependent on a broader societal climate characterized by a relative disinterest in big-picture constitutional or identity questions. Third, constitutional abeyances and the associated strategies of abeyance management are historically contingent; a "settled unsettlement" that has been stable for decades can be undermined by changes in societal preferences or elite strategies. Lastly, while the breakdown of constitutional abeyances results in a constitutional crisis, it is possible to resolve such a crisis through a renewal of abeyances if institutional, societal, and elite conditions are favourable.

4. Constitutional Abeyances in EU Treaty Development

How do these insights help us understand the EU and its treaty development? It is undisputed that the treaties that established the original European Communities in the 1950s left broad and significant constitutional questions unsettled. Wallace explained this point in a widely cited contribution four decades ago:

> A certain mythology has grown up around the "grand design" of European integration allegedly shared by the "far-sighted" statesmen who negotiated and signed the Treaties of Paris and Rome….In reality, the treaties registered a limited consensus among the signatories on areas where they were prepared to accept the transfer of authority as rational and useful, a series of bargains about the distribution of the anticipated benefits of economic integration, and a number of unspecific objectives and aspirations for future discussion on areas where the signatory governments could not agree on specific aims, means, or instruments. (Wallace, 1983, p. 411)

This absence of a "grand design"—the lack of agreement on what Foley, along with many contemporary EU scholars, would call the "finality" of European integration (Loth, 2015, pp. 73–74)—explains the unspecified character of the resulting political system. Wallace (1983) famously characterized it as "less than a federation," but "more than a regime." As no established polity model could serve as an institutional blueprint for the Communities, many other details of their political system were also left unsettled; these included the division of powers between the different Community institutions, the legal hierarchy between Community and member-state law, the scope of the member states' veto over Community policies, and the division of powers between them and the Community institutions in some of the policy fields addressed by the treaties (Craig, 2021). Yet, despite this ambiguity, Wallace pointed out that the Communities in the first 30 years of integration were characterized by institutional stability, which he attributed to:

> The perception by member governments and by their interested publics that the existence of such a new

> level of government…continues to serve a number of established interests and objectives; that its collapse or weakening would create risks and uncertainties which none would wish to take; and that the autonomy of national political systems (and economies) would be threatened by further progress on integration. (Wallace, 1983, p. 434)

In other words, crucial aspects of the political system resulting from European integration were productively held in abeyance.

The history of European integration is frequently told as one of successive "constitutionalization" of this initially non-specified political system (Rittberger, 2014; Rittberger & Schimmelfennig, 2007; Stone Sweet, 2004). This characterization refers, most prominently, to the decisions by the European Court of Justice (ECJ) in the cases of *Van Gend en Loos* (1963) and *Costa v. ENEL* (1964), which established the principles of direct effect and primacy of Community law, thus creating an explicit, quasi-federal legal hierarchy between the European level and the member-state level (Alter, 2001; de Witte, 2021; Stone Sweet, 2004). Other developments subsumed under the label of constitutionalization include the progressive empowerment of the European Parliament through a series of treaty reforms and inter-institutional bargains, as well as the establishment of explicit European-level human rights protections through a process of dialogue between the ECJ and member-state courts, later codified in the EU Charter on Fundamental Rights (Rittberger, 2014; Rittberger & Schimmelfennig, 2007).

Yet, while these developments have unquestionably brought greater constitutional clarity to aspects of European governance left unresolved in the founding treaties, they should not overshadow the importance of remaining areas of "unsettlement" in the EU's political system (Scicluna & Auer, 2023). Their importance was illustrated particularly clearly by the failure of the EU's proposed Constitutional Treaty—formally the Treaty establishing a Constitution for Europe—in 2005. The constitutional project was a response to the waning of the "permissive consensus" on European integration in the early 2000s (Hooghe & Marks, 2009; Statham & Trenz, 2013) and the perception among EU leaders that traditional patterns of elite accommodation in the EU were losing popular support. Germany's Foreign Minister Joschka Fischer, one of the main driving forces behind the project, portrayed an EU constitution as a mechanism to define the "finality of European integration" that would move the EU from a "confederacy" to a "federation" (Fischer, 2002). The Constitutional Treaty that emerged from the work of a constitutional convention and subsequent intergovernmental conference stopped short of defining the EU as a federation, but it did include significant steps towards greater supranationalism and a great deal of state-like nomenclature and imagery, from renamed legal acts ("laws" and "framework laws" instead of regulations and directives) and leadership positions ("foreign minister" instead of high representative) to provisions on EU-level fundamental rights and symbols. It also explicitly confirmed the primacy of EU law over member-state law.

