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Editorial

Merits and Challenges of Comparing the EU and Canada

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Abstract
In the last decades, EU studies have increasingly broadened in terms of their theoretical and methodological approaches. By now, comparative concepts and theories are an integral part of studying the EU, which aids the study of its polity, politics, and policies. Despite the indisputable peculiarity of the EU as a political system, many scholars have stressed the value of using comparative approaches to study it. This thematic issue aims to investigate a specific case—the political system of Canada—as to its merit for comparison with the EU. While both systems have been described as sui generis in the past, forming a class of political system by themselves, recently the similarities between both have been stressed. This thematic issue gathers articles that compare different aspects of these two systems—focusing on polity, politics, and policy—to reap the benefits of the comparative approach and gain new insights into the functioning of both systems. The contributions to the thematic issue show the benefits that both Canadian political science and EU studies can gain from engaging in comparative exercises.

Keywords
Canada; comparative politics; comparative turn; EU; EU studies

Issue
This editorial is part of the issue "United in Uniqueness? Lessons From Canadian Politics for European Union Studies" edited by Johannes Müller Gómez (Université de Montréal / Ludwig Maximilian University of Munich), Lori Thorlakson (University of Alberta), and Alexander Hoppe (Utrecht University).

1. Introduction

Over the last 50 years, the EU and its institutional predecessors have undergone an unprecedented evolution as a political system. The academic study of this political entity has also changed profoundly, moving beyond its original foundations in IR and regional integration studies to increasingly embrace tools and approaches borrowed from comparative political science (Jupille & Caporaso, 1999; Keeler, 2005). Today, comparative concepts and theories are an integral part of studying the polity, politics, and policies of the EU (Jupille, 2006; Keeler, 2005; Kreppel, 2012; Tortola, 2014). As part of this development, comparative federalism has also found its way into the study of the EU (Börzel, 2005; Fossum & Jachtenfuchs, 2017; Kelemen, 2003; Sbragia, 1993).

The use of comparative methodology to analyze the EU is less common, yet many scholars have analyzed (parts of) the EU's political system comparatively—especially with a focus on the US federal system (for instance, Fabbrini, 2005; Menon & Schain, 2006; Nicolaidis & Howse, 2001). While the US was an early and natural system for comparison (Tortola, 2014), comparisons with other federal systems, such as Canada, are gaining prominence (for instance, Crowley, 2004; Verdun, 2016).

2. Comparing the EU and Canada

We argue that the comparison with Canada offers both empirical and theoretical opportunities. First, the development of Canadian federalism and the functioning of Canada's political system invites a comparison with the EU from an empirical perspective. Despite relevant differences, Canada and the EU show structural similarities and face similar fundamental challenges (Crowley, 2004; Fossum, 2018). They are both multi-level systems that have undergone constitutional transformations as well as treaty reforms and both systems face constitutional contestation and a commitment to accommodate differences and diversity. This raises many possibilities for comparison that include intergovernmental relations and the role of executives, executive–legislative relations, accountability, constitutional asymmetries and opt-outs, the recurrent calls for secession and exit, the struggle of balancing "self-rule" and "shared rule," and contestation of the nature of the respective union. On the policy side, the comparison invites questions regarding policy coordination and implementation and managing the differential regional impacts of federal policies, especially given the shared grand policy challenges, such as migration and refugee policy, international trade, and climate change.

Second, there are commonalities in the development of disciplinary approaches in Canada and the EU. Like EU research, IR approaches have found their way into Canadian research to help explain intra-Canadian dynamics (Simeon, 1972). Also, while both the study of Canadian and EU politics have generated introspective, sui generis, and sometimes insular approaches to their polities (Simeon, 1989; Vipond, 2008), both have recently embraced comparative approaches (Keeler, 2005; Kreppel, 2012; Turgeon et al., 2014; White et al., 2008). The evolution of the EU as another attempt to reconcile unity and diversity, its institutional structures, a similar engagement in constitutional engineering and assessment, and the challenges the EU has in common with Canada have encouraged Canadian political science to deal with the EU in a comparative perspective (Simeon, 2002; Vipond, 2008).

The aim of this comparative study of the EU and Canada is twofold: First, the thematic issue assembles comparative studies focusing on (parts of) the political systems of the EU and Canada to provide new insights into how the two federal systems work. Second, based on these empirical studies, the contributions of this issue discuss how comparative analyses can improve our understanding of the EU and Canada and what lessons, merits, limits, and risks of the comparative method are in the study of different aspects of these unique political systems.

The studies in this thematic issue demonstrate that the EU and Canada offer meaningful comparative lessons with regard to their constitutional and institutional setups (polity), their actors and political processes in a multi-level system (politics), and their attempts to tackle the challenges they face (policy). They underpin our argument that EU studies should not only apply concepts and theories from comparative politics but also explicitly compare the EU with other political systems to gain insights into both the EU's political system and multi-level governance in general.

3. Contributions to the Thematic Issue

Contributions to this thematic issue compare Canada's and the EU's polities, politics, and policies to test the value and benefits of the *comparative turn* in Canadian political science and EU studies.

Both the EU and Canada are characterized by the diversity of their constituent units and the contested nature of their polities. Given these conditions, Fossum (2023) tackles the question of how these multi-level systems can be characterized in conceptual terms. Starting from a federalist perspective, the author locates the comparative potential of both systems in their contested character. Rather than focusing on differences and classifying the EU and Canada as a multi-level system and a multinational federation respectively, Fossum argues it is the internal contestation of the federal entity that sets both systems apart from "classical" federal systems as the US. Fossum develops the notion of "poly-cephalous [i.e., multi-headed] federation" to stress the similarities of both systems. It is this constant contestation, observed in instances of constitution-making, that opens up valuable venues for comparison.

With a similar focus on contestation and conflict in the building of a constitutional order, Hurrelmann's (2023) contribution innovatively applies the concept of "constitutional abeyances" from Canadian politics to the EU. These describe instances of "settled unsettlement" (Hurrelmann, 2023, p. 242), allowing actors to proceed with constitutional integration despite disagreement, making use of ambiguity in constitutional and institutional arrangements. This perspective not only sheds new light on the underlying reasons for the current multi-crisis in the EU but also suggests a cautious approach towards calls for grand reform of the EU constitutional system, advocating it at the policy level to re-establish endangered abeyances. Ultimately, they keep the system stable despite persistent disagreement between its constituent polities.

Most of the contributions in this thematic issue compare the EU and Canada's policy action in policy fields ranging from migration to health to social policy, covering many conflicted and salient questions and challenges facing the two systems. Reflecting the recent emphasis by both Canadian and EU political leaders on value-based polities, these articles often link policy analysis to the adherence to basic values such as inclusion, labor, and refuge rights, and probe the impact of the multi-level system on outcomes. Felder and Tamtik (2023) analyze the role of inclusion in student mobility policy outcomes.

Applying a policy-framing perspective and focusing on the federal Canadian government and the Commission's role in these policies, they find that while inclusion has been an underlying value in both, it has not been a goal in and for itself, especially in the European case. Accommodating sub-unit preferences in policy design as well as the multi-level character of policy implementation has instead allowed political goals, such as furthering integration (in the EU case), and economic objectives to take center stage. The study also opens interesting perspectives on the ability of different policy goals to drive integration forward.

Examining the impact of crisis on migration policies, Xhardez and Soennecken (2023) show that both polities reacted to the Russian invasion of Ukraine with temporary protection schemes to host Ukrainian refugees. While the EU response showed unprecedented unity among EU member states when it comes to migration policy, the Canadian approach departed from the historical prevalence of permanent refugee protection. Despite apparent similarities between these responses to a common crisis, the authors detect discrepancies and identify how political and historical contexts shape these differences.

The contributions by Gebert (2023) and Fierlbeck (2023) focus on the dynamics of multi-level policy design and implementation. Gebert (2023) analyses a topical and contested policy issue: labor rights for platform workers. Analyzing different approaches to the classification of platform workers in the EU and Canada, he identifies how the peculiarities of policy implementation in federal/multi-level systems have so far prevented comprehensive social security for platform workers. In health care, where the European Commission responded to the pandemic by taking a more important role in a policy field of so far limited integration, Fierlbeck (2023) finds that these dynamics in the EU have led to greater health policy centralization than in Canada. While the case of the EU seems to support neo-functionalist approaches to political integration, the Canadian case represents a contradiction. Here, the nature of the crisis, historical and political preconditions, and the political culture within the polity limit the applicability of a neo-functionalist logic. As a result, there is more centralization in this new area of health policy in the EU than in a federal state.

Lastly, two articles analyze contestation and conflict in the multi-level politics of international agreements using the cases of CETA ratification (Broschek, 2023) and the implementation of the Paris Agreement (Müller Gómez, 2023). They focus especially on conflict emerging in the sub-federal levels of the political systems. Broschek (2023) analyzes the postponed ratification of CETA due to the resistance of a regional government in Belgium, one of the most prominent cases of multi-level policy conflict in recent EU history. He finds that joint decision-making among constituent units was not the only format of coordination available and that other successful forms of intergovernmental coordination prevailed, underscoring the importance of the federal institutional configuration. The inclusion of the Canadian case in his two-level analysis which takes into account that the EU incorporates both unitary and federal constituent units has delivered valuable insights in this respect, widening the focus for analyzing joint decision-making in trade policy.

Müller Gómez (2023) analyzes how federal systems fulfill international commitments. He traces the means of conflict resolution used by the federal government (supranational level) to ensure support and compliance by sub-units and finds that two structural conditions determine the success of side-payments: the initial willingness of sub-units to comply and the absence of alliances of powerful sub-federal entities trying to resist implementation.

Taken together, the studies in this thematic issue show how valuable a comparison between the EU and Canada can be in widening our knowledge of policies, political processes, and institutional design of both entities. Taking cautious account of the differences between the two polities, the contributions show that not only is comparison methodologically possible and desirable, but empirically fruitful, as well. Constitutional-level analyses allow us to develop new and conceptually innovative perspectives on the struggles of political and legal integration in both multi-level systems and, potentially, beyond. Policy analyses deliver valuable insights on partly similar problems of policy design and implementation. The articles have produced non-idiosyncratic insights and pointed out the various parallels between Canada and the EU, debunking the sui generis myth in the study of both systems. They demonstrate how comparing constitutional and institutional issues, as well as policy matters, can advance the theorizing and understanding of multi-level systems.

This thematic issue has sought to contribute to a research program that synergizes EU studies and comparative politics. Arguably, both the absence of structured interaction of comparativist scholars within the EU studies community and the insulation of EU studies as a "discipline" of political science and related fields are in parts founded in the absence of such a program. By demonstrating the benefits for EU studies in engaging in comparative exercises, we hope to make a valuable contribution to the advancement of this discipline.

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Conflict of Interests

The authors declare no conflict of interests.

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Article

Multiheaded Federations: The EU and Canada Compared

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Abstract
The purpose of this article is to assess the merits of comparing the EU and Canada from a federal perspective. The point of departure is that both are federal-type entities that represent deviations from the standard or mainstream American model of federalism. That has given rise to alternative conceptions, multilevel governance for the EU, and a multinational federation for Canada. The article discusses the limitations of each such notion and instead argues for the merits of seeing both as different versions of multiheaded federation which is a useful analytical device for analyzing contestation over federalism within federal-type entities. This notion directs our attention to those with power and in the position to shape the political system's federal-constitutional nature and design, which normally happens in the realm of constitutional politics. It is the fundamental struggle over sovereignty within a federal-type structure that gives rise to the notion of a multiheaded federation—there are multiple heads because there is no willingness to accept a hierarchical arrangement. The notion of a multiheaded federation is particularly suitable for capturing (de)federalisation processes and dynamics.

Keywords
Canada; European Union; federalism; multiheaded federation; multilevel governance; multinational federation

Issue
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1. Introduction

The purpose of this article is to assess the merits of comparing the EU and Canada from a federal perspective. The point of departure is that both are federal-type entities that represent deviations from the standard or mainstream American model of federalism (Baier, 2005; Hueglin, 2013; Hueglin & Fenna, 2015). Such deviations have spurred analysts to develop alternative models, which are important to examine in order to clarify similarities and differences between the EU and Canada from a federal perspective. The EU is often depicted as a system of multilevel governance, a mode of political organisation whose relationship to federalism is at best ambiguous. Canadian scholars have long discussed what kind of national community—if any—Canada constitutes (see, for instance, the contributions in Simeon, 1977). Today there is a strong penchant among analysts for depicting Canada as a multinational federation (see, for instance, Gagnon & Iacovino, 2007; Gagnon & Tully, 2001; Kymlicka, 1995; Norman, 2006). In effect, McRoberts (2001, p. 694) has argued that "(m)ultinationalism has become no less than an important and influential Canadian school of political thought." In this connection, it is interesting to note that whereas the EU is clearly also multinational, there is little appetite for depicting the EU in federal terms (for an overview of this body of literature, see Fossum & Jachtenfuchs, 2017). Thus, the innovative notion of multinational federalism has found little fertile ground in the EU literature (exceptions are Auer, 2005; Oommen, 2002).

This article argues that the most fruitful way of comparing Canada and the EU from a federal perspective is to see the two as distinct and separate versions of a broader category of "multiheaded" federations. That claim was initially made in a previous article (Fossum, 2017), which was however mainly focused on the EU and did not elaborate on why the notion of multiheaded federation is more apt for depicting Canada than the model of multinational federation. Neither did the previous

article clarify the difference between multiheaded federation and multinational federalism: the former is an attempt to depict where a given political entity is located within a process of federalisation; the latter sees multinational federalism as a model of federalism or federal democracy. Proponents of multinational federalism portray it as a viable alternative to the American model of federalism. My notion of a multiheaded federation has no such pretence. It sees a multiheaded federation as a useful analytical device for analyzing contestation over federalism within federal-type entities. This article (in contrast to the earlier which focused on institutional arrangements) zooms in on those who have power and who are in the position to shape the political system's federal-constitutional nature and design, which normally happens in the realm of constitutional politics.

This article therefore discusses the EU and Canada as different multiheaded federations with specific reference to constitutional politics. The issue is not constitution making as such but what constitutional politics tells us about federalism. The presence of different federal visions spurs intergovernmental interaction and negotiations. This focus on process stems from the fact that there is no agreement on how to institutionally and constitutionally entrench the key federal tenet of shared rule combined with self-rule (Elazar, 1987). The category multiheaded federation depicts dynamic processes and draws inspiration from Friedrich's (1968) notion of federalisation. A hallmark of a multiheaded federation is that there will always be one or several governments that contest the terms of federation and refuse to accept a federal constitutional hierarchy. The lack of agreement on a shared federalism entails that contentious issues of constitutional salience cannot be left to the courts, but have to be discussed by the heads of governments (in Canada the federal PM and the provincial premiers, and in the EU the heads of states and governments) in complex systems of intergovernmental negotiations. Such systems are marked by a clear disjuncture between federalism and federation (this distinction is defined in Section 2). We need to focus on how systems of intergovernmental relations hold such entities together but, at the same time, we also need to keep in mind that such systems operate through a diplomacy-type logic and are unto themselves not well-suited for fostering a federal culture (the federalism aspect). Federal systems that rely on intergovernmental relations for stabilising their constitutional orders are likely to have to live with an element of instability.

In Section 2 I clarify how and in what sense the notion of multilevel governance is inadequate for explicating the EU's federal traits.

2. The EU as a System of Multilevel Governance?

Many analysts refer to the EU as a system of multilevel governance. That is hardly surprising given that most political systems operate with more than one level of governance. Nevertheless, there is also within the EU debate a more specific understanding of multilevel governance. Hooghe and Marks (2003) clarify that by identifying two basic types of multilevel governance. What they label as the first type, or MLG I, refers to the familiar notion of the federal state. The second type, or what they refer to as MLG II, is composed of many flexible and task-specific jurisdictions (Hooghe & Marks, 2003, pp. 236–237). Since the EU is not a state, the debate on the nature of the EU veers towards what Hooghe and Marks (2003) label as MLG II. Such a notion of multilevel governance is distinct from what we find in the state (whose mode of governing is marked by a hierarchically based form of territorial rule). Accordingly, EU-type multilevel governance is seen as marked by less hierarchy, competencies that overlap across governing levels, and interaction not only across levels of governing but also across the public-private divide. Multilevel governance is less clearly territorially defined given that it entails extensive interaction across the national-international divide (Bache & Flinders, 2004; Enderlein et al., 2010; Lépine, 2012; Marks et al., 1996; Piattoni, 2010).

If the EU is understood in this narrower sense as akin to a system of transnational networked governance, then that would not appear to be easy to square with federalism, given that basically all contemporary federations are states. One response to that objection would be to note that federalism is not intrinsically linked to the modern state, given that it clearly predates the development of the modern state. Historically speaking, federalism is not premised on state sovereignty. As Daniel Elazar has noted, "the federal idea and its applications offer a comprehensive alternative to the idea of a reified sovereign state and its applications" (Elazar, 1987, p. 230).

A second response would be to query whether networked governance as a distinct mode of governing is a suitable depiction of the EU as a political system. If we look at the EU, we see that it is a composite of supranational and intergovernmental traits (Fabbrini, 2015). What we may term the Community system is composed of the EU's internal market and flanking areas. Here, there is a hierarchical structure in place, especially regarding the EU's legal system, or what Joseph Weiler as early as 1981 labelled "normative supranationalism" (Weiler, 1981). This he noted stood in clear tension to "decisional supranationalism," or political decision-making, which was less supranational. Over time, EU decision-making has become more supranational but not across all issues/areas. Important elements of so-called "core state powers" pertaining to fiscal, security, and defence policies stand out in being largely determined by intergovernmental arrangements (Genschel & Jachtenfuchs, 2014).

There are several implications of this for federalism. Since the EU's legal structure has not only clear supranational traits but, as Weiler noted in 1981, has clear affinities with federal systems, and the EU has consolidated its decision-making system in a supranational direction, we

cannot dismiss federalism as a relevant notion for depicting the EU (this is forcefully argued by Larsen, 2021).

The argument thus far has shown that the EU has federal traits, even if it falls well short of being a full-fledged federation (for assessments of the EU's federal nature, see for instance: Bednar, 2009; Benz & Broschek, 2013; Burgess, 2006; Elazar, 1987; Fabbrini, 2015; Filippov et al., 2004; Fossum & Jachtenfuchs, 2017; Heidbreder, 2022; Kelemen, 2004; Larsen, 2021; Laursen, 2011; Nicolaidis & Howse, 2001; Verdun, 2015; Weiler, 2001). The EU should induce us to think less in binary federal- non-federal terms and more in terms of whether the EU is moving towards or away from federalism. In this sense, we need to keep in mind that there is an important distinction between federalism and federation. Federalism focuses on constitutive questions pertaining to the nature and justification of the political community, and the terms of federal co-existence, and as King (1982) notes, compels us to check whether the institutional structure (what King would refer to as the federation component) embodies and gives sustenance to the principles, values, and mentalities of the distinct political culture that we associate with federalism. These are issues that very often involve power struggles, such as struggles over the nature and status of the polity, including its territorial basis and boundaries to the external world, as well as questions of what type of community it is and whose community it should be. These are precisely the issues that are at the heart of contentions over the EU, but they are not what multilevel governance is concerned with.

In addressing these issues, we need to pay attention to federalism, not simply in terms of the EU's structural composition but in terms of the type of community, the mode of identity, and the political culture it embodies. Multilevel governance focuses on structure and process but ignores the important questions that *federalism* brings up regarding principles, values, identities, and political culture.

The EU in effect suggests that there is no one-on-one relationship between a federal mindset or mentality on the one hand and a federal-type structure on the other. The two may develop at different paces, and perhaps even in different directions. An important indicator—and determinant—is how those in charge of determining the EU's future, the heads of states and governments depict the EU and whether their words and actions move the EU in a federal or de-federal direction. In order to establish that, we need to establish whether they espouse a federal mindset or mentality, and whether their actions move the EU in the direction of a system based on a federal-type combination of shared-rule and self-rule or not.

The notion of the EU as a multiheaded federal-type structure is given added credence by recent developments during the last decade and a half of "poly-crises" (Zeitlin et al., 2019). Crises and emergency politics are generally "the hour of the executive" and that also applies to the EU. White (2022) argues that there are several features of the EU that make it particularly vulnerable to the forms of politics of exceptionalism that we see occurring during crises and emergencies. Ironically, the diffusion of power and the low degree of formal codification that multilevel governance sees as defining traits of the EU entail that "there is little to deter executive agents, singly or collectively, should they seek to improvise…[and] the diffusion of power creates an incentive to concentrate it when difficult situations arise" (White, 2022, p. 785). EU emergency politics concentrates power in the hands of executives. Nevertheless, EU crisis handling has a form and shape that gives added credence to EU "multi-headedness." That is due to the fragmented character of the EU executive (White, 2020). It consists of the European Council, the Commission, and parts of the Council (when acting as an executive in security and defence policy). The European Council which is at the heart of the multiheaded federation account has played a prominent role in the handling of all the crises that the EU has undergone during the last decade and a half. That is because it is composed of the heads of states and governments, those actors that can unleash the necessary power and capacity to deal with crises and emergencies, given the fiscal and other capacity constraints that mark the other institutions at the EU-level. Within the European Council, each head of state or government has veto; hence decisions are often reached after long and protracted negotiations and are often suboptimal compromises, as the notion of "failing forward" suggests (Jones et al., 2016).

From a federal perspective, the implication is not that there is a return of power from the EU to the member states as we should expect from an intergovernmental perspective. Emergency politics as crises generally tend to foster more integration but this takes place through a new interplay between key member state executives and EU-level experts and executives. Thus, there is a need for a different conceptualisation of the EU, one that takes heed of its distinctive supranational legal-institutional traits and at the same time pays sufficient attention to the central role of national executives in giving shape and direction to the EU's development. The best way of making sense of these traits is to understand the EU as a fledgling multi-headed federation.

Thus far we have seen that the notion of multilevel governance is not a very apt category for analysing the challenges that the EU faces. Neither does it help us to zoom in on those in charge of determining the EU's federal nature and direction. The next section discusses the other alternative conception to the dominant American model of federalism, namely multinational federalism. This model has gained strong support among Canadian academics, who depict it as a model of federalism. The analysis will show that the proponents overstate their case. Canada is still a work in progress, so the more realist depiction of Canada as a multiheaded federation still applies.

3. Canada as a Multinational Federation?

Canadians have for many decades obsessed over their country's federal nature and vocation and how to square that with multiple nationalities (Russell, 2019). This can be traced back at least to Lord Acton who noted that "the co-existence of several nations under the same State is the test…of its freedom [as well as] one of the chief instruments of civilization" (LaSelva, 1996, p. 46)

In many ways the notion of Canada as a distinct category of multinational federation draws on this conception of Canada as made up of multiple nationalities. It is not obvious that such a label should be very fitting for Canada, if we look at Canada's Constitution, the BNA Act 1867. This was so centralised that some analysts considered it to represent a mere quasi-federal constitution (Wheare, 1946/1963, as cited in Hueglin, 2021, p. 62). Canada's historical development does not correspond with what Wheare argued. Canada today is one of the most decentralised federations in the world (https://www.constitutionalstudies.ca/2019/07/centralization-and-decentralization), even if a decentralised federation is not necessarily multinational. We need to take a brief historical look at the conceptions of Canada that have been bandied about in order to get a better sense of how well the notion of a multinational federation captures Canada's defining traits.

The label multinational federation is used to designate a federal entity that contains multiple nationalities, each of which espouses a national community and a national mode of identity. This first of James Tully's list of four components of a multinational *democracy* entails that:

Since the nations of a multinational democracy *are* nations, their members aspire to recognition not only in the larger multinational association of which they are a unit, but also to some degree in international law and other, supranational legal regimes. (Tully, 2001, p. 3)

The second trait is that they contain both federal and confederal traits. The third is that they are constitutional democracies, and the fourth and final is that they are multicultural.

A properly functioning multinational federal state presupposes two sets of congruence: that the underlying nations are similar in nature, structure, and political organisation; and that there is some form of congruence between political structures and nations. One problem is that "while many states are multinational in their composition very few of them actually function as multinational states" (McRoberts, 2001, p. 711). This applies to Canada, which lacks both sets of congruence.

On the first type of congruence, similarity of nations, at first sight, Canada might appear to qualify since it has, historically speaking, been touted as *bi*-national. Institutionally speaking, we will see that this depiction of Canada is empirically inaccurate. Despite that, this conception of Canada has its supporters and can be traced back to the so-called national compact theory, which sees Canada as made up of two founding nations (Romney, 1999). The theory posits that the French nation has its core in the province of Quebec (with well over 8.5 million inhabitants (Statistics Canada, 2021). There is a significant English-speaking contingent inside Quebec, as well as a number of French-speakers outside of Quebec, and makes up close to 23% of the population of Canada (the total of which is 36.9 million), whereas the English nation makes up most of the remaining population (even if Canada's composition has become increasingly multicultural). The numbers show that there is a significant numerical asymmetry between English speakers and French speakers in Canada.

The historical veracity and normative justification of the notion of Canada as binational has been challenged by Canada's indigenous or First Nations people. They were not part of the initial federal bargain. They have a range of self-governing arrangements and are seeking to extend these. This is a conception of Canada that clearly does not fit with the national compact theory's conception of Canada as bi-national.

The role of Canada's First Nations is very complex and if it is to be dealt with adequately requires an article of its own. For our purposes, this complex issue is mentioned here to expose some of the problems of depicting Canada as a multinational federation. The first type of congruence listed above pertaining to whether a system functions as a multinational state was that the nations should have the same conditions for membership and should understand nation and community in roughly the same manner. Neither factor is uniform in Canada. Canada's nations operate with different conditions for membership, and they differ in their conceptions of nation. There is also a problem with national duality. English speakers, or the people that make up the majority in linguistic terms, do not normally see themselves as a distinct nation but "understand their own nationality in terms of the central state and will see all of the state as a single nation" (McRoberts, 2001, p. 685).

This point about English speakers understanding their nationality in terms of the central state relates directly to the second type of congruence, between political structures and nations. Such congruence is important because it speaks directly to the power relations and the conditions for a nation to be able to sustain itself over time. Here we see significant differences within Canada. Most of the French speakers are now concentrated in Quebec, which has undergone a process of "province-building" analogous to state formation (Black & Cairns, 1966; Paquet, 2019; for an early overview of the literature and a set of criticisms, see Young et al., 1984). English-speaking Canada forms a clear majority of the population but is institutionally fragmented, in nine provinces and three territories. There is therefore no institutionally unified English-speaking Canadian nation, as the carriers of Englishness are both the federal government (which is officially bi-lingual!) and the other nine provinces (and the three territories). First

Nations are seeking self-government but their situation does not mimic the territorial concentration and institutionalised power that is concentrated in a province. Compared to the French and English speakers, there are 630 First Nations communities in Canada, which make up 50 nations and 50 languages. The number of people who identify as Aboriginal in Canada according to the 2016 census is 1.67 million (Government of Canada, 2022). First Nations are scattered across Canada (for an interactive map that shows their location across Canada's provinces and territories, see: First Nation Profiles Interactive Map, aadnc-aandc.gc.ca), and far from all live under self-governing arrangements. For First Nations, there is no congruence between political structures and nations, given that First Nations live in institutional arrangements that are located within both provincial and federal jurisdictions across Canada.

The French–English incongruence between political structure and nation in Canada is reflected in the division of Canada into provinces with extensive powers and prerogatives. This notion of Canada is also historically rooted and even predates Confederation (1867), and finds its justification in the provincial compact theory "which saw Canada as a compact among the colonies and their several successors, the provinces, rather than between nations."(McRoberts, 2001, p. 695; Romney, 1999). If Canada originally was a compact of provinces rather than a compact of two nations, that brings up the question of why Canada should be considered a multinational federation. The answer seems to require somehow combining the national compact and provincial compact theory.

The provincial compact theory presupposes viable provinces, and through that province-building (Black & Cairns, 1966, introduced this notion; see also Paquet, 2019). Province-building paves the way to an institutional account of federalism (Thorlakson, 2000). Such an account would underline the importance of accumulating institutionalised power to protect the national identity of Quebec. A nation such as Quebec that is situated in a Canadian province has through province-building developed a far better ability to sustain itself and assert itself in relation to the other parts of the country than the collective of First Nations that is neither territorially concentrated nor has the levers of power that a province has. Quebec has significant access to and control of those resources that are important for Quebec's vitality and sustenance as a political system. A further element of institutionalised power is control of the key levers of socialisation and national inculcation which ensure the sustenance of the nation over time. Here, Quebec's strict language laws are quite instructive (C-11—Charter of the French language, gouv.qc.ca). Control of the popular composition of the nation also matters to its sustenance over time. In this sense, it is interesting to note that Quebec has significant control of international migration and is able to channel that to the province. All of these levers are vital for sustaining Quebec as a nation and give credence to Quebec's claim for recognition as a distinct nation *over time*. They provide Quebec with the autonomy to sustain itself over time. First Nations understood as a collective does not have even remotely the same resources to assert a unified national stance. Even English-speaking Canada composed as it is of separate governments (nine provinces and three territories) needs to come together to find an agreement. The process of province-building, Quebec's ability to turn this into nation-building and the institutional division of English-speaking Canada are important reasons for considering Canada as multiheaded rather than multinational.

To sum up the analysis thus far, it has become apparent that the notion of Canada as a multinational federation at best only captures a part of the story. The alternative historical conception of Canada as a compact among provinces is not easy to reconcile with Canada as bi-national, which animates the notion of a multinational federation. At the same time, it is difficult to think of Canada as multinational without at the same time recognising the importance of province-building serving Quebec's nation-building aspirations. The rub is that province-building was not confined to Quebec but encompassed all of Canada's provinces. The notion of Canada as a multinational federation presupposes that there has been a process of province-building that enables a minority nation such as Quebec to assert its national identity. But since a multinational federation is about nations it lacks attention to the role of the provincial governments that do not assert a minority national position but still espouse a provincialist position on the Canadian federal compact.

The analysis thus far has pointed to the shortfalls in those accounts of the EU that seek to depict it as a system of transnational multilevel governance. The analysis has also shown that there are problems with the notion of Canada as a multinational federation. This notion relies on institutional presuppositions that do not cohere with the nations in place.

Section 4 will focus on what this article highlights as the basis for comparing Canada and the EU from a federal perspective, which can be labelled the constitutional politics aspect of federalism. The issue is not constitution-making but what ongoing constitutional negotiations tell us about the system's federalism. Both the EU and Canada are marked by a lack of agreement on a viable federalism (what the system is and who it is for). That lack of agreement naturally directs us to those in the position to make authoritative decisions. A key claim of this article is that we cannot determine the nature of such contested political systems' federalisms without paying attention to *who* it is that sets the terms of federation, what leverage they have in doing so, and how explicit their efforts are. The claim is that the structuring of the process of constitution-making/change and the issues that determine this process go a long way towards understanding the system's

federalism. In other words, the process of negotiating constitutional accords is an important source of information on the system's federalism. Such processes can foster federalisation, or they can subvert federalism and produce de-federalisation. The label multiheaded refers to an important EU–Canada parallel: The core actors are the leaders of the governments of the two systems at both main levels of governing.

4. Constitutional Politics as (De)Federalisation in the EU and Canada

There are two important parallels between Canada and the EU in terms of constitutional politics understood in this (de)federalisation sense. These two parallels are as noted relevant for our thinking of these two entities in federal terms.

One important parallel is that both Canada's and the EU's legal-constitutional arrangement is contested. For Canada, that is readily apparent in the province of Quebec's refusal to sign the Constitution Act of 1982. This failure led to two major attempts to get Quebec to sign the Constitution, the Meech Lake Accord in 1987, and the Charlottetown Accord in 1992, both of which failed. With regard to the EU, the Constitutional Treaty was turned down in popular referenda in France and the Netherlands in 2005. In both cases, then, legal-constitutional contestation relates to one or several governments refusing to endorse the constitutional accord that has been negotiated.

This fact is closely associated with the second EU–Canada parallel, namely, that it is the governments of the two political systems that negotiate constitutional accords in intergovernmental formats that have clear parallels to international diplomacy (Hueglin, 2013; Fossum, 2007; Moravcsik, 1991; Simeon, 2006/1972). Such intergovernmental arrangements play a crucial role in the shaping of the two political systems' constitutional essentials. For Canada, historically speaking, the absence of an amending formula in the British North America Act of 1867 effectively meant that the federal and provincial governments negotiated constitutional accords among themselves. Numerous efforts were made to agree to a constitutional amending formula until one was inserted in the Constitution Act, 1982, which combines qualified majority and unanimity (or a historical overview of amending formula discussions (Government of Canada, 1992). The Quebec government failed to ratify this; hence there is no escaping the political logic that all governments need to assent to constitutional changes. In the EU treaty changes must be ratified by all member states in accordance with their national ratification requirements.

European treaty-making is organised in a manner with clear parallels to how Canada conducts its constitutional politics. In both cases, the heads of the two systems' governments are the key actors.

Section 4.1 provides a brief overview of how Canada conducts its constitutional politics through intergovernmental means and Section 4.2 displays how the EU relies on intergovernmental means. Both entities have tried to open and democratise these arrangements. Canada is the only one to have partially succeeded. The introduction of the Charter of Rights and Freedoms in conjunction with Canada's patriation of the constitution has altered the relationship between federalism and federation in Canada (this transformation has been examined in Fossum, 2007, although not with explicit reference to the federalism–federation distinction). In Europe, the rejection of the Constitutional Treaty has cemented the intergovernmental approach to constitutional politics.

4.1. Canadian Constitutional Politics

Historically speaking, as was noted above, we find in Canada a struggle over competing conceptions of sovereignty. Nevertheless, for most of its history, Canadian constitutional politics has been an affair for and by governments, federal and provincial. Up until the Statute of Westminster, 1931, the UK (Parliament) had played the role of umpire. After that the governments negotiated constitutional accords among themselves, and the Canadian Supreme Court did not play a significant role. Courts are normally umpires but as Morton and Knopff argue, prior to the so-called Charter revolution (which unfolded after the Canadian Charter of Rights and Freedoms had been inserted in the Constitution Act of 1982) the Canadian Supreme Court was "the quiet court in the unquiet country" (Morton & Knopff, 2000, p. 9)

Their privileged position meant that the governments of the system—the federal government and the ten provincial governments—considered themselves as the main chaperons of the constitution, the BNA Act of 1867. Alan Cairns then also termed this a "governments' constitution" (Cairns, 1991). Constitutional politics unfolded through a system of intergovernmental negotiations that goes under the label of First Ministers' Conference. The First Ministers' Conference consists of the PM and the then Provincial Premiers. This body played the most important role in the numerous efforts to fashion constitutional change in Canada. The Canadian system of First Ministers' Conference, as Simeon (2006/1972) has noted, has injected an element of intergovernmental diplomacy with clear parallels to international diplomacy into the heart of Canadian politics. There are important structural reasons that help account for why this is so. The Canadian federation is a parliamentary federation (Westminster-style parliamentary majoritarian government) at both levels of government. The first-past-the-post electoral system produces governments with powerful executives who hold different—often conflicting—federal visions. In this context, weak parliamentary controls help to concentrate power in the hands of executives who come together in forums with clear parallels to international diplomacy to work out their disagreements. Herman Bakvis notes that:

> With power concentrated in the hands of first ministers, intergovernmental relations have been the purview of first ministers and their close associates…. Generally, Canadian executive federalism has been characterized as closed and elite driven. With not one but 11 (14 including the three territories) powerful governments, it is not surprising that they are often at loggerheads, collectively or individually, resulting in stalemate. When there has been collaboration it is often done on a secretive basis, allowing virtually no opportunity for outside interests to participate or be heard. (Bakvis, 2013, p. 211)

The system of intergovernmental relations has had a centrifugal effect on Canadian politics.

The Trudeau government in the early 1980s sought to break with the binational and intergovernmental past by patriating the Constitution from the UK through the Constitution Act of 1982 and introducing the Charter of Rights and Freedoms, which could give citizens a keener sense of ownership of the Constitution. This was done without the province of Quebec's assent. Quebec responded by not signing the Constitution Act of 1982 (and has still not signed it). After the change in federal government in 1983, the new PM Brian Mulroney spoke about the need for a Quebec round to bring the province of Quebec to sign the Constitution Act of 1982 by recognising Quebec as a distinct society and ensuring Quebec a veto on constitutional change. The general Canadian constitutional amendment formula—the so-called 7–50 formula (minimum seven provinces with a minimum 50% of Canada's population)—does not require the consent of all provinces. Only few constitutional changes require provincial unanimity. Nevertheless, "the federal government decided to treat the whole package as subject to a unanimity agreement" (Cairns, 1991, p. 144). The effect was to convert "the Quebec round" into a provincial round of negotiations, where the other provinces also demanded concessions. The process that led to the Meech Lake Accord (1987) was therefore not a matter of bilateral federal government–Quebec negotiations but was instead conducted by the PM and the ten provincial Premiers in a closed-session marathon negotiating round. The lack of aboriginal and civil society participation was roundly criticised and contributed to the failure of the accord (the two provinces Manitoba and Newfoundland rejected the Meech Lake Accord; for assessments, see for instance Behiels, 1989, and Cairns, 1991).

This example shows the resilience of the model of government-to-government negotiations, even under altered constitutional conditions. Even the much more open and consultative Charlottetown Accord did not break with this pattern.

4.2. European Constitutional Politics

The EU shares with Canada this government-centred approach to constitution-making/change. EU treaty changes are, formally speaking, conducted through the Intergovernmental Conference (IGC), which is the special formation that the EU sets up to carry out treaty changes. The European Council, which is composed of the EU's heads of states and governments, played the leading role in the IGCs that made the Single European Act (1986), the Maastricht Treaty (1992), the Amsterdam Treaty (1997), and the Nice Treaty (2000). In all these instances of EU treaty change, the heads of states and governments and their coteries of officials from the member states were the key actors in charge. There was EU-level institutional input (notably the Council secretariat and the European Commission), but each member state government had veto. Ratification would take place in accordance with national ratification rules, whether through parliamentary votes or popular referendums. In the lengthy process of negotiating each instance of treaty change, the heads of states and governments of the EU member states come together at various intervals to negotiate and renegotiate the rules of their co-existence with considerable discretion. The European Council meetings are closed, attendance is strictly limited, and there is no official and publicly available record of what was discussed (only Council conclusions, available here: https://www.consilium.europa.eu/en/european-council/conclusions), as the purpose is to allow for frank and open discussion (for incisive analyses of the European Council, see Werts, 2008, and Wessels, 2016). Hence, the IGC process is surrounded by very little transparency until the ratification stage.

As early as 1972, Richard Simeon (2006/1972, p. 300) presciently noted that "the Common Market perhaps comes closest to the Canadian pattern." Simeon's book was written before the European Council was established. With the European Council in place, the resemblance between the EU and Canada increased, given the similarities between the Canadian First Ministers Conference and the European IGC.

The European Convention which was established on the basis of the Laeken Declaration (European Council, 2001) was an attempt to break with the intergovernmental constitutional negotiations model by establishing a body composed mainly of parliamentarians. Valery Giscard d'Estaing, the Convention President, in his first speech, underlined the difference between the Convention and the IGC. He noted: "We are not an Intergovernmental Conference because we have not been given a mandate by Governments to negotiate on their behalf the solutions which we propose" (d'Estaing, 2003). Nevertheless, a detailed analysis of the Convention's work has shown that the European Council was key to the outcome (Fossum & Menéndez, 2011). The Lisbon Treaty which built upon the Convention's work but was termed a treaty and not a constitution represented a clear reversal to the intergovernmental negotiations model. The failure of the Constitutional Treaty also brought more uncertainty as to the EU's constitutional character and vocation. In that sense, we

can interpret this as a step in a defederalising direction. Canada's development conversely has brought in a wider repertoire of societal actors in the constitutional process. That will likely make any further major effort at constitutional change unwieldy (and represent a high bar against any new initiative) but may produce a better balance between federalism and democracy.

5. Conclusion

The purpose of this article was to assess the merits of comparing the EU and Canada from a federal perspective. The undertaking confronted a challenge: The two systems are not only different entities (Canada is a state and the EU is something in-between state and international organisation), but the labels that are used to depict them—multilevel governance versus multinational federation—carry different federal weight and significance. It was therefore necessary to examine how well these labels depicted, respectively, the EU and Canada. It was found that they offer partial accounts only, accounts that in effect downplay important federal traits of these systems. Nevertheless, the main merit of comparing the two entities, this article has shown, is not through focusing on static structural and ideational features but rather through focusing on the dynamics of federalisation and de-federalisation. That was made possible by the notion of a multiheaded federation—an attempt to take stock of present reality without elevating that to model status (as the notion of multinational federalism). In this connection, the distinction between federalism and federation is useful because it shows that you can have a federal structure without there necessarily being agreement on the terms of federation. Barring such agreement, we need to focus on those in a position to determine the terms of federation. In both the case of Canada and the EU, it is the governments that make up the two systems that have played this role. The label multiheaded federation refers to the fact that the terms of federation are determined by the governments in complex negotiations. That stands in some contrast to the dominant conception of federations as settled legal-constitutional arrangements with courts as federal overseers and a hierarchical pattern of authority.

It is the fundamental struggle over sovereignty within a federal-type structure that gives rise to the notion of a multiheaded federation—there are multiple heads because there is no willingness to accept a hierarchical arrangement. But the fact that the governments' interaction takes place within a federal-type structure also means that the contestation is contained and can foster further integration. Thus, when within a federal-type structure, there is contestation over the locus of authority and unwillingness to yield to a hierarchical order, and the contestants are in a position to function as authority contenders (as can a government in the system but not a private actor) we have a multiheaded federal political construct.

The theoretical implication is that when we encounter contestations over the terms of federation, we need to shift perspective: Rather than discussing whether or the extent to which Canada and the EU are structured and operate as full-fledged federations, we should with Friedrich (1968) consider them as instances of federalisation—as processes towards more or less federalism. There is clearly a mutually reinforcing relationship between the development of a federal structure (the federation component) and the parties' commitment to uphold the federation (the federalism component) and the normative justifications for that. The notion of a multiheaded federation directs us to those in the privileged position to shape the system's federal future. The conundrum facing multiheaded federations is that the intergovernmental systems that play an important role in ensuring their existence are not well-suited for developing a viable federal political culture.

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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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Article

Federal Servants of Inclusion? The Governance of Student Mobility in Canada and the EU

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Abstract
Student mobility constitutes a core pillar of higher education internationalisation. Reflecting wider global trends, Canada and the EU have increasingly prioritised equity and inclusion in their student mobility programmes. Canada's Global Skills Opportunity programme, launched in 2021, provides federal funding specifically to low-income students, students with disabilities, and Indigenous students. The EU's Erasmus Programme has a long-standing tradition of community-building through inclusive student mobility. This article traces the principle of inclusion as a mobility rationale and analyses the role of the federal government in Canada and the European Commission in the EU supporting it. Using a policy framing lens, this study compares problem definitions, policy rationales, and solutions for federal/supranational involvement in student mobility. Findings show that inclusiveness has been an underlying silent value, yet it has mostly supported larger political and economic goals in both contexts.

Keywords
Canada; Erasmus; European Union; Global Skills Opportunity; higher education; regionalisation; student mobility

Issue
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1. Introduction: Macro-Regional Policies for Higher Education Internationalisation

Student mobility programmes are at the core of higher education (HE) systems globally, serving various goals ranging from institutional revenue generation to training skilled labour and assisting governments with foreign policy objectives (Sabzalieva et al., 2022; Trilokekar, 2022). At the same time, meaningful educational experiences are an individual right that helps to secure one's academic, social, and personal success in life (Preston, 2008). The ability to participate in student mobility programmes is linked to one's socio-demographic background, so minoritised students with limited financial opportunities are often excluded. This, in turn, impacts these students' cultural adaptability, language skills, and employability (Di Pietro, 2020; Roy et al., 2019). For internationalisation to be inclusive and not elitist, it must address issues of access and equity (H. de Wit & Jones, 2018). Consequently, barrier-free access to student mobility has become a significant policy problem for governments (Cairns, 2019). Not only have issues of social justice been largely absent from institutional strategies of internationalisation (Buckner et al., 2020), but a global perspective is also lacking in equity research in international education (Özturgut, 2017). This article contributes to this aspect of research, offering a comparative perspective on student mobility policies by analysing macro-governmental support for outgoing student mobility in Canada and the EU.

This article asks how Canadian and EU student mobility approaches compare from an inclusion perspective.

Zooming in on the role of inclusion in macro-regional student mobility programmes contributes to a better understanding of HE internationalisation, which is a highly political endeavour pursued by countries, institutions, and individuals. In this politicised context, central governments (Helms et al., 2015) and macro-regional structures play an important role in engaging with market-driven competition dynamics (Buckner & Stein, 2020). These public stakeholders do not only set an overall vision and direction for student mobility programmes at large but also engage in efforts to build common mobility areas through means such as funding instruments (Chou & Ravinet, 2016). Since a central purpose of federal/macro-regional governance is cohesion, we can expect that macro-regional policies for HE internationalisation reflect this task. In this context, inclusion may be defined as governmental policies and practices that aim to provide barrier-free opportunities for the participation of all in student mobility programmes. To reveal the role of inclusion in developing and governing student mobility programmes in Canada and the EU, we draw from the HE regionalisation literature and apply a strategic policy-framing perspective. The article particularly focuses on the underlying policy problems, rationales, and instruments of federal/supranational student mobility approaches. We aim to answer the following research questions: How have the federal/supranational approaches to student mobility and the corresponding policies developed over time? What role has the principle of inclusion played in federal/supranational policies for student mobility in the Canadian/EU context?