These symbolically charged provisions were among the most important issues of contention when the Constitutional Treaty was put up for ratification in the member states, a process that ultimately resulted in the treaty's failure (Hurrelmann, 2007; Scicluna, 2012). This explains why the Lisbon Treaty, negotiated as a replacement after the Constitutional Treaty's demise, explicitly avoided legal provisions or language that suggested the development of the EU in a state-like direction. The framers of the Lisbon Treaty decided that, rather than directly addressing the "finality" of European integration, it was best to return this question to the state of abeyance.

The different ways in which the Constitutional Treaty and the Lisbon Treaty deal with the primacy of EU law provide a good illustration. As was mentioned previously, the idea that Community/EU law enjoys primacy over member-state law was first elucidated by the ECJ in the 1960s; it has since become an accepted principle of the EU's legal order. Nonetheless, high courts in the member states have never unconditionally accepted the principle; rather they have reserved the right, at least as an ultima ratio, to review whether EU law is in accordance with core principles of national constitutionalism (de Witte, 2021, pp. 216–223; Scicluna & Auer, 2023). In light of this dispute, it was significant that the Constitutional Treaty explicitly confirmed the principle of primacy. Its article I-6 read: "The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States" (Treaty establishing a Constitution for Europe, 2004, p. 12). The Lisbon Treaty contains no unequivocal statement of this kind. Primacy is not addressed in the treaty itself, but only taken up in a declaration appended to the treaty (Declaration No. 17), which states:

> The Conference recalls that, in accordance with the well-settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by said case law. (Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, 2007, p. 256)

From the perspective of abeyance management, what matters about this change is not only that declarations appended to EU treaties are not legally binding, but also that the revised language appears in a much less prominent place in the treaty document and that it makes explicit reference to qualifications through case law, thus

characterizing the principle of primacy as a matter subject to judicial interpretation and demarcation.

The example of the Constitutional Treaty demonstrates that an analytical focus on constitutional abeyances and their institutional reproduction can be useful to make sense not only of Canadian constitutionalism but also of EU treaty development. The parallels between Canada's era of "mega constitutional politics" and the EU's failed constitutional project are obvious. In both cases, aspects of the political systems that had long been held in abeyance became increasingly contested in society and were subjected to growing criticism from political elites. This prompted attempts to clarify constitutional matters previously left unsettled, but these failed as the societal consensus on the proposed reforms proved insufficient. The parallels also extend to how political leaders responded to the failure of the proposed constitutional reforms, namely by abandoning attempts at constitutional clarification and seeking to return contested constitutional issues to the state of "settled unsettlement." We can conclude that constitutional abeyances and their institutional reproduction are key dimensions of constitutional development in both Canada and the EU. However, it seems that efforts to defuse constitutional conflict have been more successful in Canada than in the EU, where a sequence of further crises with constitutional ramifications—including the withdrawal of the United Kingdom, the eurozone and refugee crises, as well as conflict over rule-of-law violations in some member states—have developed since the entry into force of the Lisbon Treaty.

5. A Constitutional Abeyance Perspective on EU Crises

How can an analysis based on the concept of constitutional abeyances make sense of these recent crises of European integration? And in what respects does such an account differ from the contributions by Kelemen and McNamara (2022) and De Vries (2022) cited at the beginning of this article?

In line with other HI-inspired approaches, a constitutional abeyance perspective emphasizes that the recent crises of the EU can only be understood in the context of the EU's longer-term institutional development. However, while the analysis by Kelemen and McNamara (2022), as well as De Vries (2022), views these crises as belated effects of impactful decisions taken at critical junctures in the past, a constitutional abeyance perspective presents them as evidence of *present-day problems in the institutional reproduction of foundational abeyances* that have traditionally sustained political acceptance for the EU's institutional architecture among member-state leaders and societies. For instance, the Brexit process in the United Kingdom resulted at least in part from a failure to keep in place and reproduce the abeyances that had for decades allowed to taper over differences between British and continental perspectives on the nature of European integration, in particular on whether the EU should be seen mainly as a single market or as a much deeper political union (Westlake, 2017). The eurozone and refugee crises showed that the abeyances that had allowed for the creation of core EU policies in the absence of member-state consensus—introducing the Economic and Monetary Union without settling the question of fiscal federalism, creating a Common European Asylum System without agreement on shared responsibility for refugee reception—could not be successfully reproduced once these policies were subjected to external stress and domestic political contestation (Schimmelfennig, 2018). The conflicts over rule-of-law violations in Hungary and Poland demonstrate that legal uncertainty about whether the EU is authorized to enforce minimum standards of democracy in its member states can no longer be ignored as a purely hypothetical question once authoritarian-nationalist political leaders control the highest offices of member-state government (Scicluna & Auer, 2023). In short, all these crises are about constitutional abeyances whose institutional reproduction has become problematic. In analogy to the Canadian case, the reasons for this development can be traced to both societal transformations—the politicization of European integration, but also new policy challenges such as refugee movements into EU territory—and to the emergence of a new generation of political leaders, particularly authoritarian-nationalist governments at the member-state level.

In addition to shedding light on the emergence of EU crises, an analysis of constitutional abeyances and their reproduction can also inform thinking about political responses to the EU's current challenges. The analyses cited at the beginning of this article converge in a call for path-breaking change in European integration, away from traditional patterns of accommodation and depoliticization, and in the direction of full-fledged democratic statehood (De Vries, 2022, pp. 11–13; Kelemen & McNamara, 2022, pp. 981–984). A constitutional abeyance perspective would point to the failed constitutional project as evidence of the questionable merits of this approach. Instead of advocating large-scale constitutional renewal, such a perspective would seek to de-constitutionalize the conflicts in question. It would ask if reforms can be pursued at the policy level to protect, update, or renew constitutional abeyances whose institutional reproduction has become precarious. Once again, the Canadian case can be constructive to guide this approach—but we can also find examples in the EU's responses to its recent crises. For instance, in the eurozone crisis, setting up the bailout funds outside of the EU's regular institutional structure made it possible to support struggling member states without formally moving the EU to a system of fiscal federalism. In the refugee crisis, the focus on fortifying external EU borders, while undoubtedly problematic from a humanitarian perspective, has served to ease pressures on the member states to come to an intra-EU agreement on the extent

of solidarity in hosting refugees and processing asylum claims. And, in the rule-of-law conflicts with Hungary and Poland, withholding payments for programs under the EU budget has proven a more effective approach than purely legalistic strategies. From a constitutional abeyance perspective, these forms of crisis response are not just examples of pragmatic (perhaps even "dirty") compromise, rather they constitute elements of a strategy of abeyance management aimed at protecting the stability of the EU's institutional order.

An abeyance management approach to the EU's crises has limitations and costs. First, there is no guarantee that it will indeed be possible to defuse constitutional conflict. As the analysis of the Canadian case shows, the maintenance, renewal, and updating of constitutional abeyances are facilitated by institutional settings that minimize formal interdependencies between different governments and political levels; it also requires political leaders and societies willing to pursue (or at least condone) accommodative strategies, instead of seeking to escalate the constitutional conflict. In all these respects, the constellation in the EU is complicated. While recent governance innovations have promoted forms of "loose coupling" between political levels that encourage flexibility (Benz, 2015), the EU's multilevel system remains reliant on collaboration between member-state governments and EU institutions. This challenge is compounded by the rise of political leaders in several member states who relish confrontation with the EU for short-term political gain, as well as by the entrenchment of Euroscepticism as a political force across the Union. This poses challenges for abeyance management. Second, an abeyance management approach can also be criticized on normative grounds. It may imply that important democratic or human rights principles that are widely shared in the population, but not consensual, cannot be as vigorously or systematically pursued as many citizens would desire. From the perspective of abeyance management, this is the cost that must be paid if one wants to hold a political system together, especially in diverse societies.

6. Conclusion

This article has argued that the concept of constitutional abeyances can provide a helpful addition to research in EU studies, especially HI-inspired work that seeks to make sense of the EU's current state of affairs by examining historical trajectories of European integration. The recent scholarship by authors like Kelemen and McNamara (2022) or De Vries (2022) has generated thought-provoking arguments about the reasons behind the EU's recent crises and the best ways for the architects of European integration to respond. The concept of constitutional abeyances can add to this literature by highlighting how areas of "settled unsettlement" in the EU's institutional architecture have historically contributed to the stability of the EU's political system. The concept opens the door for an analysis of why the institutional reproduction of these areas of deliberate ambiguity has become increasingly precarious, how this dynamic has contributed to the crisis tendencies noticeable in the EU today, and under which conditions—if at all—the EU's foundational abeyances can be restored.

As an entity whose constitutional structure deliberately eschews conventional templates, the EU is inevitably faced with instances of constitutional unsettlement. These institutional characteristics of the EU make the concept of constitutional abeyances particularly attractive for EU studies. However, the concept has, up to now, not been systematically applied to the EU and its treaty development. To demonstrate the potential of a constitutional abeyance perspective, this article, therefore, turned to the example of Canada and scholarship on its constitutional development. In the Canadian case, the country's constitutional history over the past five decades is frequently told as a sequence of foundational abeyances becoming increasingly precarious, governments trying in vain to replace them with more precise constitutional texts, only to then return to an abeyance management strategy that put some of the most disruptive constitutional conflicts back to sleep. While there are obvious parallels to the EU case, it has not been my ambition to suggest that the Canadian story can necessarily be replicated in the EU context. What I hope to have shown is that a focus on constitutional abeyances provides fresh analytical perspectives that can also inform research on the EU's institutional development, including a distinct set of strategies for responding to crises and moving European integration forward.

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Conflict of Interests

The author declares no conflict of interests.

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