There are two ways to conceptualise inclusion in student mobility (Janebova & Johnstone, 2020). One approach views inclusion in student mobility as a public good, providing widened access to mobile citizens who get employed and can contribute to economic growth. The second approach views inclusion as an ideology that critically addresses social justice disparities resulting from student mobility. Thus, inclusion can be a strategy that supports the expansion of the societal benefits of internationalisation or it can be an ideology that purposefully addresses unfair inequitable practices, focusing on systemic change. The idea of social inclusiveness as a tool for the public good has been central in the Bologna Process and the construction of a "Europe of knowledge" as enshrined in the EU's Lisbon Strategy (e.g., Powell & Finger, 2013). In this narrative, social cohesion is promoted as a solution to Europe's lack of global competitiveness, so that EU macro-regional governance aims to unite economic and social objectives (e.g., Beerkens, 2008). In the Canadian context, social justice and inclusion ideals have been present as an important ideological aspect of Canada's broader foreign policy agenda around equity, guided by significant development aid distributed over the years globally. Trilokekar and Kizilbash (2013, p. 2) noted that Canada's approach to foreign policy has been characterised as "anti-imperial power committed to supporting a just and equitable world order." This goal speaks to inclusion as an ideological equity issue, reflected in the ways inclusion is addressed in student mobility programmes. Yet, similarly to the EU, there is notable criticism around ethical issues and systemic injustices associated with Canada's approach to international education (Brunner, 2022).

Subsequently, we outline how approaching HE regionalisation from a policy-framing perspective is useful for analysing the development of federal/supranational policies for student mobility over time. After introducing our empirical strategy, the results of our analysis are first presented for the case of Canada, followed by the case of the EU. We show how social justice and inclusion have been values underlying student mobility in both jurisdictions yet primarily supporting larger political and economic goals. We conclude with a discussion of our findings and future research avenues.

2. A Policy Framing Perspective on Higher Education Regionalisation

Theoretically, we situate student mobility programmes within the larger context of political regionalisation. HE regionalism is defined as "a political project of region creation" that involves certain levels of state authority (national, supranational, international) and guides activities in the HE policy sector (Chou & Ravinet, 2016, p. 4). This concept applies to both Canada and the EU, where a multitude of education systems governed by provinces and member states ought to contribute to joint federal/supranational strategies such as increasing student mobility. Accordingly, the "building [of] connections and relationships among [HE] actors and systems in a region" (Knight, 2012a, p. 17) is referred to as HE regionalisation. In the Canadian context of federalism, there has been a move towards horizontal governance in (higher) education where hierarchies are less visible and collaboration is apparent across governmental actors (e.g., Tamtik & Colorado, 2022). In the EU, there is an interplay between national and supranational actors that has been shaping student mobility and/or HE policies for reasons of guarding (i.e., member states) or increasing (i.e., European Commission [EC], European Court of Justice) their competencies (e.g., Beerkens, 2008).

To examine the change in the role of the federal/supranational government in fostering student mobility, we consider the three components of a policy that follow from framing approaches to (supranational) policy analysis (Buckner et al., 2020; Cino Pagliarello, 2022; Elken et al., 2022; Rhinard, 2018) and combine them with Knight's (2012a) theorisation around HE regionalisation (see Table 1). Rhinard (2018, p. 309) defined strategic framing as:

> The deployment of certain ideas about policy change—including the depiction of a policy problem, a rationale for action, and a set of "appropriate" solutions—in order to reshape the existing

ideas, actors and institutions inside a particular policy domain.

Consequently, in our analysis we distinguish between different HE regionalisation approaches, on the one hand, and problems, rationales, and solutions of federal/supranational student mobility policies, on the other hand.

We draw on Knight's (2012a) framework of functional, organisational, and political approaches to HE regionalisation (see Table 1) to derive problem definitions and policy solutions of supranational/federal student mobility policy, while secondary literature on HE internationalisation has provided us with policy rationales. When following a functional approach, HE regionalisation serves the purpose of practical alignment of national/sub-regional HE systems. This alignment is achieved through bringing HE institutions and their students and staff together by funding mobility and/or joint study programmes. For the functional approach, the corresponding problems lie in different types and levels of barriers (individual/institutional/systemic) to student mobility. In turn, the organisational approach to HE regionalisation relies on the building of bureaucratic structures among (non)governmental bodies and professional organisations, which provide structural support for cross-regional study and mobility programmes. When approaching HE regionalisation politically, student mobility is translated into the political will to make it a priority for the HE sector and thus is reflected in intergovernmental agreements. These agreements may either remain at the level of declaring joint interests, such as increasing the quality of HE, and/or include detailed provisions such as for harmonising study cycles. As follows, organisational HE regionalisation is supposed to mitigate gaps in (supra)national coordination and coherence, and from a political HE regionalisation perspective, the core problems result from regional and/or global interdependence that may only be resolved through macro-regional cooperation. In sum, HE regionalisation always aims to build and strengthen HE systems, yet the approaches through which this is achieved differ.

Student mobility may have an educational, cultural, economic, social, or political rationale (Elken et al., 2022; Knight, 2012b). The educational rationale places the exchange of ideas either through returning outgoing students or incoming international students at the centre. From a cultural rationale, student mobility ought to enhance intercultural skills such as the acquisition of languages. Economically speaking, student mobility is considered an investment for long-term economic growth and short-term direct benefits such as tuition fees. The social rationale considers systemic barriers to individual access in student mobility. Finally, for the political rationale, student mobility serves as a dimension of foreign policy and contributes to soft power and strategic alliances. The manifestations of these rationales vary across actors and levels and thus for the respective HE regionalisation approaches. Since functional HE regionalisation ought to align national/sub-regional HE systems, the rationales for action relate to the levels of individuals such as students, HE institutions, and the state. When regionalisation is approached politically, again all four rationales may apply, yet they primarily manifest themselves at the national and regional levels. The organisational approach towards HE regionalisation puts coordination tasks at the centre and adds the organisational layer to functional and political regionalisation, so that we may find individual, institutional, and systemic-level interpretations of the rationales. The economic rationale,

Table 1. Problem definitions, rationales, and solutions in student mobility policies.

		Supranational/federal student mobility policy		
		Problem definition	Preferred policy solution	Rationales for action
Approach to HE regionalisation	Functional	Individual/institutional/systemic barriers to student mobility	Funding schemes for HE institutions and individuals Joint study programmes Credit transfer system	*Educational*: Academic exchange and quality of education *Cultural*: Intercultural skills *Economic*: Competitiveness (national economy) and/or revenues (HE institutions) *Social*: Individual access, considering systemic barriers *Political*: Policy objectives at the institutional/national level
	Organisational	Lack of (supra)national coordination and coherence	Networks among various actors in a HE system for implementing functional and political HE regionalisation	
	Political	Community/global interdependence	Intergovernmental agreements	

Source: Authors' work based on Elken et al. (2022), Knight (2012a, 2012b), and Rhinard (2018).

for example, has a different meaning at the individual (returns to education), institutional (income generation), national (human resources development), and regional levels (economic competitiveness).

Ultimately, combining the HE regionalisation framework with a policy framing approach is not only useful for accounting for the development of federal/supranational approaches to student mobility over time but has also served to bring forward the role of inclusion in federal/supranational student mobility policy. So far, there do not exist analyses of HE regionalisation that incorporate the issue of inclusion. Our analysis will reveal whether, in the two compared contexts, inclusion is defined as a problem and/or whether inclusion is at the core of a proposed policy solution and, thus, is a rationale guiding supranational/federal student mobility policy.

3. Case Selection, Methodological Approach, and Data

Our rationale for comparing Canada and the EU is threefold. While we recognise that Canada and the EU are different in many respects, there are parallels that allow for useful comparison. First, both operate in a decentralised system (federalism in Canada and treaty-based union of independent member states in the EU), allowing examination of federal/supranational activities of political region-building in a sensitive policy area. Second, both jurisdictions prioritise inclusion and diversity, protecting groups within diverse ethnic and cultural settings. Social cohesion has been an important aspect in building a sense of community for both the EU and Canada. This aspect of social awareness allows us to examine the specific nuances and impacting factors that shape the ideals of inclusion and social justice across these jurisdictions. Third, international student mobility drives their economies and is a source of immigration. With increasing federal and supranational stakes in internationalisation policies, the two cases allow us to compare the strategic framings associated with inclusion and student mobility from a pragmatic point of view. Our analysis specifically focuses on the role of the federal government in the case of Canada and on the role of the EC in the case of the EU.

To answer the research questions, we conducted qualitative policy analysis using primary data relevant to student mobility including white papers, federal/supranational internationalisation strategies, and programmatic documents of the two central student mobility programmes (the Erasmus Programme and Canada's Global Skills Opportunity programme). We selected documents from 1970 to 2022 based on public availability, focusing on student mobility and references to inclusion. In both Canada and the EU, the issue of increasing the mobility of students emerged strategically during the 1970s first in the form of cooperative projects among HE institutions and was subsequently strengthened both in terms of political commitment and in terms of allocated resources. To overcome the limitations of a policy analysis based on official and publicly available documents, we were mindful to pay attention to both what was said and what was not said in the documents. We also consulted historical scholarship for data triangulation.

In the data analysis, we applied deductive categorisation using existing literature to identify the policy problems, rationales, and solutions. However, we also allowed for inductive exploration of the data when it related to the concept of inclusion. For the categorisation of policy problems, we differentiated between references to individual/institutional/systemic barriers, (supra)national coordination, and international interdependence. Concerning policy solutions, we distinguished between references to funding, institutional partnerships, and HE system alignment and mentions of coordination, for example, in the provision of funding and political goals in areas such as foreign policy. Regarding policy rationales, we decided whether the mentioned purposes of student mobility would qualify as educational, cultural, economic, social, or political. Table 2 presents how our data analysis categories were applied to the example of the Council decision adopting the Erasmus Programme in 1987. The table shows that this document problematises the need to increase student mobility against the backdrop of regional and global interdependencies. The solutions to increase student mobility include functional and organisational HE regionalisation elements. The analysis of the programme shows that its underlying rationales were not only political but also economic in combination with cultural and educational rationales.

4. Analysis: The Case of Canada

Canada's engagement with international student mobility has been characterised by shifting national priorities and peripheral governments' support. A functional approach towards student mobility has been present across three different eras: (a) social justice agenda supporting foreign policy goals (1970–1990), (b) dominance of economic goals with silence on social justice (1991–2019), and (c) social justice for skilled labour needs (2020 onwards). Federally, Canada is regarded as a latecomer in developing a national vision for international education—Canada introduced its first internationalisation strategy only in 2014, developed by the Ministry of Foreign Affairs, Trade and Development. In 2019 this document was updated for another five years. Global Affairs Canada (International Education Division) has the primary responsibility for international education within the federal government. Yet, other players such as Immigration, Refugees and Citizenship Canada and Innovation, Science and Economic Development Canada also play a role in policy development, as international education is linked to skilled labour, immigration, and research cooperation (Viczko & Tascón, 2016). International students are an important source of Canada's skilled labour market. Choi et al. (2021) reported that 31% of international students

Table 2. Application of data analysis categories at the example of the Erasmus Programme decision in 1987.

Problem definition	Policy solution	Rationales for action
• (Supra)national coordination: "The *competitiveness of the Community* in world markets *depends on* ensuring that the entire *intellectual resources of the universities in the member states* are harnessed to provide top quality levels of training for the benefit of the Community as a whole.''	• Functional HE regionalisation: "The Community will introduce a European *network for university cooperation*…[and] a scheme for the *direct financial support of students at universities*…carrying out a period of study in another member state"; "the Community will…through cooperation with the competent authorities in the member states…promote mobility through the academic *recognition of diplomas and periods of study* acquired in another member state.''	• Economic and social: "The objectives of the Erasmus Programme shall be…to…increase…the number of students…spending an integrated period of study in another member state, in order that the Community may draw upon an *adequate pool of manpower* with first hand *experience of economic and social aspects of other member states*.''
• Community/global interdependence: "The further *development of the Community depends* to a large extent on its being able to draw on a large number of *graduates* who have had *direct experience of studying and living in another member state*.''	• Organisational HE regionalisation: "The…programme shall be implemented by the Commission….In performing this task, the *Commission shall be assisted by a committee* composed of two representatives per member state.''	• Educational and economic: "To harness the full *intellectual potential* of the universities in the Community…thereby improving the *quality of the education*…with a view to securing the *competitiveness* of the Community in the world market.''
		• Political: "To strengthen the *interaction between citizens*…with a view to consolidating the concept of a *People's Europe*.''

Source: Authors' work quoting from Council Decision of 15 June 1987 (1987).

remained in the country after graduation. International students are also crucial for institutional income revenue, making up for shortfalls from the federal-provincial governments, paying substantially higher tuition fees compared to domestic students (McCartney, 2021). Outgoing student mobility was not formally prioritised by the government until 2021. The Canadian Bureau for International Education (2016) reported that only 2.3% of Canadian students engage in outward student mobility, primarily through institutional exchanges with limited financial support. Recognising the limited interest towards outgoing student mobility as a barrier to the public good, the government launched a new student mobility programme (Global Skills Opportunity) in 2021. The core emphasis is on inclusivity, aiming to bridge socioeconomic divides among student groups, with significant financial support attached to the programme.

4.1. Social Justice Agenda Supporting Foreign Policy Goals (1970–1990)

This era was characterised by a political approach that framed inclusion as a social justice issue that would support Canada's foreign policy objectives. The rationale was that helping other countries would secure peace internationally, benefitting Canada politically and economically. The corresponding policy solution was to provide development aid, including support for student mobility programmes. In the post-war decades, a narrative of "Canadians as internationalists" was created with the federal government's leading role in peacekeeping activities, development aid, and cultural connections (Department of External Affairs, 1970, p. 6). Canada had historically placed considerable emphasis on the provision of technical assistance to developing countries (particularly in Latin America) as a means of transferring knowledge and expertise. The document *Foreign Policy for Canadians* noted: "In this way, the total resources and experience of Canadian organisations can be used to establish and support similar institutions in the developing countries" (Department of External Affairs, 1970, p. 15). Under the technical assistance programme, students were brought to Canada with scholarships for enrolment in Canadian universities, technical schools, or special industrial courses. Social justice ideals were put into practice with particular attention to race conflict and national security in places where the government feared race conflict might lead to "violent disturbances" (Department of External Affairs, 1970, p. 30). In 1974, the Academic Relations Section within the Department of External Affairs of the federal government was created to govern student mobility programmes (Brooks, 2019). This structural arrangement further attested to student mobility being part of foreign policy when this

unit started to administer and oversee the Canadian Studies Abroad programme, the largest student mobility programme of that period. Linguistic and cultural diversity was embedded in the mandate of the programme as part of its inclusion criteria. Special attention was given to areas such as human rights, civil liberties, aboriginal rights, arctic sovereignty, and women's studies (Symons, 1975, pp. 83, 123). Trilokekar (2010) noted that federal government spending on international cultural relations peaked in the mid-1980s with approximately $20 million of operational funds. In the 1980s, gradual concerns were expressed that Canadian spending was unequal, with some countries (the US and Europe in particular) benefitting more than others. It was suggested that scholarship opportunities to study in Canada should be broadened, so that "Canada's increasing interest and relationship with other nations be reflected" (Canadian International Development Agency, 1986, p. 270). At the end of this era, concerns over equity were tied to national interests through the claim that the selectiveness of countries for student mobility was becoming a barrier to foreign policy.

4.2. Economic Goals With Silence on Social Justice (1991–2019)

This period marked the government's emphasis on a knowledge-based economy, characterised by the decline of financial investment in and the overall importance of government-supported study abroad programmes in Canada. The era depicts a functional approach with economic rationales dominating incoming student mobility as a policy solution. As such, the corresponding answer to the problem of boosting economic growth was the marketisation of Canada as an attractive study destination with aggressive recruitment of international students. The Canadian Studies Abroad programme was closed in 2012 (Brooks, 2019) as an unnecessary expense. In 1992, Canada hosted around 37,000 students with estimated contributions to the Canadian economy of C$472 million (Trilokekar & Kizilbash, 2013). The Department of Trade and Foreign Affairs was created in 1990 as the unit overseeing international education programmes, framing student mobility as a tradable commodity. The 2005 evaluation of the Department of Trade and Foreign Affairs' International Academic Relations Programs referred to the need for a results-oriented culture in academic mobility (Brooks, 2019). C$1 million of the federal budget was allocated to develop Edu-Canada as a marketing brand for student export (Trilokekar & Kizilbash, 2013). In 2014, Canada announced its first International Education Strategy that focused heavily on the marketing of Canadian HE abroad, recruiting fee-paying international students to ensure Canadian economic wealth. An advisory document noted that a "clear long-term strategy is needed to ensure that Canada maintains and increases its market share of the best and brightest international students and researchers" (Government of Canada, 2012, p. ix). Inclusion or social justice concerns were hardly mentioned. One exception was the evaluation report of the federal University Partnership programme, which mentioned a best-practice project in Brazil with university involvement, emphasising the inclusion of civil society groups and women in building capacity in the country and stating that "the project is having a major impact on the inclusion of groups formerly regarded as pariahs within the society" (Canadian International Development Agency, 2007, p. 15). Diversity was viewed primarily from the geographical perspectives of new recruits who could bring social and cultural benefits and add diversity to smaller communities in Canada. The federal advisory report on international education mentions inclusivity as an economic consideration: "International education strategy should be inclusive of all sectors (K12 through PhD)" (Advisory Panel on Canada's International Education Strategy, 2010, p. 2). This was to be achieved by undergraduate recruitment, international research collaboration, relaxed visa policies, and opportunities for Canadian students to study abroad. Yet, Canadians' studying abroad was encouraged without deeper considerations of the inclusion or equity issues that prohibited some students from participating. The International Education Strategy was renewed in 2019, with the lead unit Employment and Social Development Canada. It was with this shift that the social focus, driven by the need for qualified workers, came back to student mobility in the 2020s.

4.3. Equitable Access for Skilled Labour Needs (2020 Onwards)

This era has continued to take a functional approach in which inclusion is framed as a policy problem on its own. Limited access to student mobility has been considered to create barriers to diverse student groups developing their global skills and competencies. This is where Canada's policy narrative of inclusion has turned from a social justice agenda to concerns over public good through equitable access to student mobility. The preferred policy solution has been the introduction of a new student mobility programme with significant financial support from the federal government. In 2020, the Canadian federal government launched the Global Skills Opportunity programme with $95 million in funding over five years (Universities Canada, n.d.). It was the first time that the federal government allocated specific attention with significant financial support to an outgoing student mobility programme. Furthermore, never before had the Canadian government paid attention to the financial, social, and logistical barriers that prevented many students from participating in global study and work opportunities. The programme overview stated that the programme "will build strong international networks and partnerships, equip the next generation of Canadians with in-demand

workplace skills, and serve as a social equaliser that bridges socioeconomic divides" (Universities Canada, 2021). According to the programme guidelines, 50% of student funding goes to study/work abroad opportunities for low-income students, students with disabilities, and Indigenous students; 40% of funding is to prioritise activity in non-traditional countries (i.e., countries other than the US, UK, France, and Australia); and 10% of funding is to be used to support innovative organisational approaches to reducing barriers to outbound student mobility in Canada. The programme was referred to as "ambitious" and "ground-breaking" in its aim to remove barriers for various student groups ("RDP's new Global Skills Opportunity program to help students gain international study and work abroad experience," 2023). The programme has a decentralised governance structure whereby projects are proposed, implemented, and managed by universities, colleges, and institutes across the country. This decentralised and locally driven structure is intended to allow post-secondary institutions to create projects that best serve the needs of their students. The programme is expected to cater to more than 16,000 college and undergraduate-level university students by 2025 (Universities Canada, n.d.). The programme is primarily focused on enhancing transferable skills that would be attractive to future employers such as problem-solving, communication, digital literacy, creativity, and adaptability to adjust to changes and new demands in the workplace. It taps into a demographic that has been overlooked—the increasing number of Indigenous youth who will benefit the Canadian labour force in the near future.

5. Analysis: The Case of the EU

From the outset of supporting student mobility in the European Community, all three approaches towards HE regionalisation have been pursued. Next to developing inter-university cooperation programmes and providing financial support for student and staff mobility (functional HE regionalisation), the Community action to increase student mobility has also been guided by recognition issues (political HE regionalisation). To put the supranational support for student mobility into practice, systematic guidance and capacities (organisational HE regionalisation) have been guaranteed through means such as a decentral implementation system. EU student mobility policy has a strong political backing and organisational basis. Not only has the system to implement EU support for student mobility been refined over time (Blitz, 2003) but also the networking among HE policy actors has steadily increased (Vukasovic et al., 2018).

There are two reasons why, despite HE policy not being an EU competence, student mobility policy has been able to be established and broadened in scope over time. First, the EC traditionally has encouraged cooperation between HE institutions, since "mobility and networking [are] areas in which the EU can act without infringing the core education policies and responsibilities of member states" (K. de Wit & Verhoeven, 2001, p. 201). Second, the first European Community action programme for education had already foreseen "EC supported educational activity [to] support…the EC's larger policies" (Corbett, 2003, p. 327). In successfully coupling educational issues with the core objectives of European integration, EU action has mattered to aspects of HE such as student mobility. This process has been supported by both an entrepreneurial EC and sectoral actors such as HE institution associations (Beerkens, 2008).

The interrelationship between the objectives of European integration more broadly and the support of student mobility is reflected in the identified phases during which the issue of inclusion has (not) played a role in the EU's actions related to student mobility. Similar to Canada, the EU has had three phases during which the issue of inclusion has played different roles in student mobility. In the first phase (1976–1990), inclusion primarily meant equal access for different genders. In 1991–2013, inclusion was primarily understood in terms of participating countries and types of education for economic purposes, so social inclusion was not a central concern. From 2014 onwards, provisions related to social inclusion have not only become more elaborate but also have been made a clear priority next to the economic and cultural objectives of the EU mobility programmes.

5.1. Mobility Programmes for a Mobile Elite (1976–1990)

In this era, all three approaches to HE regionalisation—functional, organisational, and political—were present. Originating from the European Community's action programme for education in 1976, the Joint Studies Program provided financial support to HE institutions and individuals to increase student mobility. Running until 1986, the programme laid the grounds for the European Community Action Scheme for the Mobility of University Students (Erasmus) launched in 1987. The Erasmus Programme aimed to support not only the creation of the single market but also the development of the "People's Europe" (Blitz, 2003; Papatsiba, 2005). While the idea of shaping citizens of Europe was the ideological force of the programme, the fostering of student mobility was clearly connected to economic problem formulations such as a lack of competitiveness. The *Adonnino Report* from 1989, which introduced the "People's Europe" concept, also included the proposal to establish a European credit transfer system, or ECTS (European Commission, 1985, p. 18), which is an instrument of a political approach to HE regionalisation. Aimed at the "training of European-minded professionals" (Papatsiba, 2005, p. 175), the Erasmus Programme interwove economic, political, social, and cultural rationales for student mobility. The programme was aimed to develop a "pool of graduates…for intensified economic

and social co-cooperation in the Community" (Council Decision of 15 June 1987, 1987, Art. 2(v)). Given the financial constraints associated with the programme, this initial pool of graduates contained only a small group of students and, thus, constituted a mobile elite. The Economic and Social Committee expressed concerns that not only did regional imbalances in participating institutions need to be monitored, but also that "no member state's students should be discouraged for financial reasons" (Economic and Social Committee, 1986, p. 2). Following these concerns, the Commission proposed a corrective mechanism to address equity in participation, adopted by the Council in 1989 (Council Decision of 14 December 1989, 1989). It, however, only secured participation across study disciplines and did not address issues of financial need.

5.2. The Expansion of Programmes for Economic Growth and Social Inclusion (1991–2013)

From 1991 to 2013, the functional and political aspects of HE regionalisation in Europe were further strengthened. Not only was the geographic territory eligible for supranational support expanded but also the EU's mobility programmes were broadened to other education sectors such as vocational schools. To strengthen economic ties within wider Europe, the Tempus Programme aimed to support the restructuring of HE systems in Central and Eastern European countries along market economy logics. Moreover, agreements on the participation of European Free Trade Association countries (Iceland, Liechtenstein, Norway, Switzerland) and prospective member states (Austria, Finland, Sweden, UK) in the Erasmus Programme were established in 1991. The core problems during this period, as they were formulated in the Erasmus Mundus Programme launched in 2004, were the quality and accessibility of European HE. The programme was meant to increase cooperation in HE beyond Europe albeit with a clear economic rationale. Already throughout the 1980s and 1990s "education was viewed as a crucial instrument in the political and economic relaunch of Europe" (Cino Pagliarello, 2022, p. 135), yet with the new millennium, the connection between student mobility and economic competitiveness became even stronger. As such, increasing student mobility numbers remained one of the major objectives of the Bologna Process (Powell & Finger, 2013), which since 1999 has been the central EU-supported intergovernmental cooperation framework in HE. With the adoption of the Lisbon Strategy in 2000 and its follow-up of the Europe 2020 strategy, the creation of a European Area for HE became further guided by a competitiveness rationale.

It has been argued that the knowledge economy paradigm has weakened the social aspects of education (Nicaise, 2012). However, issues of equity and social inclusion nevertheless found their explicit entrance into EU student mobility policy with the Erasmus Mundus, Socrates II, and Tempus II programmes. The respective programmes not only entailed provisions for guaranteeing access to participants regardless of their gender or cultural and social backgrounds but they also were meant to "contribute to achieving the aims of Community policy in the areas of equality, equal opportunities for women and men and promotion of social inclusion" (Decision of the European Parliament and of the Council of 24 January 2000, 2000). While, before, inclusion was only formulated as a problem for student mobility, it was now also formulated as an objective of student mobility. The notion of supranational education programmes serving the economic and social objectives of European integration was strengthened even further with the second Erasmus Mundus programme (2009–2013) and the transformation of Socrates into the Lifelong Learning programme (2007–2013). The horizontal policies of the latter programme did not only include an equality of access clause but also referred to "combat[ing] racism, prejudice and xenophobia [and to] making provision for learners with special needs" (Decision No of the European Parliament and of the Council of 15 November 2006, 2006). These two elements for ensuring social inclusion were already part of the first Socrates decision in 1995, albeit in the preamble and not serving as horizontal policies across member states.

5.3. Erasmus for All? (2014 Onwards)

Having consolidated the functional and political approaches to HE regionalisation in the service of the quality of HE in the EU and, thus, the competitiveness of European HE, the period from 2014 onwards has been characterised by a turn towards prioritising social issues. When the next EU education and youth mobility programme was announced in 2011, it was labelled as "Erasmus for All." This title reflected the programme's undivided focus on inclusiveness (Nicaise, 2012). The Erasmus+ Programme (2014–2020) further emphasised access, promoting "social inclusion and the participation of people with special needs or with fewer opportunities" (Regulation of the European Parliament and of the Council of 11 December 2013, 2013, Art. 23). Since the "low levels of participation among people with fewer opportunities stem from different causes and depend on different contexts" (Regulation of the European Parliament and of the Council of 20 May 2021, 2021, p. 4), the regulation for the programme period until 2020 proposed to develop inclusion action plans for each of its member states. The more recent and stronger uptake of diversity, equity, and social inclusion issues in EU student mobility reflects a wider political debate at the EU level centring on these issues. As such, in 2021, the European Council concluded that equity and inclusion in education and training mattered to promoting educational success for all (Council conclusions on equity and inclusion in education and training, 2021). This was a strong plea for better reconciling social fairness with the EU's competitiveness objectives.

6. Discussion of Findings and Conclusions

By comparing Canadian and EU student mobility policies, this article has served to systematise the development of macro-regional approaches towards inclusion in student mobility and explain their underlying problem definitions, rationales, and policy solutions. Overall, the two contexts have suggested different perspectives on inclusion. Concerning functional HE regionalisation, Canada and the EU share many similarities whereby the federal/supranational approach to increase student mobility has been achieved through the support of HE institutions in the establishment of joint study programmes and the funding of mobility schemes. Regarding organisational regionalisation, the networking within the HE system appears to be stronger in the EU context than in the Canadian context, where the networking is confined to the HE institutions themselves. This connects to the pursued political approaches of HE regionalisation. In the case of the EU, the role of student mobility has always been strongly tied to pursuing the political project of EU economic and social integration, whereas in Canada international education on its own standing has entered the federal policy agenda more recently.

In answering the question of how the issue of inclusion has been featured, our analysis yields that the EU's approach to inclusion has been consistently focused on mobility serving the public good, while Canada has been promoting inclusion as a matter of its social justice agenda while largely using it to serve other purposes such as foreign policy or immigration (see Table 3). However, the primary rationales towards HE regionalisation remain functional and organisational. Accordingly, in both the Canadian and EU contexts, inclusion entered

Table 3. The development of macro-regional student mobility and the role of inclusion in the EU and Canada.

	Period 1		Period 2		Period 3	
	Canada	EU	Canada	EU	Canada	EU
	1970–1990	1976–1990	1991–2019	1991–2014	Since 2020	Since 2014
Problem definition	Unequal global opportunities; Race conflicts	Individual/ institutional/ systemic barriers to student mobility	Decline of government funding	Quality and accessibility of European HE	Inclusion for all	Educational success for all citizens
Rationale for action	Political and economic: Foreign policy goals supporting economic agenda supporting	Economic: Competitiveness of single market; Cultural and educational: European identity	Economic: Competitiveness of Canadian HE	Economic: Competitiveness of European HE Cultural, educational and political: Enlargement	Economic and political: Need for skilled labour for economic growth	Economic and political: Reconciliation of competitiveness and social cohesion
Policy solution(s)	Development aid (cultural and academic exchanges); Financial support for programmes	Financial support (HE institutions, individuals); Networking of HE system actors (credit transfer)	Aggressive recruitment; Marketization; Policy support	Financial support; Networking of HE system actors; Intergovernmental agreements (Bologna Process)	Financial, logistical, and programmatic support (HE institutions, individuals)	Financial support; Networking of HE system actors; Intergovernmental agreements
Inclusion	Inclusion as a social justice issue	Equal participation across disciplines	Geographic diversity; Inclusion not a priority	Equality of access; Programme area expansion; European integration objective	Inclusion for public good; Equitable access for under-represented groups	Reconciliation with competitiveness (national inclusion action plans)

the agenda of federal/supranational student mobility policy through functional instruments such as student mobility programmes. To ensure compliance with the provisions for equality of access and participation in these programmes, the organisational HE regionalisation component, i.e., the actors responsible for implementing mobility funding and joint study programmes, has also been concerned with issues of inclusion. Our analysis reveals that, even though in the two compared contexts inclusion has been defined as a problem, it has not necessarily been at the core of policy solutions and, thus, has not played the role of a stand-alone rationale guiding supranational/federal student mobility policy. While Canada's Global Skills Opportunity directly addresses the issue of social equity, the programme still supports federal immigration interests.

When explaining why and how the issue of inclusion has (not) played a role in supranational/federal student mobility policy, it is useful to consider the aspects of national/provincial sensitivity, on the one hand, and of student mobility policy supporting wider supranational/federal policy objectives, on the other hand. When shaping student mobility policy, the supranational and federal levels have always needed to accommodate member states, provinces, or HE institutions themselves and their interests in programme financing and implementation. EU action is dependent on member state agreement, whereby inclusion has only found an entrance into supranational student mobility concerns when it has been positioned as fostering European integration more generally. As such, supranational action in education traditionally has served other objectives of European integration, primarily economic and political. With regards to Canada, the federal government cannot overstep its lack of jurisdiction over education, which is a provincial responsibility. Thus, the federal role in student mobility has been less related to regional integration but more strongly to a pan-Canadian skilled labour and immigration agenda. As shown above, prior to launching the Global Skills Opportunity programme, inclusion was subsumed under foreign and economic policy considerations.

Even though we identified a continuous and gradually increasing emphasis on inclusion in the assessed policy documents, studies have shown that this does not necessarily translate into programme implementation (e.g., Cairns, 2019). This reflects our finding that inclusion has not been a federal/supranational policy priority of its own standing until recently but instead has functioned as a silent, supportive idea in the economic and political realms of student mobility. With regard to conflicting goals, future research may further investigate the complex task of enacting student mobility programmes at the institutional level. This is particularly relevant given that, while macro-regional stakeholders such as the federal government in Canada and the EC can provide overall direction for internationalisation, there is an ever-growing horizontal cross-stakeholder impact from groups situated outside of the central authority.

While the purpose of this article has been to compare the development of supranational/federal student mobility objectives in Canada and the EU, its insights may also feed into future analyses of tensions between different levels, actors, competencies, and resources in the making of macro-regional policies. In particular, the tension between inclusion-related and economic factors as adhered to in our analysis can be illuminated in greater detail for the case of student mobility and for further policies that may also be characterised by shifts from market building to social policy. By accounting for problem formulations, rationales for action, and proposed appropriate solutions separately, one can first ask if the identified problems are faced by each sub-unit, such as a member state or province, or by the state/federation as a whole. One can furthermore determine whether the federal/supranational level pursues objectives that the subunits have agreed upon, or whether the federal/supranational level pursues its own objectives. Finally, one can inquire whether the proposed appropriate solutions involve sub-unit action and/or federal/supranational action. For this exercise, additional data would be required that go beyond the official discourse in documents. Expert and/or stakeholder interviews would be insightful sources, as they have the capacity to reveal underlying tensions between policymakers who, due to their location at different levels, are backed by different legal provisions and are equipped with different financial and political resources.

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The authors declare no conflict of interests.

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Article

Temporary Protection in Times of Crisis: The European Union, Canada, and the Invasion of Ukraine

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Abstract
The Russian invasion of Ukraine in February 2022 triggered a major displacement crisis. In an unprecedented move, the European Union activated the 2001 Temporary Protection Directive to give those fleeing the conflict temporary protection, marking the first use of the directive in 20 years. Meanwhile, Canada announced its readiness to accept an unlimited number of Ukrainians and launched the Canada–Ukraine Authorization of Emergency Travel to fast-track their arrival. This article compares the policy responses of the EU and Canada to the crisis in Ukraine, focusing on the two temporary protection schemes and differentiating between their overarching goals, policy instruments, and settings. While the policies may seem similar at first, we show that a closer examination reveals underlying disparities, contradictions, and complexities, particularly when analyzing the precise policy instruments and settings. Considering that contemporary policy trajectories are informed by the past, we suggest that while the two programs build on the respective regions' historical and political contexts, crises also create opportunities for change, raising questions about the future direction of immigration policy in both regions.

Keywords
Canada; European Union; international protection; policy responses; temporary protection; Ukraine

Issue
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1. Introduction

In February 2022, the Russian invasion of Ukraine triggered a massive displacement crisis, with over eight million people fleeing the ongoing war recorded across Europe, making it the largest displacement in Europe since the Second World War (United Nations High Commissioner for Refugees, 2023). In response, the EU activated provisions of the 2001 Temporary Protection Directive (TPD; Council directive 2001/55/EC of 20 July 2001, 2001), giving those fleeing the war in Ukraine the right to temporary protection (Carrera & Ineli-Ciger, 2023; Carrera et al., 2022; Motte-Baumvol et al., 2022). Following the call of the Justice and Home Affairs ministers, the European Commission proposed activating the TPD on March 2, 2022, and provided operational guidelines for member states, including simplified border controls, flexible entry conditions, and humanitarian assistance (European Commission, 2022b). On March 4, 2022, the Council of the EU unanimously adopted the decision, triggering obligations of member states towards persons enjoying temporary protection: the right to live, work, and access healthcare, housing, and education for up to three years. This was the first time the EU had ever used the two-decade-old TPD, which was created in the aftermath of the conflicts in the former Yugoslavia and had almost been considered obsolete (Genç & Şirin Öner, 2019; Ineli-Ciger, 2015). At the end of 2022, a total of

4.8 million people were registered for temporary protection either in the EU or in similar national programs (Bird & Noumon, 2022). However, in the past decades, the EU has struggled to present a united front among member states in handling previous refugee "crises," even raising more fundamental questions about European integration (Bauböck, 2018; Nicolosi, 2021; Owen, 2019).

The large number of people fleeing Ukraine has primarily been absorbed by European countries, but other states have also created pathways to protection, resulting in the rapid expansion of various protection programs around the globe, ranging from New Zealand to the US (Katsiaficas & Matos, 2022). One interesting example is Canada, which rapidly announced that it was willing to accept an "unlimited number" of Ukrainians fleeing the war (Tasker, 2022). On March 17, 2022, Canada launched the Canada–Ukraine Authorization for Emergency Travel (CUAET), which enables Ukrainians and their immediate family members to enter Canada with minimal and free-of-charge visa requirements and allows them to stay for up to three years. In addition to their fast-tracked arrival, Ukrainians can simultaneously apply for a study permit or an open work permit. By March 2023, approximately 190,970 Ukrainian citizens or Canadian permanent residents of Ukrainian origin had already arrived or returned, and 949,418 CUAET applications had been received, with 617,726 applications approved (Government of Canada, 2023b). The program was initially set to expire one year after its launch—at the end of March 2023—but has been extended to July 15, 2023. Canada's response is notable; the CUAET is a temporary admission scheme, whereas Canada has traditionally favored offering permanent resettlement to individuals fleeing conflict zones through one of its humanitarian immigration streams.

Although it is certainly not the first mass displacement crisis faced by either Canada or the EU, the Ukrainian crisis has been called "a migration crisis like no other" (Martín, 2022), necessitating rapid and unprecedented international military and humanitarian responses (Katsiaficas & Matos, 2022; Motte-Baumvol et al., 2022). This article compares the EU's and Canada's policy responses to the crisis in Ukraine, with a focus on their temporary protection schemes. Although one could interpret Canada's and the EU's responses to the exodus of millions of Ukrainians as an instance of policy convergence in times of crisis (Hernes, 2018; Knill, 2005), we show that their choices and approaches are in fact quite different. Considering that contemporary policy trajectories are informed by the past, we suggest that while the two programs build on the respective regions' historical and political contexts, crises also open windows for change, raising profound questions about the future direction of immigration policy in both regions. The remainder of the article is organized as follows: The next section opens with a comment on our methodology before moving on to a discussion about policymaking in times of crisis. The second part of the article contains the comparison. To analyze the two temporary protection policies, we build on Hall's (1993, p. 278) typology by differentiating between "the overarching goals that guide policy in a particular field, the techniques or policy instruments used to attain those goals, and the precise settings of these instruments." In the conclusion, we briefly reflect on what makes the EU's and Canada's policy responses to this crisis unique and what this uniqueness might mean for the future of immigration policymaking in the two regions.

2. Comparing and Understanding Immigration Policy Responses in Times of Crisis

This study compares the policy responses of the EU and Canada to the Ukrainian crisis using a paired comparison strategy (Tarrow, 2010). On the one hand, Canada, a classic "settler" society, has traditionally pursued a welcoming yet highly selective approach when it comes to admitting newcomers (Kelley & Trebilcock, 1998). This approach has been referred to as "Canadian exceptionalism" because it is characterized by steadily increasing immigration levels, political parties that do not openly oppose immigration, and positive public attitudes towards immigration and multiculturalism (Triadafilopoulos, 2021). On the other hand, the EU also exhibits a form of "European exceptionalism," as it represents the first instance of a group of democracies that pooled sovereignty to manage and control the flow of people (Luedtke, 2018, p. 23). However, many EU member states—despite colonial ties and "guestworker" schemes—have not traditionally viewed themselves as immigration countries until more recently. Furthermore, the EU has encountered numerous challenges in managing external migration, adopting a more securitized approach, facing strong anti-immigration movements and delays in uniting member states in the development of a cohesive immigration and asylum system (Huysmans, 2000; Scipioni, 2018).

Despite their divergences, comparing the EU's and Canada's immigration policies and systems offers valuable insights. As strategic partners, the EU and Canada are interested in learning from one another. In particular, "Canada's long experience in asylum, immigration, integration, citizenship and multiculturalism is well-known and frequently requested by European partners" (Government of Canada, 2023a). In the literature, researchers have previously explored several similarities and interactions between these two regions' immigration policies (e.g., Carrera et al., 2014; Desiderio & Hooper, 2016; Smith, 2020; Soennecken, 2014). For example, Canada has been actively working on exporting its private refugee sponsorship model to Europe since 2016 (Smith, 2020). Influence also exists in the opposite direction. Canada has adopted several of the more restrictive asylum policy measures already practiced in Europe, leading Soennecken (2014) to argue that this shift in Canada's refugee policy represents a

"European turn," with Canada serving as both a follower and an adaptor, rather than a leader. Yet, beyond such exchanges of knowledge and ideas, political will and historically constructed policy choices play a key role in this policy dialogue across the Atlantic. Contemporary policy trajectories are fundamentally conditioned by past policy choices and—once institutionalized—remain remarkably stable, as change occurs only gradually unless disrupted by events unsettling the equilibrium (Thelen, 1999). For this reason, we focus on comparing policy choices during times of crisis.

Immigration policy is said to be driven by large, slow-moving processes, ranging from economic considerations to demographic challenges, and by domestic "clients," ranging from employers to ethnic advocacy groups, and civil and human rights organizations (Freeman, 1995, p. 888). Yet, crises also play a crucial role in shaping immigration policy. Crises can create "critical junctures" that lead to changes in policy that may previously not have been deemed possible, by potentially generating a sense of urgency, setting the agenda, or opening political windows of opportunity (e.g., Birkland, 1997; Keeler, 1993; Pierson, 2004). Disruptions to societal routines and expectations create opportunities for actors within and outside of government to propose policy innovations and organizational reforms, redefine issues, gain popularity, and attack opponents (Boin et al., 2009, p. 82). The Ukrainian conflict constitutes a major exogenous shock and exhibits some distinct characteristics compared to previous refugee-generating conflicts. First, it is the first inter-state war on European soil since the Second World War, making it highly symbolic and geo-politically pressing for Western nations. Second, with an estimated eight million internally and another eight million externally displaced Ukrainians across Europe (United Nations High Commissioner for Refugees, 2023), together with the "phenomenal" speed of their exit ("More than 1.2 million refugees flee Ukraine," 2022), the scale of this crisis dwarfs previous mass exoduses. Third, the belief that Ukrainians will eventually return home is stronger in public discourse compared to other displacement crises, like Afghanistan and Syria (De Coninck, 2022). Fourth, the flow of displaced people is predominantly composed of women (70% or more of the adults) and children (over one-third; OECD, 2022, p. 99). Lastly, the fast decision-making and unanimous support for aid offered by Canada and the EU are also exceptional.

3. Comparing the European Union's and Canada's Temporary Protection Policies: An Exploration of Differences in Goals, Instruments, and Settings

Comparing policies requires differentiating between "the overarching goals that guide policy in a particular field, the techniques or policy instruments used to attain those goals, and the precise settings of these instruments" (Hall, 1993, p. 278). To understand the contemporary temporary protection policies in the EU and Canada, it is necessary to consider the broader framework within which these policies were made. While both the EU and Canada grapple with the liberal paradox of wanting to control migration while at the same time wanting to encourage it (Hollifield et al., 2022, p. 3), their respective histories shape their divergent immigration paradigms—meaning the framework of ideas and standards within which policymakers customarily work (Hall, 1993)—impacting their policy goals, instruments, and settings.

3.1. Immigration and Past Policy Choices in the European Union and Canada

Canada has a long tradition of humanitarianism, but also of immigration control and deterrence (Dauvergne, 2005). It has an equally long history of distinguishing between individuals whom it wants to admit permanently to Canadian society and those to whom it permits entry only conditionally (e.g., after being approved for a visa) or temporarily (Goldring & Landolt, 2013). Prior to Canada finally signing the 1951 Geneva Convention and 1967 Protocol in 1969, significant numbers of refugees (or, more broadly, individuals in need of protection) were admitted to Canada on an ad hoc basis, through orders-in-council issued by the cabinet, bypassing parliament, with the intent of offering them a permanent home (Dirks, 1977)—notably, approximately 37,000 Hungarians in 1957, 12,000 Czechs in 1968, and 8,000 Ugandan Asians in 1972. The now-defunct Designated Class system, created with the passing of the 1976 Immigration Act, which was aimed at large-scale Indochinese resettlement, facilitated fast and flexible admission of individuals and even groups in need of protection directly from overseas (Casasola, 2016). This system was faster because it entailed less paperwork. One reason for this was that, legally, it presumed that all individuals in the class were prima facie refugees (Batarseh, 2016, p. 57), skipping individual refugee status determinations. It was also more flexible in that it allowed for the admission of eligible individuals who did not meet the narrow criteria for obtaining refugee status as laid out in the Geneva Convention; this included, for instance, those who were still in their own country (Labman, 2019; Mangat, 1995, p. 22). While the Designated Class system was abolished in 2011, Canada has retained the commitment to admitting groups in need of protection on a discretionary basis—that is, sometimes in addition to or outside of its annual resettlement and inland asylum determination system intakes—always with the goal of permanent residence. For example, in 2017, Canada announced it would resettle 1,200 Yazidis and other Daesh survivors through a mixture of private and government sponsorships, in addition to Canada's targets that year (Immigration, Refugees and Citizenship Canada [IRCC], 2017).

It is notable that contemporary Canadian immigration law, the Immigration and Refugee Protection Act,

contains no separate class for temporary humanitarian admissions. The Immigration and Refugee Protection Act distinguishes between four temporary resident classes: visitors, students, workers, and other special/discretionary permit holders (temporary resident permit or minister's permit). Although temporary resident permits are occasionally issued to victims of human trafficking, most of them are issued to individuals who would otherwise be inadmissible because of criminality or on health grounds (IRCC, 2020, p. 32). These temporary resident permits are distinct from the permission granted to individuals who are allowed to remain in Canada because of a temporary suspension (or an administrative deferral) of the removal order (Canadian Border Services Agency, 2021). Individuals on removal order suspensions are allowed to work and go to school and become eligible to apply for a pathway to permanent status (e.g., Humanitarian and Compassionate Applications) if the suspension is later lifted. The absence of temporary protection programs in Canadian immigration history makes the creation of such a program for Ukrainians even more interesting, especially given that previous calls for similarly swift action—for example for Afghanis fleeing the Taliban takeover—remained unheeded, notwithstanding the various pathways to permanence that Canada *did* create for both Afghanis and Syrians (IRCC, 2022). At the same time, the CUAET only provides temporary protection, reportedly in line with the wishes of the Ukrainian community (Tasker, 2022).

On the other side of the Atlantic, EU member states have a long history of accepting refugees and asylum seekers (Orchard, 2018), pre-dating the Geneva Convention and the creation of the EU. Today, all EU member states are parties to the 1951 Convention and its 1967 Protocol. While not all immigration areas are regulated by the EU, asylum policies have at least been partially communitarized since 1999, with power extended to EU institutions to adopt legislation on asylum and steps taken to create a Common European Asylum System (CEAS). The CEAS operates on the principle of minimum standards, meaning member states can have higher standards than those required, but must at least meet the lowest standards established (Guild, 2014, p. 239). Yet, over the years, the rhetoric of "burden'' and "responsibility" has contributed to a lack of agreement among member states and an overall reluctance to accept migrants. This is reflected in the continuing diversity of asylum policies among member states, despite nearly two decades of EU harmonization efforts (Zaun, 2018) and multiple reforms of the CEAS. The Syrian refugee crisis of 2015 further revealed significant shortcomings in EU asylum policies, from the lack of solidarity among member states to the human rights and legal issues in the implementation of such policies. In response, the European Commission proposed a New Pact on Migration and Asylum in 2020 to improve procedures throughout the asylum and migration system, balance the principles of fair sharing of responsibility and solidarity, and "rebuild trust between member states and confidence in the capacity of the European Union to manage migration" (European Commission, 2020a). However, member states have yet to break the political impasse and adopt the New Pact. Even though the European Parliament and the rotating Council presidencies agreed on a joint roadmap in September 2022, and to make it a top priority and conclude negotiations before the end of the 2019–2024 legislature (European Commission, 2023, p. 16), some experts have expressed doubts regarding the prospect of its adoption in the foreseeable future (Thym, 2022).

The TPD (Council directive 2001/55/EC of 20 July 2001, 2001) is particularly reflective of the EU's struggle to not only develop but also implement a common policy for managing mass influxes of displaced persons. The TPD was adopted in 2001 in response to the displacement caused by the conflicts in the former Yugoslavia in the late 1990s, in parallel to the first steps to create the CEAS. During the Kosovo crisis, member states offered temporary protection under a Humanitarian Evacuation Programme proposed by the United Nations High Commissioner for Refugees (Nicolosi, 2021, p. 21). Searching for a common and ready-to-use solution in the EU, member states designed the TPD to cope with a future "mass influx of displaced persons" (Ineli-Ciger, 2018, p. 149). While further analysis of this legal instrument goes beyond the scope of this article, the rationale of the TPD is to temporarily protect displaced persons from non-EU countries who do not necessarily qualify for refugee status. Although the directive has been transposed into national legislation by member states (with varying scopes and mechanisms; Noll & Gunneflo, 2006), its activation requires a Council decision adopted by a qualified majority on a proposal from the Commission (see Article 5 of the TPD; Carrera et al., 2022, p. 11; Council directive 2001/55/EC of 20 July 2001, 2001), which, despite several attempts, had never actually been accomplished. The TPD was invoked in 2011 in response to the NATO intervention in Libya: Malta and Italy requested its activation, but such requests were not followed (European Commission, 2011; Luyten, 2022). In 2015, the European Parliament adopted a resolution regarding the recent tragedies in the Mediterranean, pointing out that "the Council should seriously consider the possibility of triggering" the TPD (European Parliament, 2015). Once again, justice and home affairs ministers rejected the proposal due to opposition from several member states, particularly those in Central and Eastern Europe, who feared that the use of the TPD would create an unfair burden, act as a "pull factor," or not address the root causes of the problem (Bosse, 2022; Ineli-Ciger, 2015, 2022). The Commission even proposed the repeal of the TPD in 2020, as it was viewed as a "potentially lengthy and cumbersome procedure" that "no longer responds to member states' current reality" (European Commission, 2020b, p. 64). The unanimous activation of the TPD for Ukrainians

in a mere two days was therefore seen as a surprise (Ineli-Ciger, 2022).

3.2. Comparison of the European Union's and Canada's Temporary Protection Schemes: Disparities, Contradictions, and Complexities

Immigration paradigms vary. Canada defines itself as a settler society with an extensive humanitarian tradition and continues to recruit large numbers of immigrants annually, while the EU continues to exhibit a reluctance towards permanently welcoming new immigrants, including on humanitarian grounds. For the EU, humanitarian protection remains an obligation or a "burden" that needs to be shared among member states, rather than viewing it as only one component of a larger immigration intake, as in Canada. Although both have opted for externalization when it comes to controlling unwanted asylum-seeking and "irregular" migrants (FitzGerald, 2019), Canada remains one of the top refugee resettlement countries in the world, while the EU—despite over 20 years of being governed by a "policy core" (CEAS)—continues to exhibit "strong power asymmetries" (Geddes & Hadj-Abdou, 2022, pp. 684, 700) and hesitates to expand humanitarian migration except in the case of Ukraine. Therefore, the implementation of temporary protection policies is noteworthy in both cases, but for different reasons. Moreover, while the two policies may seem similar at first, a closer examination reveals underlying disparities, contradictions, and complexities, particularly when analyzing the precise policy settings and instruments. While the EU and Canada share the goal of protecting people fleeing the war in Ukraine, the instruments they used—temporary protection schemes—differ in their settings, as demonstrated by the systematic comparison presented in Table 1.

The key variation that jumps out in this comparison is the visa requirement. In Canada, Ukrainians continue to require a pre-authorized visa for entry from abroad, unlike EU citizens who are exempt from a visa and only require an electronic travel authorization for entry. What is more, this requirement has remained in place, despite calls from all opposition parties to allow visa-free travel for Ukrainians, with some directly recommending solutions like those in the EU Schengen Area or Ireland (Falconer, 2022). While Canada's Minister of Immigration, Refugees and Citizenship Sean Fraser stated that removing the visa requirements altogether would take too long (Tasker, 2022), Liberal MPs and other government officials repeatedly cited national security as the main reason for keeping the visa requirement in place in parliamentary committee hearings (House of Commons, 2022). But because the CUAET did not require parliamentary approval to be created, the visa requirement has remained in place, showcasing the executive's control over immigration in Canada. In contrast, Ukrainian citizens with biometric passports do not need a visa to enter the EU and, even before the war, could travel freely to EU member states in Schengen for 90 days in any 180-day period (Carrera et al., 2022; Regulation of the European Parliament and of the Council of 17 May 2017, 2017). In 2017, the visa liberalization agreement between the EU and Ukraine came into force, which officially aimed to strengthen the economies, security, and friendship between the two entities (European Union External Action Service, 2017). This agreement is a major factor to consider when understanding the EU's response, as visas, of course, also function as "remote control" instruments (FitzGerald, 2019; Guiraudon, 2022). Compared to other displacement situations, this potentially limited the scope of action as the decision to activate the TPD would determine whether individuals would become undocumented if they overstayed, offered access to the asylum process, or be granted temporary status to remain and work legally (Benton & Selee, 2022).

The second key element that stands out in Table 1 is the absence of the asylum instrument. Although Ukrainians are being called "refugees" in both popular and political discourse, unlike Syrians in the past, neither the EU nor Canada has thus far formally raised the question of granting asylum to them. Instead, EU media and government sources speak of the asylum system as already "overburdened" and are discussing other pathways to permanence for Ukrainian nationals. While most of the focus has been on the preferential treatment of Ukrainians on both sides of the Atlantic (e.g., Bosse, 2022; Chishti & Bolter, 2022; De Coninck, 2022; Garnier et al., 2022; Pardy, 2023; Venturi & Vallianatou, 2022), the current situation in Canada and the EU also raises questions regarding the coexistence or complementarity of distinctive policy instruments, especially temporary protection and asylum. Moreover, not all Ukrainians fleeing the war in their country may qualify as refugees (Storey, 2023). As underlined by Benton and Selee (2022), the conflict in Ukraine could be a tipping point for refugee protection:

> The real test will come several years down the road if people covered by temporary protection need to transition to a more permanent status. Rather than accessing asylum systems, many Ukrainians may eventually opt for labor pathways to stay in European countries or resettle outside the European Union, given their skills and the real needs of labor markets in Europe and countries such as Canada, the United States, and Australia. But there is a real risk too that some will not be able to access these options and could fall outside the protection regime as well. It will be an ongoing challenge to balance pragmatic ways of integrating people with protection needs into host countries in the most efficient ways possible without depriving them of their right to international protection if they need it.

While temporary protection policies are nothing new in the practice of refugee law (Fitzpatrick, 2000), this is the

Table 1. Comparison of settings of temporary protection instruments: TPD and CUAET.

Settings	European Union: TPD	Canada: CUAET
1. Date of activation	March 4, 2022	March 17, 2022
2. Eligibility	Ukrainian citizens and their family members (residing in Ukraine before February 24); Ukrainian temporary residents. Variation among member states regarding the scope (e.g., which Ukrainian residents and dependents are considered eligible).	Ukrainian citizens and their family members (regardless of nationality).
3. Visa policy	None; 90 days to ask for a residence permit in the country in which they want to settle ("free-choice" policy), but temporary protection is automatic.	Expedited and minimal visa requirements, application from abroad (processing time within 14 days of receipt of a complete application). Visa and travel requirements include background checks (including biometrics) and security screening.
4. Length	Limited to one to three years (Article 4), with no renewal after three years (Article 6a). In principle, cease to apply after March 4, 2024.	Limited to three-year stay (renewal possible for up to three years).
5. Work or study	Right to work (Article 12). People under 18 have the right to study in the same conditions as students from the welcoming state (Article 14).	Option to apply for an open work or study permit (application is free and renewable).
6. Settlement and integration	Member states' responsibility; varies accordingly.	Access to federal support from the Settlement Program, normally only available to permanent residents, for a period of one year. Role of provinces in providing supplementary measures.
7. Cap	No cap, although each member state is considered to have a specific "reception capacity" (Article 25). The Commission has created a solidarity platform where member states can share information on reception capacity.	No cap (unlike traditional refugee resettlement applications and permanent residence streams, no limit to the number of visa, work, or study permits granted).
8. Long-term access to residence	Through regular routes to residence in the member states (return and measures after temporary protection has ended: Articles 20–23).	Temporary to permanent residence: IRCC's regular immigration programs and streams. Prioritizes family reunification via a sponsorship program; for Ukrainians with family members in Canada, there is the option of "fast-track" to permanent residence.
9. Financial aid	Right to suitable housing (Article 13.1) and access to social assistance, medical assistance, and means of subsistence (Article 13.2).	One-time payment of $3,000 per adult plus $1,500 per child. Additional income support from the province/territory. Access to public health care depends on the province/territory.
10. Costs/fees	Free or minimal costs (Article 8.3).	Fee waiver. Exempt from immigration medical exam overseas. May be required within 90 days of arrival (paid; certain provinces provide additional support).

first time that such temporary protection schemes have been used so widely and simultaneously in both Canada and the EU. As the conflict drags on, both the EU and Canada face another set of challenges related to transitioning to longer-term protection (Rasche, 2022): There are important questions about the transition to another status should Ukrainians choose not to return home. Therefore, this comparison could also provide valuable insights for policy learning and policymakers' search for more permanent solutions, such as family reunification via a sponsorship program in Canada.

Third, both cases are strongly influenced by multi-level governance dynamics, resulting in variations. Scholars studying the EU have shown the enduring tension between the EU and national governments regarding their degree of discretion in interpreting and implementing directives, resulting in heterogenous reception and asylum policies across member states (Caponio & Ponzo, 2022; Schmidtke, 2006; Scholten & Penninx, 2016; Zaun, 2018). Interestingly, with respect to the TPD, as well as EU-wide efforts to enact related guidelines and coordinate action, this reactive protection instrument is in fact more proactive and collective than ever before (van Selm, 2023, p. 377). Nonetheless, member states differ in their application of temporary protection in several aspects. For instance, the definition of which Ukrainian residents and which dependents are considered to be eligible varies (Setting 2). Furthermore, member states have substantial autonomy in organizing and offering essential settlement services (Settings 6 and 9). In Canada, the multi-level governance of immigration has intensified in recent decades (Gunn, 2020; Paquet, 2019; Vineberg, 2012), with provinces playing an increasingly significant role (Paquet & Xhardez, 2020). In the case of Ukrainians, multiple provinces have taken additional measures beyond those offered to other newcomers, such as reimbursing immigration medical exam fees (Setting 10), providing income support, and offering accelerated access to physical and mental health checkups and services (Setting 9). An analysis of other provincial actions reveals further variation. For example, several provinces, including Saskatchewan, Newfoundland and Labrador, and New Brunswick, have organized charter flights to bring Ukrainians to their respective territories. To gain a comprehensive understanding of temporary protection schemes, it would be essential to conduct a more in-depth analysis of variations. This is particularly important since divergent outputs resulting from these variations may lead to contrasting outcomes over time.

Finally, immigration policy is frequently driven not just by external factors, such as humanitarian crises, but by internal dynamics as well. As Freeman (1995, p. 888) famously argued, immigration politics in liberal democracies are shaped by the relative costs and benefits of immigration for its clients, such as "employers, ethnic advocacy groups, and civil and human rights organizations," who, he contends, are largely in favor of admitting newcomers. Canada, home to the second largest Ukrainian diaspora after Russia, even before the conflict (Falconer, 2022, pp. 2, 5), has a long history of admitting Ukrainians—especially those displaced by war (Luciuk, 2000; Stick & Hou, 2022). The Ukrainian community, chiefly represented by the Ukrainian Canadian Congress, has been instrumental in advocating for mobility pathways for displaced Ukrainians and convincing the government to opt for a temporary protection scheme in 2022, and to extend it in 2023 (Tasker, 2022; Ukrainian Canadian Congress, 2022, 2023). The Canadian Government cited the wishes of the Ukrainian community as a reason for temporary protection, stating that "many of the Ukrainians coming to Canada will want to return home when it's safe to do so" (Ibrahim, 2022). Additionally, the Ukrainian community is well represented among Canadian political elites, with Deputy Prime Minister and Minister of Finance Chrystia Freeland at the forefront, recognized as "an influential advocate and ally for Ukraine as it battles Russia's invasion" (Moss & Nash, 2023). Within the EU, Ukrainians have become one of the largest groups of third-country nationals, with a significant increase in Ukrainian migrants since Russia's "illegal annexation of Crimea" in 2014 (European Commission, 2022a). The largest number of Ukrainians reside in "Poland and then followed by Germany, Czech Republic, Hungary, Spain, and Italy" (Dimitriadi & Lehmann, 2022). The EU has recognized the role of the diaspora upon the activation of the TPD as well as its value for integration (Council implementing decision of 4 March 2022, 2022). As the European Commission (2022a) put it: "Ukrainians with pre-existing contacts, family or friends already present in the EU will find it easier to navigate the bureaucracy of a new country, find accommodation, employment and education opportunities." The geographic distribution of their diasporic networks may explain the swift distribution of Ukrainians across Europe (Lehman & Dimitriadi, 2023, p. 273). While we should be cautious not to overemphasize the role of diasporas, it would be worthwhile examining how Ukrainian dynamics, political influence, and activism have shaped contemporary migration policy trajectories (Dyczok, 2000; Isajiw et al., 1992; Luciuk, 2000), specifically in advocating for protection schemes and additional paths to residency.

4. Conclusion: Discussion and Outlook

It is worth emphasizing again that while the "dynamics and outcomes of crisis episodes are hard to predict" (Boin et al., 2009, p. 81), for migration scholars, it is important to continue paying attention to the Ukrainian crisis, not only because of the many lives that are being uprooted but because of the unprecedented use of temporary protection schemes in Canada and the EU, as well as in other parts of the world. Although crises can create opportunities for change, a thorough understanding of long-term dynamics is crucial for understanding its direction. The EU's swift and unanimous decision

to use temporary protection during the Ukrainian crisis was remarkable (Bosse, 2022, p. 532), given the history of obstruction and division among member states. Despite previous debates on the legal and political challenges hindering the use of temporary protection, this episode emphasized the importance of political will in making progress in crafting a cohesive and common international protection system in the EU (Ineli-Ciger, 2022). In Canada, the absence of a history of temporary humanitarian protection raises different questions, ranging from worries about the potential dilution of permanent refugee protection to creating further precedents for the preferential and expedient treatment of some groups of protection-seekers over others. It also echoes a steady trend towards temporariness in Canada's immigration regime, especially regarding labor migration. For the first time, in 2007, Canada welcomed more individuals on a temporary than on a permanent basis (Nakache & Kinoshita, 2010, p. 3). While temporariness was not intended in Canadian humanitarian schemes, this current episode stands out. Will the use of temporary protection in both Canada and the EU result in a shift of their larger immigration policy paradigms—the frameworks of ideas and standards within which policymakers customarily work (Hall, 1993)? While it is certainly too early to decide, this comparison sheds light on immigration policy development in times of crisis and creates avenues for further study on both sides of the Atlantic. While questions have been raised about why previous displacement crises—such as the Syrian crisis in Europe and the Afghan crisis in Canada—did not elicit comparable responses, one may wonder whether future displacement flows will lead to the use of similar temporary protection schemes, marking a turning point.

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Conflict of Interests

The authors declare no conflict of interests.

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Article

"Can You Complete Your Delivery?" Comparing Canadian and European Union Legal Statuses of Platform Workers

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Abstract
In December 2021, the European Commission proposed a directive creating five criteria for the presumed classification of platform economy workers as salaried employees. The issue is timely, of course, as the digital organisation of work continues to grow rapidly. Our article contrasts the merits and limitations of this initiative to the Canadian experience concerning so-called independent contractors in the platform economy. In fact, Canadian labour law has long recognised a third status of workers—dependent contractors. It permits collective bargaining, while platform workers remain autonomous, notably for tax purposes. Immediately, the striking similarities between the European Union's five criteria and judicial tests applied by Canadian labour tribunals seem to indicate that both entities are moving in the same direction. However, the federal structure of labour law in Canada and the single market's social dimension also pose important challenges regarding the uniform implementation of new protections. Based on recent fieldwork in Toronto, and as the European Union directive moves into the approval and implementation stages, our article addresses the research question of how basic labour rights in the platform economy progress similarly (or differently), and which actors are driving the change on each side of the Atlantic. We argue that this policy field provides labour market actors with opportunities for "institutional experimentation" navigating the openings and limitations of federalism.

Keywords
Canada; digital labour platforms; European Union; labour law; labour policy; trade unions

Issue
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1. Introduction

In December 2021, the European Commission proposed a directive creating a set of five criteria intended to provide a unified basis for the presumed classification of platform economy workers as salaried employees within the single market (European Commission, 2021a). The issue is crucial, as app-based organisation of work continues to grow rapidly in the retail, food delivery, and transportation sectors. This article compares the ongoing progress and substantive developments of the EU directive to the recent Canadian experience concerning so-called independent contractors in the platform economy.

In fact, Canadian labour law (both federal and provincial) has long recognised a third status of workers—dependent contractors. It permits collective bargaining and some health and safety coverage, while platform workers remain autonomous, notably for tax purposes. The striking similarities between the European Commission's five criteria, as presented in the draft directive, and judicial tests commonly applied by Canadian labour tribunals seem to indicate that both entities are moving in the same direction. They are both attempting to avoid workers' misclassification and regulate employment within the platform economy.

The federal structure of labour law in Canada and the importance of subsidiarity in the EU pose important challenges when applying new protections uniformly and implementing said policy initiatives. Canadian labour law is indeed a patchwork of one federal and 10 provincial

legislations. Similarly, social protections for workers do not fall within the exclusive jurisdiction of the EU. Even directives adopted under the mantle of the four freedoms need to proceed along the winding road of member-state implementation, risking divergence from the norm.

This article's research question explores how basic labour rights in the platform economy progress similarly (or differently), and which actors are driving the change on each side of the Atlantic. In doing so, the article contributes to long-standing debates about policy innovation in multi-level-governance systems. In particular, we are interested in the role of spillover (Haas, 1958; Niemann, 2021) whereby higher-level governments are pushed towards legislation by labour market actors (e.g., large multinationals, employer organisations, and trade unions) or policymakers on lower levels. By making contradictory policy demands and proposals, legislative action at the highest level may be required in order to maintain policy coherence. This then poses the question of "subsidiarity" (Endo, 1994) in federalist systems, unearthing potential sources of resistance when implementing directives from the highest level. A different body of literature anchored in sociological institutionalism insists on the role of isomorphism (DiMaggio & Powell, 1983) within intertwined jurisdictions. Different levels of government thereby "mimic" (Sisson, 2007) policy initiatives that are seen as novel or successful, which may encourage (or hinder) policy experimentation. An additional focus will be on the role of labour market actors versus legislators and courts when approaching this multi-level game of policymaking.

The multidisciplinary approach, combining labour law, policy research, and labour market sociology, is meant to enrich the discussion. It is not meant to create uniformity or an overarching framework where none exists. If anything, the adaptation to a relatively new phenomenon in the labour market, such as the spread of platform work and app-based services, should be met with a flexible theoretical framework. One that comes to mind is "institutional experimentation" (Ferreras et al., 2020), which is defined as a process by which labour market actors assume specific roles in shaping institutional change within larger policy frameworks, resources and contingencies. This article argues that neither actor-based innovations alone nor a purely legal approach can result in effective protections for platform workers. In our case, the heterogeneity of labour law frameworks within two multi-level governance structures, Canada and the EU, provides such an open field for institutional experimentation.

Answering why the EU and Canada provide for a fruitful comparison of platform workers' legal statuses hinges precisely on the interplay of labour market actors and institutions. The multi-level governance structure of both polities, albeit constitutionally quite different, opens up space for actor-based innovations where more homogeneous nation-states tend to compress policy innovation into established path dependencies (Pierson, 2000). Institutional "layering" (Streeck & Thelen, 2005), "bricolage" (Crouch, 2007) by social actors facing blocked or alternate paths, and the "ambiguity and agency" (Mahoney & Thelen, 2010) such a setting creates have long been concepts used to explain actor-induced institutional change over time. The cases of platform workers in Canada and the EU provide two very promising cases for such an analysis.

By proceeding in this way, the article contributes first and foremost to a better understanding of labour law and labour market actors within comparative political science, focusing on the role that creative experimentation and policy advocacy plays in shaping institutions. The article also speaks directly to practitioners on each side of the Atlantic. By highlighting the opportunities and challenges of organising platform workers in the delivery and transport sectors, and by contextualising them in the complexities of federal labour law, practitioners in both geographical locales (and beyond the subsectors covered by our fieldwork) can draw important lessons for improving the plight of millions of platform workers, be it in Canada or the EU.

The article progresses as follows: After a brief overview of definitions and the empirical basis for the article (Section 2), we will present the fundamentals of multi-level employment law, as it is applied to platform workers in the two cases (Section 3). Then, we will describe our findings from the Canadian fieldwork (Section 4) and discuss legislative initiatives in that country (Section 5). Crossing the Atlantic, we will then elucidate national initiatives on regulating platform work in Europe (Section 6), before turning our attention to the EU directive itself (Section 7). In Section 8, we will discuss the drivers of similarities and differences for the variable progress shown in the two cases, before ending with some conclusions for theory and practice (Section 9).

2. Empirical Basis of the Article and Key Definitions

Embarking on an analysis of institutional change and the role of social actors in a setting of multilevel governance necessarily comes with its own pitfalls. Firstly, definitions of key institutional concepts may not concur. We have used the term "multi-level governance" (Scharpf, 1999) to describe labour law in both Canada and the EU. We, of course, realise that the European Union is more of a "supranational polity" (Hix, 2007) or a confederation, based on (some) upwards delegation of jurisdiction while relying on national-level implementation and respecting the principle of subsidiarity. In comparison, Canada is a constitutional federation with relatively clearly divided responsibilities in the field of labour, with each of the institutional levels (federal and provincial) overseeing implementation independently (see Article 92 in the 1876 Constitution Act; Minister of Justice, 2021).

Secondly, we have applied the legal constructs of "salaried employee" and "independent contractor"

uniformly while realising that the notions imply somewhat different criteria on each side of the Atlantic. The resulting in-between statuses are even trickier. For the purposes of this study, we distinguish two. Under "dual-status" workers, we include those who find themselves recognised vis-à-vis a designated employer for most of the purposes of labour legislation, while retaining the status of "independent contractor" notably for purposes of taxation and contract law. With "third status," we mean a detailed hybrid, by which only some, limited parts of labour law apply to them. The variations of such an in-between model are too plentiful to enumerate them all. Some allow for collective bargaining of wages and working conditions in a separate negotiation framework but do not include social security protections. Others focus on occupational health and safety (OHS) and workers' compensation schemes, but without extending the right to collective representation.

Finally, given the multiple forms of app-based work and the various incarnations of the gig economy, we must focus on the precise sector that our study covers by analysing applicable employment law, labour policy, and actor-based innovations in the context of in-person services mediated by platforms (digital apps acting as intermediaries between customers, service providers, and workers). More specifically, we are only examining the food delivery and transportation subsectors. They are of particular interest, as they have seen tremendous growth in numbers, both absolute and relative to the more traditional service sectors against whom they now compete. While we appreciate that this limits our findings—to two very dynamic subsectors with relatively low-skill workers—and generalisations with other subsectors of the gig economy might be difficult, we believe that experimentation can best be studied in a context of disruption and rapid growth.

Based on recent fieldwork concerning the organisation of food-delivery and transportation platform workers in Toronto, as well as some expert interviews on each side of the Atlantic, we follow a largely inductive epistemology, drawing inferences and developing implications for social and political theories as we progress. In Canada, a total of six semi-structured interviews each of approximately 45 minutes were held at different levels (local organisers and national union representatives) and with interviewees from different occupational backgrounds (e.g., riders and drivers). In Europe, we conducted five expert interviews covering three different countries as well as the EU as a whole. They varied from 30 minutes to an hour in length (for the complete interview list, see the Supplementary File).

To circumscribe the legal lay of the land on each side of the Atlantic, we completed an analysis of applicable legislation and policy documents. In Europe, we analysed seven national legal frameworks (Belgium, Denmark, France, Germany, the Netherlands, Norway, and Spain) and three supranational texts (the European Commission, Council, and Parliament). Data from Norway was included, as the rules of the single market do apply to Norway by virtue of its EEA association agreement. In Canada, we concentrated on federal, Ontario, and Quebec legislation. We also executed extensive documentary research, analysing over 30 texts stemming from seven different, independent media sources (two Canadian and five European), including a six-part podcast series by the *Toronto Star*. We also obtained trade union documentation (nine Canadian and six European policy documents as well as 11 Canadian and five European press releases found on the respective organisations' websites). Additionally, we also analysed three Canadian press releases issued by the multinationals Uber and Foodora.

Before exploring these extensive information sources in more detail, the next section will embark on an overview of the institutional and legal framework covering platform workers in the EU and Canada. The section is arranged by government level and labour policy field to explore labour standards such as health and safety, working time and minimum wage, collective bargaining, and trade union accreditation.

3. Platform Workers in the Context of Multi-Level Employment Law

At least 28 million workers in the EU are currently working for digital labour platforms, a number forecast to rise to 43 million by 2025 (European Commission, 2021b). A Canadian study (Action Canada, 2021) showed that 28% of Canadians draw some form of income from digital platforms, with it being the main income source for one in four. This would put the total number of Canadian platform workers at roughly 2.6 million at the time of the study, likely to be even higher today.

Platform workers, especially in the transportation and food delivery sectors, do not typically choose their status as autonomous workers deliberately. As our interviews revealed, above all, they need "a job" without too many entrance requirements. The rapidly expanding platforms provide them. The abundance of young, migrant, and often racialised workers in Canada are readily absorbed into this segment of the service industry. This seems to apply similarly in Europe (Altenried, 2021). The lack of protections related to not being a salaried employee—albeit intimately part of the platforms' business model—often comes as an afterthought to workers.

The stark dichotomy between salaried employees and independent contractors is put to multiple tests in this new world of highly mobile labour. Platform work, while technically considered to be independent, often falls between the cracks. For the worker, many of the benefits of being truly independent are absent and protections (linked to a stable salaried employment status) are patchy. In practice, social actors and policymakers have thus toyed with various forms of a "dual status." This would entail giving platform workers certain rights from both categories, as salaried employees of clearly

identifiable employers (e.g., for collective bargaining purposes) and as independent contractors (e.g., for tax purposes). This contrasts with classifying them into various forms of "third status." Such a classification would take away the independence of being a contractor and provide only a limited set of the rights habitually granted to salaried employees, thus effectively they become neither independent contractors nor salaried employees.

Complicating this conundrum is the decentralised nature of labour law in both of the jurisdictions being compared. In Canada (see Figure 1), over 90% of all employment is considered provincial jurisdiction under the Canadian Constitution (Statistics Canada, 2021). Federal labour legislation (Minister of Justice, 1985) primarily covers banks, interprovincial/international transportation and shipping, telecommunications, and the federal civil service (including state enterprises). Only the category of "postal and courier services" might provide for some application of federal labour legislation to in-person platform work. Thus, most platform work is regulated by provincial labour codes.

The federal labour code, as well as those of nine of the provinces (all influenced by jurisprudence stemming from the Anglo-Canadian common law tradition), already recognises a third status as "dependent contractors" (Minister of Justice, 1985, Art. 3.1c). While the province of Quebec, representing roughly 20% of the Canadian workforce, does not. Its civil law tradition opted to create distinct legal frameworks for various forms of "dual statuses" (e.g., for artists and childcare operators) instead.

Legislation on workplace accidents and occupational diseases in the provinces is very similar (the federal legislator has not created its own workers' compensation scheme). Therefore, federal employees follow their respective provincial legislation—a no-fault collective insurance paid for by employers. Henceforth, and unless the workers contribute themselves to said schemes on a voluntary basis, this generally excludes independent and dependent contractors. The apparent (mis)classification of platform workers adopted by each province, thus becomes a critical weakness for workers' effective protection against workplace accidents.

In the EU (see Figure 2), only broad minimum standards can be adopted under the mantle of the *acquis communautaire* aiming at protecting fair competition. Such has been the case, under Art. 153.1b, in the fields of working time and paid annual leave. While social protections, such as employment insurance and rules around termination of employment (Art. 153.1d), require unanimity among member states and are thus next to impossible to harmonise. Right of association and wage setting (Art. 153.5) continue to fall entirely under national jurisdiction (Consolidated version of the Treaty of the European Union, 2012).

OHS regulation exemplifies the most integrated policy field—a framework directive, specific directives about issues such as protective equipment and contaminants, and a multitude of binding standards. It also has its own enforcement agency (European Agency for Health and Safety at Work, 2023). Together, these elements have created an evenly and directly applicable regulation, thereby providing a common floor for workers across the EU. The aim here is to prevent the cutting of corners on health and safety at work from becoming grounds for competitive advantages or stark differences in OHS approaches thus limiting the four freedoms (free movement of goods, services, capital, and labour) within the single market in some way. The problem, of course, is that independent contractors are not always covered; thus, a policy initiative for misclassified platform workers is crucial.

After having laid out the main legal dilemmas created by the classification issue, the next section will

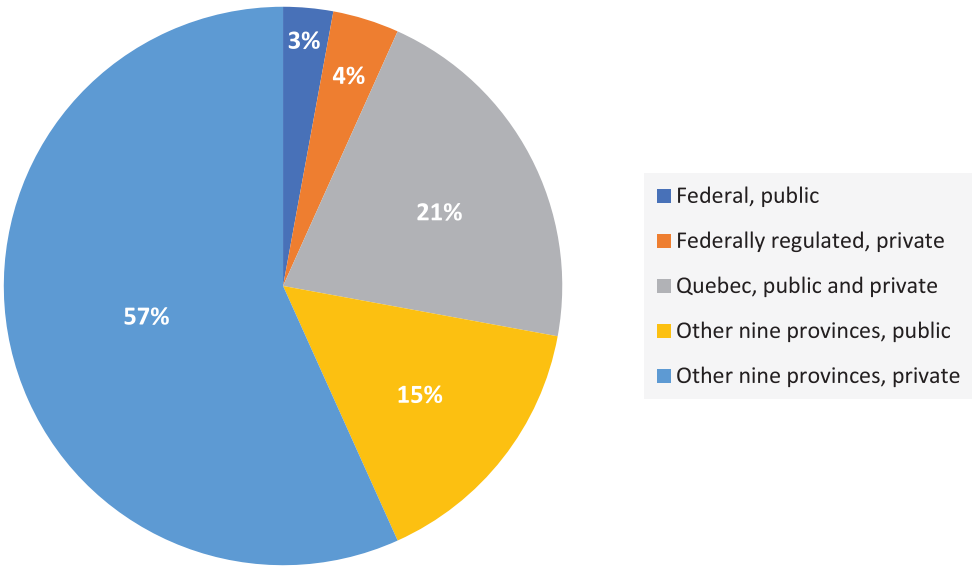

Figure 1. The architecture and coverage of Canadian labour law. Source: Author's work based on data from Statistics Canada (2021).

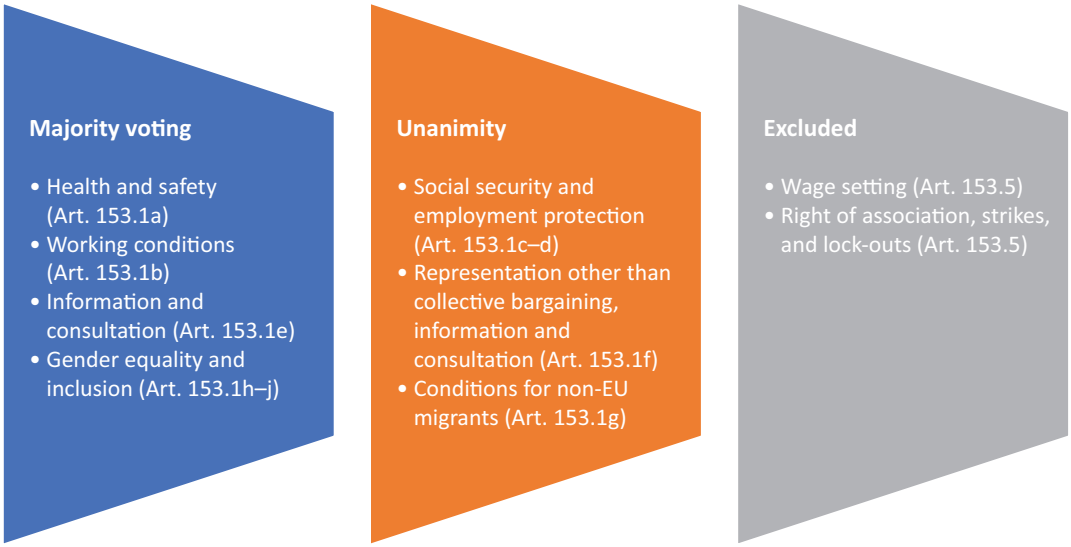

Figure 2. The 2008 Treaty on the Functioning of the European Union and its application to labour and social policy.

bring our discussion into the details of the consequences of misclassification in the day-to-day reality of platform-based work in Canada. It will also discuss the inclusion (and exclusion) of misclassified workers in the ranks of Canadian trade unions.

4. Risks and Benefits for Platform Workers as Revealed by Our Canadian Fieldwork

On substance, what are they complaining about? When determining misclassifications, both the proposed EU directive and the Canadian jurisprudence insist on subordination and control over working conditions as key elements. As revealed by workers' testimony before the Ontario Labour Relations Board (OLRB), in the case of Foodora, food-delivery workers are subject to intense surveillance—ranging from tight timelines for pick-ups and deliveries to algorithm-imposed disciplinary measures. They also have no possibility to negotiate their remuneration; rather, they have predetermined fee schedules by distance and/or type of service. This creates an "economic dependency" according to the tribunal's ruling (*Canadian Union of Postal Workers v. Foodora Inc.*, 2020).

While some elements of the Canadian five-step judicial test, which will be presented later in more detail (Table 1), may point to a status as independent contractors (e.g., the possibility to work for different food delivery platforms at the same time and the risk of economic losses stemming from long wait times at a restaurant), the OLRB ultimately evaluated the link of subordination and dependency to be more significant. With respect to the obligation to provide one's own equipment, such as a mobile phone with a data plan, a car or bicycle, and protective gear (and, in the case of Foodora, even an obligation to acquire the emblematic, fuchsia-coloured thermal bags), these obligations may also apply to salaried employees under many Canadian labour codes and do not by themselves permit a classification as independent contractors.

As revealed by our interviews with food delivery riders, the most upsetting problem that they faced in the Canadian example is the lack of respect from a relatively anonymous employer. This is exemplified by employers intervening through messenger chats (rather than face-to-face communication) as well as severe health and safety concerns for the workers. Delivering meals on bikes frequently leads to work-related injuries, ranging from road accidents, such as dooring by drivers exiting their parked vehicles and bike tyres becoming trapped in potholes. Especially in the depths of a Canadian winter, both deliveries by bike and by car are replete with safety-related issues—repeatedly stressed by our interviewees. A further important safety issue is the absence of protection from harassment and even sexual violence, reported by female delivery workers during our fieldwork.

As previously mentioned, unless they make voluntary contributions for themselves, independent contractors are not covered by Canadian workers' compensation schemes. Nor are their employers required to take preventative measures to ensure a safe work environment for them. A symptomatic situation reported by a Toronto-based rider, who broke his arm from a fall due to a tramway rail, inspired the title of this article. When reporting his accident to the dispatch over the app, the manager's initial reaction was: "Are you still going to be able to complete the delivery?" (Gebert, 2021). This became a rallying cry for the Foodora worker unionisation drive in that city. Severe safety problems, coupled with a flagrant lack of respect for the workers, have propelled the issue of their independent contractor status to the fore catching the attention of traditional labour market actors, such as national Canadian trade unions.

Most Canadian labour codes reserve collective representation and industrial action for workers who are classified as salaried employees or dependent contractors

(Gouvernement du Québec, 1964; Government of Ontario, 2000; Minister of Justice, 1985). To access those rights effectively, however, trade unions need to organise them first. This setup provides little to no incentive to do so, once they have been effectively misclassified by their employers as independent contractors.

In the history of collective action and labour organisations, however, the status of autonomously executed work is not necessarily an anathema to collective action and social protection. As a case in point, one of the first trade unions in North America (the shoemakers of Boston) was founded in 1648 upon an association of skilled tradespeople who were seeking to negotiate their fee schedule collectively (Commons, 1909). After a period of prohibition, presumably because it would infringe on antitrust principles (Cox, 1955), many trade unions are still intimately linked to skilled trades. This is especially so in the construction industry, and thus they do have a historical repertoire linking them to individuals identifying as workers but acting as small entrepreneurs for other purposes. This dual identity dubbed "craft unionism" (Perlman, 1922) might very well apply to workers in the gig economy as well.

Canadian legislators have sometimes reacted by enshrining such a dual status into law. For example, workers in the arts, media, and entertainment industry (e.g., actors, screenwriters, dancers, and singers) are considered both independent contractors and workers who are entitled to collective bargaining and basic labour protections (Minister of Justice, 1992). Working on multiple television or filming sets at the same time and signing individual contracts for their services, they are nevertheless organised by major Canadian trade unions and negotiate basic protections and minimum fee schedules with recognised employer associations. Such arrangements are not uncommon, the so-called academic trade unions in Scandinavian countries function in a similar way (Logue, 2019). Also, the Canadian province of Quebec recently allowed home-based childcare providers (while remaining small enterprises for fiscal purposes) to negotiate their fees collectively with the Ministry of Families (Gouvernement du Québec, 2009).

Anglo-Canadian common law jurisprudence and labour codes have instead provided for a "third status," that of "dependent contractor." It entails that autonomous workers must be able to access collective representation and social protection if they can satisfy certain legal tests establishing their subordination to (and dependency on) a presumed employer. This is precisely the scenario of the previously introduced Foodora example. The OLRB, after applying the five-step test regarding subordination, pay schemes, discipline, and control, concluded that the couriers and drivers had been misclassified by their employer and should benefit from unionisation and other forms of collectively negotiated protections (*Canadian Union of Postal Workers v. Foodora Inc.*, 2020). The situation bearing the closest resemblance in Europe, is the "worker status" for employment within the platform economy that predominates in the UK (Rogers, 2019).

In the debate over how to improve the plight of app-based delivery workers, one may ask whether such reclassification is the way forward, or whether a "third status" is perhaps a third rail—zapping a vast variety of protections in exchange for a more limited set of workplace rights. That debate is justified because the salaried employee status remains the most legally binding guarantee for economic and social rights. The problem of inclusion in (or exclusion from) the OHS frameworks of their respective jurisdictions is a case in point: While the OLRB was competent to require union certification, it did not have the mandate to require inclusion into the workers' compensation framework. However, fearing civil lawsuits over work accidents, at least one platform has since elected to contribute to the Ontario workers' compensation scheme on a voluntary basis.

The multiple challenges experienced by platform workers in Canada thus beg two questions: Why have the legislators at the federal and provincial levels not intervened? And what precedent (if any) would apply to their situation? That discussion will be the subject of the next section, which includes a presentation of the role Canadian social actors play in policy innovation.

5. The Canadian Experience on Policymaking in the Field of Labour Law

Achieving better coverage for Canadian workers through basic labour protections is hindered by the county's multi-level governance structure in labour law—similar to the EU's. Instead of a uniform approach, labour market actors, legislators, and workers have been experimenting with various third and dual statuses for non-standard workers. In other fields of social policy, however, we can see mimicking of successful efforts at the provincial and federal levels. For instance, proactive pay equity legislation first introduced in Quebec in 1997 was finally incorporated at the federal level in 2018. This was due, in large part, to the pressure exerted by prominent public sector unions such as the Canadian Union of Public Employees and the Public Service Alliance of Canada.

Strikebreaker legislation and card-check certification have seen a similar ebb and flow between jurisdictions. For example, Ontario created (1990), then abolished (1995) card-check accreditation. After decades of lobbying by the Canadian Labour Congress, strikebreaker legislation is now being proposed at the federal level, while card-check legislation was only briefly repealed federally between 2014 and 2017. Quebec created and retained both since 1982. However, being subject to the changing politics on both jurisdictional levels, Canada (like the EU) has been unable to provide uniform protections.

In the aforementioned case of the Canadian Union of Postal Workers seeking accreditation for Foodora couriers and drivers in Mississauga and Toronto, the weaknesses of a purely "actor-based" experimentation with

existing legislation become evident. Shortly after the OLRB ruled in favour of the Canadian Union of Postal Workers, Foodora exited Canada, thereby leaving the entirety of the Canadian market for app-based food delivery unorganised once again.

A separate but related case involved Uber Eats drivers contesting their dispute settlement scheme with the company. The contested mechanism referred to Canadian disputes in arbitration in the Netherlands. Starting in 2017, the case wound its way through the labour courts. After a final setback before the Supreme Court of Canada, the company agreed to substitute its previous arbitration practice with a voluntary representation scheme with the United Food and Commercial Workers trade union acting as an official interlocutor (*Uber Technologies Inc. v. Heller*, 2020). The United Food and Commercial Workers is now recognised to represent Uber and Uber Eats drivers in their grievances against the company but without any formal trade union accreditation (Uber Canada, 2022). Consequently, the United Food and Commercial Workers abandoned their request for formal accreditation before the OLRB. Henceforth, this settlement has been panned by large parts of the Canadian labour movement as a less-than-desirable third-tier option in comparison to the securities that formal accreditation would otherwise provide.

In the meantime, policy initiatives similar to the one spearheaded by the European Commission remain few and far between in Canada. Neither social democratic nor liberal governments at either jurisdictional level (provincial or federal) have proposed a significant policy to protect platform workers, especially those in high-risk/low-pay working conditions. Currently, the three provinces with the largest shares of platform workers in Canada—Alberta, Ontario, and Quebec—are all led by conservative governments. We can state, with certainty, that no imminent improvements at the policy level are in sight. In fact, the Ontario government recently passed a law enshrining independent contractor status for digital platform workers. This law only allows for very limited protections, such as respecting the minimum wage level and permitting individual dispute resolution (Government of Ontario, 2022).

As this section has shown, a concerted effort by established labour market actors such as trade unions, coupled with the mimicking effects and institutional disruptions within a federal structure, seems to nurture a conjuncture pushing governments towards policy experimentation. Much to the disadvantage of the workers, platform-based employment in Canada has not yet benefited from such a political conjuncture. With that in mind, let us now turn our attention to some examples from several EU member states.

6. Select Initiatives in EU Member States

There has been extensive research concerning experimentation with legislative frameworks offering protections to app-based workers in Europe. While there are too many simultaneous developments to provide an exhaustive overview, the challenges of misclassification seem quite similar to those in Canada. Bennaars and Boot (2019) describe the contradictory rulings of Dutch labour courts on the classification of platform workers there, for example, opposing workers on two different market areas and platforms, such as food delivery (Deliveroo) and tourism (Booking).

Belgium briefly introduced its own version of a third status. The "De Croo law" (Verwilghen & Ghislain, 2020) principally aimed at clarifying the gig workers' status as small entrepreneurs under its tax law, while maintaining some elements of social protection as employees if they earned more than a certain monthly amount. However, after the noncompliance of several digital platforms, the law was partially revoked and the country reverted to more general protections reserved for those classified as workers (Raucent, 2022). It has, however, recently adopted a new law on platform work which presumes salaried employee status for platform-based work (FPS Employment, Labour and Social Dialogue, 2023).

In Denmark, trade unions succeeded in bringing at least two digital labour platforms (the cleaning staff platform Hilfr and the food delivery multinational Just Eat) into the prominent Scandinavian framework of voluntary collective agreements (Ilsoe, 2020; Scheele, 2021). As stated, these collective agreements are voluntary and not generally applicable by law. As a sectoral application of such agreements requires either the involvement of an employers' association or other major employers to sign up individually, there is now an active campaign to welcome the homegrown Nordic platform Wolt into the fold. If completed, this would leave the subsidiaries of the German multinational Delivery Heros, as well as Uber Eats, as the sole remaining major holdouts.

Recently, France has also legislated to reclassify app-based transport workers in the form of "dual status." This provides extensive individual and collective rights to workers while maintaining them as "independent contractors" (Ordonnance du 6 avril 2022, 2022). It remains to be seen, however, whether the enforcement of these rights will be effective. Compounding the challenges in that country, many workers are subletting their app accounts. This facilitates a much-needed source of income for undocumented migrant workers there (Gomes & Isidro, 2020). As France's version of a dual status continues to allow for subcontracting, we must now address the regularisation of highly vulnerable undocumented workers in the sector.

Based on a tripartite agreement between the government, two main employers' confederations, and two major trade unions, Spain promulgated the Rider's Law in May 2021 (Eurofound, 2021). It requires food delivery workers to be classified as salaried employees and digital labour platforms to disclose information about their algorithmic work organisation (e.g., payment schemes and schedules) to their employees. In adopting the law,

the government and the social partners responded to a landmark Spanish Supreme Court ruling in September 2020. More recently, the Norwegian government (with the support of Norway's main trade union confederation) also proposed legislative action in the platform economy. Such a change would mandate employee status for digital platform workers (LO Norge, 2023).

Even in a country with dual labour relations systems (trade unions and statutory works councils) like Germany, recent strikes at the delivery platform Gorillas (a generalist, not specialising in food delivery) are also linked to problems of worker misclassification (Landesarbeitsgericht Berlin-Brandenburg, 2021). Lacking protections against dismissal in the case of collective action, the situation there quickly escalated to the labour courts. These courts decided that platform workers are correctly classified as independent contractors and thus may not engage in collective action. However, the federal labour court (Bundesarbeitsgericht) has simultaneously defined some criteria to determine salaried employee status for workers—similar to the Commission's proposal (Gramano & Stolzenberg, 2021).

Thus the European situation is comparable to its Canadian counterpart: Traditional labour relations actors are attempting to invoke traditional labour law, but the reality of platform-based work still largely escapes this route (with limited gains in Denmark). Despite legislators' timid attempts to start regulating the sector (e.g., Spain), enforcement dilemmas and collateral damages remain plentiful. Other legislators (e.g., in Belgium and France) have toyed with third-way or dual solutions. In the absence of a concerted campaign by labour market actors, such as national and European trade unions, it is unclear whether the momentum created by certain court rulings and the Commission's initiative is sustainable.

7. The European Commission to the Rescue? Analysing the Current EU Directive

It is in this volatile national-level policy context, described in the previous section, that litigation regarding the employment status of platform workers has risen sharply within the EU. Over 100 court decisions and 15 administrative decisions have been handed down since 2021's close (European Commission, 2021b). A comprehensive review of these decisions concluded with mixed results (Hießl, 2022): While British, Dutch, German, and Nordic rulings still maintain barriers between app-based work and salaried employee status, most decisions by national courts agreed to reclassify platform workers as salaried employees on a case-by-case basis. The European Court of Justice found the UK classification of platform workers to be compatible with EU law, as long as the workers remained independent contractors (*B v. Yodel Delivery Network Ltd.*, 2020). While this court case precedes the UK leaving the EU, its value as a precedent should nevertheless not be underestimated. To avoid a multitude of incoherent legal tests and the resulting patchwork of labour standards, with significant risks of so-called Delaware effects (Cary, 1974), the European Commission decided it was time to intervene.

To "support and complement the activities of the member states" (Consolidated version of the Treaty on the Functioning of the European Union, 2008), it drafted a directive to impose a uniform presumption of salaried employee status, applying to many of those working for digital labour platforms. If certain conditions were met, the presumption and subsequent reclassification would then automatically give the employees their rights under national legislation—including minimum wage (where it exists), working time and health protections and lastly unemployment and sickness benefits. All of the aforementioned would be determined according to where the work is performed, and not necessarily the home country of the digital platform—a principle previously enshrined in the revised posting-of-workers directive (Directive of the European Parliament and of the Council of 28 June 2018, 2018). Collective bargaining for autonomous workers is addressed in a separate set of Commission guidelines (Communication from the Commission, 2022) with national rules currently varying significantly (Fulton, 2018) between member states.

The initial criteria to warrant a presumption for reclassification were:

1. Unilateral wage setting;
2. Supervision, discipline, and algorithmic surveillance of performance;
3. Penalties for refusing shifts and/or prohibition of subcontracting;
4. Specific code of conduct for customer service and/or branded equipment and clothing;
5. Prohibition of "multi-apping" (working for other applications or as a truly independent contractor).

If two of these criteria were met, the directive would force member states to create a "presumption" of salaried employee status (European Commission, 2021a). The digital labour platform would then have to rebut the presumption in the labour courts, effectively inverting the burden of proof.

However, the European Parliament, after discussing the draft directive (January 2023), did away with the five criteria completely and instead opted for a general presumption of employee status for platform workers. The Council (June 2023) then reverted to a less directly-applicable presumption, leaving much of the burden of proof to the platform worker and their representatives. Once again, labour market actors will need to intervene in court if they seek to represent platform workers (entailing stark disincentives to organise workers from the start).

Whatever final form the EU directive will take, the original starting point (the initial five criteria) had a striking resemblance to the legal tests that Canadian jurisprudence developed to invalidate independent contractor status (either to reclassify workers as salaried employees,

or at least to declare them as "dependent" contractors). Let us, therefore, contrast them in detail.

Canadian jurisprudence, both under Quebec civil law and according to the Anglo-Canadian common law tradition, also considers five criteria to determine whether a worker is an independent contractor (Gagnon, 2013):

1. Subordination, including surveillance, imposition of work schedules, and tasks, as well as creating economic dependency (by setting fee schedules unilaterally and prohibiting work for third parties);
2. Ownership of equipment and freedom to choose the geographical workplace;
3. The possibility to earn a share in the profits or risk of incurring losses;
4. The prohibition of subcontracting;
5. The integration into the employer's staffing structure and organisation of work.

Contrary to the EU criteria, they are not applied mathematically (two out of five). They are rather interpreted holistically and respecting a certain hierarchy, as demonstrated by the previously-discussed Foodora case. That hierarchy notably focuses on questions of subordination and economic dependency, while relegating the other criteria to a lower level.

One must also keep in mind that the Canadian criteria were developed for all forms of independent contractors and that they were designed before the massive growth of digital labour platforms. Hence, the EU criteria are (of course) much more applicable to the reality of the platform economy. However, as Table 1 shows, they are still broadly comparable. It also becomes clear that the category of "subordination" and elements of "economic dependency" are understood to be the determining factors in Canada, while the other four criteria are supplementary. In the case of the EU directive regarding platform workers, this emphasis is also reflected by grouping three out of the five criteria regarding economic subordination (Table 1).

8. Discussion: Explaining Legislative Action on Platform Work (or Lack Thereof)

One attempt at reading the EU initiative might be a straightforward "spillover" argument (Haas, 1958), whereby the EU was pushed towards legislation. This momentum was provided by policymakers, labour courts, employers, and trade unions who were all making contradictory claims about the employment status of platform workers. According to this argument, maintaining coherence in the single market required the Commission's legislative intervention. A supplementary explanation stemming from sociological institutionalism lies in the isomorphism of intertwined jurisdictions (Sisson, 2007), whereby labour policy initiated in one jurisdiction may sway other member states or higher-level governments into pursuing their own similar initiatives through mimicry. A more critical approach might view "social Europe" (Pochet, 2019) as serving as an antidote to successive EU crises. Especially the activism of the European Parliament, drastically broadening and deepening the proposed directive on platform work, seems to indicate a new urgency to occupy policy space, an area left relatively untouched by national legislators.

Compared to the EU, the Canadian experience provides none of the aforementioned conditions. The platform economy does not create significant spillover nor do mimicry effects among Canadian provinces (even less so within the minimal scope of federal labour legislation). Additionally, nor does the federal government see any political gains (or need for additional legitimacy) in

Table 1. Comparison of judicial tests regarding independent contractor status.

Proposed EU directive 2021	Canadian jurisprudence
Unilateral wage setting	Subordination, including surveillance, imposition of work schedules, and tasks, as well as creating economic dependency (by setting fee schedules unilaterally and prohibiting work for third parties)
Supervision, discipline, and surveillance of performance	
Prohibition of multi-apping	
Penalties for refusing shifts and/or prohibition of subcontracting	The prohibition of subcontracting
Specific codes of conduct for customer service and/or branded equipment and clothing that needs to be purchased	Ownership of equipment and freedom to choose the geographical workplace
The requirement to earn at least minimum wage in the country where the work is performed—not part of the original criteria, albeit one of the implied objectives	The possibility to earn a share in the profits or risk of incurring losses
	The integration into the employer's staffing structure and organisation of work

providing leadership on the issue. This experience contrasts somewhat with other recent policy initiatives by the Canadian government, such as the adoption of a proactive pay equity law (mimicry of previous Quebec legislation), the introduction of paid sick days (responding to the pandemic crisis), and even the revamping of a federal minimum wage as well as draft legislation for a more union-friendly labour code (both in response to political campaigns). One could thus argue that the federal government has now spent its political capital in the field of social policy, thereby making action on platform work highly unlikely.

Why is it that millions of platform economy workers do not stimulate similar political activism, either at the behest of provincial governments or at the federal level? Everything points to the interaction of actor-based initiatives creatively mobilising existing legislation, mimicking limited decentralised initiatives elsewhere and creating urgency at the top level to regain the political initiative. While Canada does not seem to provide such a helpful conjuncture now, the EU just might.

Labour market actors often remain stuck in the traditional framework of labour law and in their very own "repertoires of action" (Tilly, 2006). They then neglect newcomers and outsiders, even when a sector is growing as rapidly as the platform economy. However, by changing the narrative about platform workers (such as overcoming the singularly judicial debate about employment status) and enlisting this dynamic workforce in creative political campaigns (Fulton, 2018), trade unions might yet become "strategic actors" (Hyman, 2007) in the sector. The precedent of the 2018 European Riders' Assembly in Brussels (Dufresne, 2019) and the nascent Gig Workers United in Canada (Canadian Union of Postal Workers, 2021) might mark the beginning of such an overarching social movement for platform workers.

Despite our fieldwork and analysis being limited to the food-delivery and transportation subsectors, most of the challenges concerning the legal status of platform workers and the blatant lack of congruent actor-based initiatives apply to many workers in the ever-growing gig economy. The range of professionalisation amongst these workers is also quite broad. On the lower end, one can find goods deliverers, homecare workers, administrative assistants, cleaning personnel, and maintenance workers. On the higher end, one can find programmers, stringers in journalism, graphic designers, and translators. Most of these workers face similar challenges of "dual" or "third" statuses under labour law. Many of them will satisfy legal tests on subordination and economic dependency. The overwhelming majority of them are currently unrepresented, not even courted, by labour-market actors such as trade unions.

9. Conclusions and the Way Ahead

Returning to our initial research subject once again, in Canada, most platform workers work under provincial labour law rather than under federal jurisdiction. Even though the mimicking effects of federalism can (and do) impact legislation eventually adopted by the provinces, progress has been limited. As addressed earlier, the current political orientation of the three major provincial governments (Alberta, Ontario, and Quebec) makes progress at that level unlikely. The federal political climate, despite a liberal minority government supported by a social democratic party, is unlikely to foster the necessary momentum either.

So what can Canada learn from the EU? If a concerted social movement like the one calling for federal leadership on a $15 minimum wage, spillover, or mimicry mechanisms are off the table for now, what is the next step? As we have seen in the European cases (with individual national governments, various local labour courts, and administrative bodies adopting reclassification), approaches driven by labour market actors alone are unlikely to succeed. At best, they might simply create a patchwork of employment statuses and highly uneven social rights. In that context, it is novel that some Canadian trade unions (such as the Canadian Union of Postal Workers) are cooperating with platform workers to create a sensible litigation strategy. But a concerted, Canada-wide campaign in favour of regulating platform workers' rights (like the EU directive), is still far from being on the horizon.

Even once critical mass is reached and legislative action is initiated at the top level, the road to implementation and overcoming resistance to subsidiarity in multi-level governance systems is long. In the EU, Council and member states may have already undercut the proposed directive before it was able to create a level playing field for the platform economy. Trade unions will need to intervene to preserve the existing progress.

Based on our analysis, the importance of mutually reinforcing mechanisms between labour market actors and policymakers is paramount. These mechanisms further underscore the theoretical arguments calling for meaningful institutional experimentation within multi-level governance systems. Actor-based initiatives alone cannot explain progress in this field, and neither can legislative spillover and mimicking effects—upwards or sideways.

Scholars may disagree on the precise role of labour market actors, but (as this article has attempted to demonstrate) these actors do play important roles. They both advance bottom-up processes and promote political urgency at the relevant institutional levels, be it through a timely litigation strategy or concerted political campaigns. The inclusion of platform workers within established labour unions on both sides of the Atlantic is thus an important precondition for other social actors (e.g., employers, labour courts, and policymakers) to embark on their own pathway towards meaningful regulation.

So, what is the future for platform workers? The jury is still out on the EU directive and its implementation. In Canada, limited gains by trade unions have quickly

been swallowed up and replaced by employers' initiatives. In the meantime, the expansion of employment in the platform economy is unrelenting. The current shortage of labour supply in many Western countries may tilt the bargaining power in favour of platform workers, but it is unclear whether their actions can be concerted enough to force meaningful and enduring policy change. All the while, the grave dangers of (some) platform work will continue to push vulnerable workers to "complete the delivery" while federalist policymaking plays catch up.

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Conflict of Interests

The author declares no conflict of interests.

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Article

Health Care in Federal Systems

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Abstract
How do multilevel health care systems evolve? Do they develop in a similar manner, or are their respective paths of evolution more sui generis? The aim of this article is to compare the way in which Canada and the European Union have attempted to coordinate health policy between their component multilevel jurisdictions over time. This article argues that the EU—despite its limited authority over health care—has been better able than Canada to develop a greater capacity for addressing health policy at a supranational level, notwithstanding Canada's greater federal involvement in financing health care. While the experience of the EU supports the theoretical premises of neofunctionalism (that a certain level of integration will induce even greater integration in other areas, especially in response to crisis), the experience of Canadian health care federalism does not fit that theoretical paradigm. This suggests a limited applicability for neofunctionalist theory across multilevel systems more widely.

Keywords
Canada; Covid-19; European Union; federalism; health care; health policy; neofunctionalism

Issue
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1. Introduction

Comparative health policy analysis, as a disciplinary field, began to blossom in the 1990s, driven by fiscal strain, rising demand, and increasing technological capacity (Altenstetter & Bjorkman, 1997; Freeman & Marmor, 2003; Ham, 1997; Klein, 1997; Marmor et al., 2005). But comparative health policy analysis at this point focussed only on national comparisons, using national-level data across states. This worked well for health care systems that were highly centralized. But in decentralized states where much of the financing and delivery of health services occurred at the subnational level, these national-level abstractions did not represent the wide diversity in health care policy across regional units. The first serious comparative study of provincial health systems in Canada was published only in 2013 (Lazar et al., 2013). Even so, this is not sufficient: In multi-level systems, a federal/supranational role in health care has become increasingly prevalent (Costa-Font & Greer, 2013; Fierlbeck & Palley, 2015). Thus, comparative health policy analysis must also attempt to understand the nuances and complexities of the relationship between the relevant actors in multilevel health care systems.

The key question for this article is whether the dynamics facilitating greater supranational governance in health policy within the EU are also apparent in Canadian health care federalism. The dynamics underlying the migration of rule-making authority from member states to the European Union have been studied in some depth, and the primary theoretical paradigm explaining post-Maastricht dynamics has been neofunctionalism (e.g., Sandholtz & Stone Sweet, 2012). Inherent in neofunctionalist theory is the concept of "spillover," where an initial level of integration requires additional integration in related areas in order to achieve the original objectives (Niemann & Ioannou, 2015). This concept has been especially useful in explaining the development of European health policy (Greer, 2006). But to what extent can this concept explain the trajectory of health policy of multilateral health care systems beyond the EU? Using Canada as a test case, this article argues that

neofunctionalism has limited explanatory force within that jurisdiction.

Section 2 discusses the kinds of instruments generally available to federal bodies in shaping health policy across federal systems (constitutional, regulatory, and financial). These instruments are set out in Table 1. Sections 3 and 4 describe how these mechanisms are employed within the European and Canadian policy contexts, respectively. Section 5 concludes by questioning the overarching utility of neofunctionalist theory in understanding the dynamics of health policy within federal systems as a rule.

2. The Challenge of Understanding Multilevel Health Care Systems

This article employs a comparative case study approach evaluating the degree to which influence over the nature and direction of health care has migrated upward to a supranational or federal level. "Health care" in this article refers to the funding, provision, and regulation of health care services. Each political unit in the two federal systems under review has a different set of rules governing public access to health care. These access rules, set out in legislation, determine who is covered, which health services are covered, and what proportion of costs of covered. Services not covered publicly may be provided in the private sector, but these may also be subject to regulatory conditions.

While the response to Covid-19 by these federal systems is an important part of the discussion, the overarching analytical time frame begins with the key point at which a federal modus operandi was established setting out health policy roles and responsibilities for each jurisdiction, up to and including the pandemic response. In the EU, the Maastricht Treaty (1992, Article 129) set out a formal treaty base for the EU in public health although, as Section 3 describes, the development of a substantive federal health capacity was much more gradual and indirect. In Canada, the 1984 Canada Health Act established a formal understanding of the role of federal, provincial, and territorial (FPT) governments, although this document was itself based on earlier FPT legislation and continues to be subject to interpretation through federal "interpretation letters."

As noted above, the theoretical framework here is influenced by the role that neofunctionalism has played in explaining EU integration in general, and the direction of EU health policy more specifically. The key claim embedded in this approach is that a level of existing integration will lead to conditions and incentives facilitating spillover in related policy areas (Greer, 2006; Nicoli, 2020; Niemann, 2021; Niemann & Ioannou, 2015; Schmitter, 2004). The methodology used here is a comparative review of articles discussing the nature and extent of health care authority over time in each jurisdiction. The first case study, of the EU, will outline the ways in which neofunctionalism has been employed to explain the dynamics of EU health policy, with specific reference to the reaction to the Covid-19 pandemic. The second case study, of Canada, will argue that there has been no discernible spillover effect following the initial period of FPT shared-cast funding nor during the Covid-19 pandemic. The final section will suggest reasons why greater integration in Canada has not occurred.

In looking at the EU and Canada side by side, the usual methodological caution must apply here: It can be very tricky to compare a national federal state and a supranational federal system (Fierlbeck & Palley, 2015). An analytical armature can nonetheless be constructed focusing on the constitutional division of powers, regulatory authority, and financial capacity (Table 1).

In terms of the *formal division of power*, authority over health care was initially clearly situated in the member states in the EU and PTs in Canada. Under the provision of the current TFEU (2012), Article 168 sets out limited authority for the EU in public health (with clearly stated limits). Canada's Constitution of 1867 (revised in 1982) also delineates the respective powers of federal and PT governments but, as Section 4 notes, the division of powers over health care is not as watertight as may appear to a casual reader. That Canada is perhaps the most decentralized nation within the OECD in the area of health care (Requejo, 2010) makes it a useful comparator to the EU's federation of member states. The formal division of power in each case sets out the regulatory and financial capacity of each jurisdiction, and it is here that the differences between the two entities become distinct. As explained in Section 3, the regulatory capacity of the EU may be quite restricted in the area of health services and delivery, but its oversight of other regulatory functions gives it considerable capacity to shape health at a supranational level more indirectly. As Table 1 clearly outlines, the EU has considerable authority to regulate in areas that indirectly have an effect on health. These areas include the regulation of standards of goods (such as blood products, pharmaceuticals, or food safety) and services (including working conditions). Its mandate to ensure the effective functioning of free markets, as Section 3 notes, was a key causal factor in the establishment of the 2011 Cross-Border Directive on patient mobility as well as the free movement of health care professionals. Finally, the EU's authority over fiscal governance mechanisms has given it considerable influence over member states' spending on health care within their own borders. In Canada, the federal government holds authority over pharmaceuticals (patents), food safety standards, and some very limited authority based on its jurisdiction of criminal law (safe injection sites) and public health (under very circumscribed conditions). Because Canada has no formal mandate to secure an open economic union, the free movement of health care professionals across borders is much more constrained.

However, the narrative is quite different when addressing financial capacity. Canada's federal government has considerable ability to levy taxes, especially

Table 1. Dimensions of federal authority over health care.

	Legal authority	Regulatory power	Financial capacity
Canada	The Constitution Act (1867)	Provincial authority: • Article 92(7) gives authority over "hospitals, asylums, and eleemosynary institutions" to the provinces and territories (PTs); • Article 92(16) gives "all matters of a merely local or private nature" to the PTs, and was interpreted to include health services which, at the time, were both "local and private"; • Article 92(13), on "matters of property and civil rights," gives jurisdiction over the regulation of insurance (interpreted to include public health insurance). Federal authority: • Article 91(23), which confers authority over patents to the federal government, is the basis for the federal regulation of pharmaceuticals.	• Articles 91(3), "the raising of money by any mode or system of taxation," and 91.1(A) give the federal government the authority to tax subjects and is often referred to as Ottawa's "expenditure power." Federal taxation streams include personal and corporate taxes, employment insurance contributions, taxes on goods and services, and excise taxes. • Article 92(2) authorizes provinces to levy "direct taxation within the province in order to the raising of a revenue for provincial purposes." These sources of taxation include personal and corporate income tax, province-specific goods and services taxes, property taxes, excise taxes, and resource revenues.
EU	Treaty on the Functioning of Europe (TFEU; 2012)	EU authority: • Market regulation: Articles 21 and 26 protect freedom of movement (ie, for health care workers and patients) and Article 106 addresses competition in the provision of health services (although public health care has a carve-out under Article 14); • Fiscal governance: Article 121 permits the EU "to ensure that fiscal policy is conducted in a sustainable manner" and Article 126 allows the EU to "examine compliance with budget discipline"; • Social policy: Articles 151, 153, and 156 highlight "improved living and working conditions"; • Public health: Article 168 gives the EU a treaty base in "improving public health,'' but recognizes member state authority over health care funding (although Article 9 is also a general statement that EU activity must take into account a "high level" of human health); • Consumer protection: Articles 169 addresses "the health, safety, and economic interests of consumers"; • Environment: Article 191 includes a focus on "protecting human health" (eg, air quality); • Civil protection: Article 196 is the treaty basis for RescEU.	According to Articles 311 and 322(2), the EU cannot raise or set direct taxes on EU residents. It depends largely on national contributions, supplemented by import duties and fines. Its expenditure cannot exceed its revenue. The EU's budget is less than 1% of the EU's gross national product.

compared to PTs, which have the formal responsibility for high-cost programs such as health, social services, and education, with a much more limited capacity to raise taxes. Thus Ottawa's influence has rested largely in its ability and willingness to transfer health funds to the provinces (under the aegis of its "expenditure power"). In contrast, the EU has no major capacity to levy taxes directly; its limited funding capacity rests upon the negotiated contributions of nation-states. How are these elements constituted so differently in the EU and Canada such that the policy dynamics in the former have facilitated the migration of authority over health policy to the EU level, while this same level of shift of authority to the federal level has not been occurring in Canada despite the considerable (and increasing) financial involvement of the Canadian federal state?

3. The European Union

Within the EU, health care is the responsibility of individual member states; there is no "European health care system" as most national health care systems were established well before the consolidation of the EU as a formal political entity. Nonetheless, while there is no European health *system* there is, as Greer et al. (2022) note, an increasingly discernible European health *policy*. Throughout the gradual creation of the European Union as a coherent political body from the postwar Coal and Steel Community to the 1992 Maastricht and 2009 Lisbon Treaties, jurisdiction over health care has remained firmly and explicitly under the purview of member states. The point of greater European integration was to secure an economic union facilitating the freer movement of goods and services. Nonetheless, gradually and incidentally, the coordination and integration of health governance in the EU have progressed such that, by 2021, the first formal articulation of a potential "European Health Union" appeared.

The formal legitimacy of European policy-making rests in various "competencies" ratified by all members and set out in the TFEU. The key health competence, public health, is explicit but limited: Article 168 of the TFEU (2012) clearly requires "a high level of human health protection" on the part of member states but, at the same time, also stipulates that "the organization and delivery of health services and medical care" are under their authority. Nonetheless, this article also encourages member states voluntarily to coordinate activity within the field of health and places a formal requirement upon the EU to facilitate this coordination between states whenever possible.

But while the formal application of the public health treaty base was limited (Greer & Jarman, 2021), the gradual formation and coordination of public measures developed as a contingent consequence of the burgeoning internal market. The increasing trade in livestock, for example, generated widespread agreement (especially in the shadow of mad cow disease) that all member states should reasonably expect a high level of food safety across the EU. The "level playing field" assumptions of internal market competition also meant that no member state should be able to game the internal market by permitting a lower standard of worker safety. Furthermore, the internal market was not simply about the free movement of goods, but also of services; and where medical professionals provided health care services on the open market, they logically could expect the same level of unfettered movement as other workers. This, of course, required some standardization across the EU in the training and licensing of health care professionals. And as these professionals began to be able to cross national borders with ease, so did patients demand the same right to avail themselves of medical services across state boundaries.

While the directives facilitating these flows took the form of political agreements (such as the 2011 Cross-Border Directive on Patients' Rights), the battleground for the expansion of these kinds of integration across the EU took place more so in the courts in the first instance (especially in the area of competition law). While fully public health care systems are protected from the legal requirements facing private health care delivery, most national health care systems in the EU have some level of private care, and thus the question of where competition law applies can become quite complicated. The extent to which a health care service is an "economic" (i.e., market-based) activity—and thus subject to competition law—rather than a "solidaristic" one (i.e., public) activity is often a matter for judicial interpretation. A clear integrative function, in this way, has been gradually established in health care through EU case law. To understand EU health policy, then, one has to understand not only the formal (and limited) treaty bases for "European" health policy but also the wider acquis of case law and soft law that provide the contours determining where the EU can influence health care.

The economic crisis that descended globally in 2008 led to the development of fiscal measures that permit the EU to exert more pressure on member states to address or modify aspects of their health care systems. The European Semester, for example, is an iterative exercise designed to monitor and assist member states to avoid the outcomes experienced by countries such as Greece following 2008. Member states are now expected to report a granular level of economic activity to the EU Commission, whereupon the Commission can helpfully assist each state to preserve or re-establish its economic health. Because health care tends to incur a heavy outlay of expenditure and has such a direct impact on the well-being of a population, the EU can exert a certain degree of influence on member states' health care systems through its responsibility to assist in the general fiscal well-being of each jurisdiction (for a fuller discussion, see Greer et al., 2022).

By 2020 the contours of a distinctly "European" health care policy had taken shape. This was partly due

to member states taking advantage of the requirement that the EU facilitate collaborative endeavours between member states whenever possible (see, e.g., Schmidt et al., 2022). But it was also due to the development of a substantial acquis that was more the contingent outcome of the regulation of market competition than the application of the formal health provisions of the TFEU. Even so, the contours began to shift once more as Europe grappled with the Covid-19 pandemic.

The first three months of the Covid-19 pandemic were a disheartening period for those who had hoped that European states would use structural advantages provided by existing EU frameworks to present a coordinated response to the public health threat. But, as Quaglia and Verdun (2023) observe, the pandemic—like the financial crisis a decade earlier and the political crisis occasioned by Brexit—led the EU to address the threat of greater disintegration by reconfiguring the EU into a more integrated unit. And health policy, which had for decades remained a relatively peripheral policy area, became the focal point for a reinvigorated imagining of a more integrated Europe.

At the heart of EU health policy formulation is the tension articulated by Article 168 of the TFEU (2012) which, on one hand, explicitly forbids the EU from harmonizing or otherwise directly engaging with member states' delivery of health care services and, on the other, legitimizes and supports the role of the EU in coordinating and facilitating complementary activity (including "incentive measures") to address "major cross-border health scourges." The EU, in other words, cannot impose harmonization of public health measures upon member states, but it can certainly coax them into it with the right incentives.

How did the EU pivot from a brief but tense period of devil-take-the-hindmost to the development of integrative policies that, according to some, could serve as the basis for a coherent European Health Union? As Brooks et al. (2022) explain, the pandemic presented challenges that the EU was able to address, not through the creation of (potentially contentious) bodies with new powers, but rather through the expansion of capacities in existing bodies and legislation. This development, they note, had several identifiable aspects. One of these was the extension of the authority of the European Medicines Agency (EMA) and the European Centre for Disease Control. The EMA oversees the regulation of pharmaceuticals and medical devices, while the European Centre for Disease Control's function is to identify, assess, and communicate potential risks presented by circulating pathogens. Because the Covid-19 pandemic utilized a full array of vaccines, anti-virals, and testing mechanisms on a massive scale, the salience of the EMA became very pronounced. Given the deep interdependence of European supply chains prior to Covid-19, the ability of member states to access new drugs and technologies depended to a considerable degree on the capacity of the EMA. The EU's clinical trial network, for example, was highly fragmented, which meant that it was challenging to establish Covid-19-related clinical trials as well as compile and analyze their data quickly and effectively. While the EU's DisCoVeRy trial struggled to recruit 3,100 patients across seven countries, for example, the UK's RECOVERY trial was able to recruit 48,287 participants in the UK alone (Tani, 2022). The EMA's existing mandate was thus expanded to address emergency situations, including the development of an Emergency Task Force to provide scientific advice and a Medicines Shortages Steering Group to monitor the availability of essential products.

Like that of the EMA, the European Centre for Disease Control's purview was extended to deal with pandemic management, including the creation of the Early Warning and Response System and the EU Health Task Force. A third body, the European Health Emergency Preparedness and Response Authority was created at the Directorate General level to "prevent, detect, and rapidly respond to health emergencies…through intelligence gathering and building the necessary response capacities" (European Commission, 2021). Introduced in 2020 under the aegis of the German presidency of the EU, the European Health Emergency Preparedness and Response Authority was viewed as a key pillar of the newly conceptualized European Health Union.

In addition to the repurposing of existing bodies and the introduction of new ones, existing legislation was tweaked to address the pressing needs precipitated by the pandemic. One major piece of legislation, the Health Threats Decision, "extends the EU's role in national policy, strengthens its role in the event of an emergency, and lays the foundation for integration beyond the field of a crisis response" (Brooks et al., 2022, p. 13). Somewhat similar to the EU's role in financial management, the Health Threats Decision gives the EU the capacity to monitor member states' plans for emergency response and preparedness and—significantly—hands the EU the authority to declare a state of public health emergency on behalf of the entire EU. Notable changes to legislation also occurred outside of the specific purview of public health. As Brooks (2022) explains, a major provision in the TFEU (2012) focusing on the protection of the free movement of goods and services (Article 36) also legitimizes *barriers* to this free movement where it can be shown to be necessary to protect the health of the European population as a whole. This remarkable shift, seeming to contradict the very raison d'être of the EU as a free market, was a direct response to the attempts by some member states in the early stages of the pandemic to ban the export of Covid-19 medical supplies. Further, Nabbe and Brand (2021) document the considerable public concern with the fact that the EU lacks primary competence in health. This level of public support has facilitated the moves by EU actors to provide more authority over health care at the EU level. Backman and Rhinard (2018, p. 270), for example, note the "strong indications of Commission entrepreneurship, using crises as windows of opportunity to advance previously stalled initiatives, assembling networks of national

officials interested in crisis-related tasks, and promoting analysis of European vulnerability in the face of increasingly complex threats."

Perhaps most significantly, Covid-19 response measures included EU-level funding programs that directed a substantially higher amount of funding into public health functions. Since 2003, the EU's flagship Health Programme in public health had limped along with minimal funding, and it was slated to be absorbed into the European Social Fund in 2021. As the profound effects of Covid-19 on member states became recognized, officials made the decision to repurpose the Health Programme into EU4Health—presented as another key aspect of the new European Health Union—and provide it with a budget 10 times higher than its predecessor. While part of this fund is dedicated to crisis response, it also incorporates more integrative functions such as a common data infrastructure. Bazzan (2020) lists a number of instruments across domains and levels of government that have been established by the EU4Health policy.

It is important not to focus too sharply on Covid-19: As Bengtsson and Rhinard (2019) argue, a successive series of health crises had for the previous two decades established a resonant "health securitisation" strategy that moved beyond the simple collection and sharing of national surveillance data to the establishment of a comprehensive "all hazards" approach that addressed a much wider conceptualization of cross-border "threats to health." Nevertheless, the response to the Covid-19 pandemic was singularly significant. Brooks et al. (2022, pp. 6–7) draw on the neostructuralist framework to establish three hypotheses: First, that a "neofunctionalist theory of any kind would predict integration as a result of the pandemic"; second, that the costs of "failing to integrate and coordinate responses" to the pandemic would generally affect all member states equally; and, third, one would expect to see three integrative responses "spillover (an increase in competence and supranational governance), spill-around (an increase in the scope of competence but based on an intergovernmental governance structure), or build up (an increase in supranational governance but confined to the existing scope of competences)." The authors conclude that neofunctionalism can well explain the behaviour of EU actors during the pandemic:

> The level of integration within the EU meant that member state governments had no disintegrating response available to them, and so invested heavily in EU public health….The EU showed why governments in a well-integrated economy might want to rapidly constitute a supranational system capable of managing that integrated economy's public health. (Brooks et al., 2022, p. 736).

Similarly, Bazzan (2020, p. 726) concludes that "the new EU4Health policy…can be regarded as the result of the creation of a more conducive environment for the occurrence of mechanisms that could, in turn, result in greater policy integration," while Fraundorfer and Winn (2021, p. 10) argue that "the European Health Union might be a way for the EU to gain further traction in health policy."

4. Canada

While health care in Canada is highly fragmented and remains largely under the jurisdiction of PTs, we can nonetheless reference a Canadian health care "system" because the 1984 Canada Health Act (and the financial transfers supporting it) facilitates a voluntary coherence to general principles of governance and delivery. The necessity for such an act was due to the formal distribution of constitutional authority in 1867 (see Table 1), which explicitly gave jurisdiction over hospitals to the provinces; authority over "health care" more broadly was inferred with reference to matters of a "local and private" nature.

This changed drastically mid-century. Saskatchewan established the first public insurance model in Canada in 1947. When federal legislation covering hospital insurance was finally implemented in 1958 (with legislation for primary care insurance coming into force in 1968), the federal stipulations for PTs receiving federal health transfers provided voluntary uniformity across the country. The 1984 Canada Health Act (consolidating the previous two acts) further clarified the conditionality of receiving federal health funding.

Health care as a coherent *system* in Canada has thus been shaped by national legislation that is not binding on any of the provinces or territories. Provinces have unique and idiosyncratic perspectives on the delivery of health care; the most substantial lever the federal government has to influence the way in which health care is delivered is expenditure. Constitutionally, Ottawa has the legal ability to fund activity outside of its jurisdiction, within certain parameters; financially, its taxation capacity far exceeds that of the PTs. In some small areas, including health care for those in federal penitentiaries and the military, health insurance for refugees, and pharmaceutical regulation, Ottawa does have clear jurisdiction over health care; in others, such as regulation of health insurance for migrant workers, health insurance for Indigenous Canadians, and public health, the nature of health care is much more complicated and overlapping (Fierlbeck & Marchildon, 2023).

That Canadian health care is as consistent across jurisdictions as it is is largely because of federal financial outlay. By 2023–2024, the federal health transfer to provinces amounted to C$49.4 billion. This mechanism would seem to be straightforward and unproblematic: The federal government has the ability to offer money to the PTs for certain purposes, and the PTs, in turn, are free to accept or reject these funds as they wish. Yet this relationship is a highly acrimonious and unstable one. Why?

While provinces were initially keen to take advantage of shared-cost programs, their experiences with the

program over time began to temper their enthusiasm. The key lesson for provinces was that what was given easily could be rescinded equally easily. The initial design of 50/50 cost-sharing between federal and provincial governments was reconfigured in 1977 when Ottawa perceived that the open-ended arrangement was becoming too expensive. Ottawa informed the provinces that it would henceforth distribute a defined amount each year while giving the provinces more tax room to raise the remaining funds themselves. In the mid-1990s, the federal government unilaterally reduced the rate of increase for health transfers; upon the expiration of the Canada Health Accord in 2014, Ottawa, without warning, cut the health transfers' rate of increase by half. The problem with cutting program funding, of course, is that those who use these programs get used to a certain level of service, creating set expectations. When provinces running the programs cut back on them, they are punished politically. Thus, provinces have learned to be wary of federal government proposals for new shared-cost programs (including certain iterations of pharmacare or "dentacare"): There is simply no guarantee that these programs will continue to be funded federally, but once a sense of social entitlement to services has been established, it is exceptionally difficult to rescind them. "Provinces often balk when Ottawa tries to attach strings to health-care funding" (Wright, 2022), and this reluctance is generally most evident in the provinces of Quebec and Alberta, which demand unconditional funding for social programs (e.g., French, 2021). Both provinces are especially adamant about the ability to opt out of any proposed federal pharmacare program (Aiello, 2019).

The federal government has also gained a clear understanding of the disadvantages of this kind of funding relationship. By opening up tax room for the provinces in lieu of cash funding in 1977, for example, one expectation was that provinces could spend more on cost-effective services such as home care rather than on medical services (Naylor et al., 2020). They did not do so. Over two decades later, in an attempt to build bridges with the provinces after squeezing health transfers in the mid-1990s, the federal government introduced the Canada Health Accord in 2003 and the 10-Year Plan in 2004, which distributed an additional C$41 billion of federal funds in addition to existing health transfers. The purpose of the additional funding was explicitly to "buy reform" of the health care system. But the attempt at comprehensive reform fell well short (Health Council of Canada, 2011); rather, much of the funding went into improving the salaries of existing health care workers or replacing old equipment. Federal politicians became even more concerned when provinces demanded more federal funds for health care at the same time that they cut their own tax rates, thereby decreasing the revenue stream that would have allowed them to pay for health programs from their own revenue.

The dynamics of federal-provincial health transfers are strongly influenced by the federal party in power. Conservative governments have recently been less willing to shape the direction of health care at a national level through economic incentives. And, while the Liberal government since 2015 has been interested in providing direction in health care through its expenditure power, it has been reluctant to provide greater unconditional funding for health care. It sees unconditional increases in health transfers as a form of moral hazard, where provinces are divorced from the consequences of their actions. For example, using additional funds to raise the salaries of physicians in the hope of attracting health professionals from other provinces merely results in a beggar-thy-neighbour situation of some provinces attempting to outbid others with no net increase in health providers. Rather, the Trudeau government has focused on offering either bilateral deals for specific purposes or comprehensive health transfer increases tied to specific programs such as health data management and health human resource management. These are evident areas of need, yet many provinces are loath to accept the condition that additional funds be used for these purposes.

Thus, the federal expenditure capacity was an effective instrument in establishing the parameters of the Canadian health care system initially, but the federal and provincial experience of unforeseen and disadvantageous externalities has gradually resulted in a dynamic of distrust exacerbated by a sociopolitical context which inhibits political negotiation between jurisdictions. How did the pandemic affect federal dynamics within Canada? Formally, each PT was responsible for emergency responses, and each jurisdiction addressed the crisis differently (some provinces, for example, closed their border to interprovincial travel; others did not). During the pandemic, there was considerable discussion (Flood & Thomas, 2020; Mathen, 2020) about whether the federal Emergencies Act could or should be used in pandemic management (Canada was the only federal country that did not issue a national lockdown, nor was a national emergency declared in response to Covid-19). Federal bodies such as the Public Health Agency of Canada and the National Advisory Committee on Immunization provided guidance for those provinces desiring it, but no directives were imposed on the provinces. C$72 billion of extra federal funding was provided by the federal government to support the health and safety of Canadians over the course of the pandemic, and Ottawa played a major role in securing vaccines, antivirals, and testing supplies. Despite the considerable outlay in federal funding during the pandemic, however, federal authority in the field of health care did not increase, nor was Ottawa able to use its considerable expenditure to consolidate health policy across the country.

5. Discussion and Conclusion

As with any comparison of state systems, any extrapolations of the juxtaposition of Canada's health system

with that of the EU must be done with caution. In both instances, the demand that the responsibility for the delivery of health care by member units be observed by the central authority is tempered by the recognition that there is much to be gained (and potentially lost) through greater coordination. Beyond this, the specific dynamics in each case are quite different. The Canadian Constitution and the TFEU specify differing authorities and competencies, and the component units in each case have different capacities and interests. Analytically, the most interesting question is perhaps whether both federal health care systems are subject to the same kinds of dynamics and, if not, why not? If the pandemic led to greater integration in the EU, why do we not see the same dynamics in Canada?

Brooks et al. (2022) use neofunctionalism as a lens through which one can understand the move toward greater health policy integration in the EU: A "neofunctionalist theory of any kind," argue Brooks et al. (p. 6), "would predict integration as a result of the pandemic." Because the EU's only formal treaty base for health rests on public health, and because pandemic management sits absolutely squarely within the public health domain, the conditions for the expansion of this public health mandate in the EU were perfect. The limitation of neofunctionalist theory is that it cannot explain why integration does *not* occur when one might expect it should. Looking at Canadian and European health care federalism side by side, it becomes apparent that Covid-19 might have been an important, and possibly even necessary, causal factor in facilitating greater integration in federal health policy, but it was not sufficient. What other factors might explain why the EU seems to have been more successful in achieving greater integration in the area of health policy?

One explanation for this difference lies in the historical dynamics of power—and the lessons learned from these historical relationships. Neofunctionalism might suggest that PTs, already somewhat integrated through the mechanism of the Canada Health Act, would clearly benefit from even greater integrative measures such as national pharmacare, dental care programs, or long-term care standards. But PTs have learned, over time, that federal program spending is both a blessing and a curse. The putative gains—such as increased funding—may look very attractive at the outset for the PTs by increasing their health capacity. However, as time progresses, they may become more aware of how vulnerable they become by depending too heavily on federal resources that can be so easily discontinued, and the short-term gains are increasingly tempered by fears of the political havoc caused by the sudden reduction in federal program funding. Thus, while neofunctionalist approaches may focus on the short-term logic of greater integration, the historical experience of these political actors over time makes them more likely to act on the perceptions of potential longer-term consequences. To the extent that integration rests on the financial largesse of a federal or supranational entity, there may be a threshold of integration beyond which the potential costs of accepting funding become apparent, changing the behaviour of the discrete political units. Theorists viewing the current capacity of the EU to dedicate much higher levels of health-related funding to member states should thus be cautious in extrapolating the *current* integrative dynamic (facilitated by greater EU-level expenditure) over the longer term. As the Canadian experience suggests, the mere capacity for a federal authority to fund health initiatives does not mean that member states, over time, may always be receptive to accepting these funds if they perceive that the potential longer-term externalities are not worth the shorter-term gains.

A second explanation focuses on the specific constitutional distribution of powers and how this distribution of authority is affected by a particular type of crisis. The Covid-19 pandemic was obviously a public health crisis, and the EU was able to expand areas of authority where it already had *some* competence. The pandemic led to greater EU authority for the EMA, for example, due to the agency's role in managing pharmaceuticals; but in Canada pharmaceutical regulation is the one health-related area over which it already has considerable authority. Similarly, the EU's authority expanded with the establishment of the European Health Emergency Preparedness and Response Authority but, again, international disease surveillance is a function that already rests at the federal level in Canada (although the Global Public Health Information Network was poorly managed prior to the pandemic; see Robertson, 2021). One key aspect of increasing EU capacity has been the budgetary increases in the area of health: As noted above, for example, programme spending on health (and particularly EU4Health) has increased tenfold. This has required buy-in by member states, whose contributions fund these spending increases. In Canada, in contrast, federal revenue is raised independently of PTs, and Ottawa thus continues to control the level of health transfer spending at its own discretion. In sum, those public health-related areas that the EU was able to leverage to its advantage are not areas that Canada could similarly exploit. In this way, the utility of neofunctionalism as an analytical construct may depend on the existing structural context of a federal system: Some entities could have more room for integration, while others have reached a point of equilibrium where further integration requires considerable political effort.

Another condition that may be necessary for greater integration across regional health systems is the existence of a broad, underlying "fascia" of supportive administrative bodies that serve as informal channels of communication and coordination. Much of the coordination and harmonization in specific areas of EU health are not done at the level of first ministers. As the EU has the *formal* function to facilitate harmonization of health policies between member states where and when member states are willing to go in this direction, it can often

achieve this through the web of administrative bodies that perform the quotidian bureaucratic functions of EU activity. This vast integrated "governance architecture," which has evolved to develop and harmonize standards across member states, expanded considerably following the 2008 financial crisis in order to monitor and manage the fiscal performance of individual member states. As such, it provides horizontal coordination between member states. Less conspicuously, the European Commission plays an active role in networks and agencies, using them as a "back road" to both the informal harmonization of regulatory practices and as a strategy for solving compliance problems (Schrama et al., 2022). The fascia of European Administrative Networks, which vary in role and competencies, are organizations comprised of national administrative units (which could be national agencies, ministries, or civil servants). Canada does not enjoy the same extensive administrative network. There are some examples of pan-Canadian sharing of information (such as FPT committees), but cross-jurisdictional health policy bodies that include the active partnership of federal and provincial governments are much rarer (the only notable exceptions being the Canadian Agency for Drugs and Technologies and the pan-Canadian Pharmaceutical Alliance).

More speculatively, the political culture of these two federal entities may also be a variable in determining how well they are willing to coordinate or harmonize health policy within their domains. Canada, as a first-past-the-post parliamentary system, is a more adversarial political culture in which winners in electoral contests have the scope and authority to pursue policy initiatives tailored to their preferences. With few exceptions, minority governments are seen as holding periods until one party can regain the ability to shape the policy landscape. Canadian politicians are highly unused to the nuances of having to negotiate power-sharing arrangements between parties. In contrast, most European states have some form of shared national governance, which means that the normal governance style must be more consultative and collaborative. These are also competencies that allow them to undertake collective activity in policy areas beyond their borders.

There are, in sum, a number of confounders that can facilitate (or constrain) greater integration within federal systems. This supports the argument presented by Greer et al. (2023) that "federalism is too complex to make a good independent variable" (p. 6) and that federalism as an explanatory factor "only makes sense as part of the configuration of factors that makes up a case" (p. 20). The logic of functional spillover does provide a reasonable explanation for why the component units of a federal system might agree to the expansion of authority at the federal level. But we should be careful not to give it too much of a determinist explanatory force. The EU has seen a gradual but remarkable level of integration over the past three decades in health policy, and the Covid-19 pandemic has brought the EU even closer to a European Health Union (although this trend itself should not be overstated; for a more sobering perspective, see Greer, 2020). But it may be that the logic of neofunctionalism only takes root in fertile soil. A comparison with Canadian health care federalism suggests that additional variables, such as the constitutional framework, historical experiences, and even political culture, might be relevant in determining the extent to which this neofunctional logic is able to unfold.

Conflict of Interests

The author declares no conflict of interests.

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Article

Multilevel Trade Policy in the Joint-Decision Trap? The Case of CETA

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Abstract
Wallonia's refusal to ratify CETA in October 2016 suggests that multilevel trade politics may increasingly be subject to the pitfalls of joint decision-making, or even a joint-decision trap. This article, however, presents a more nuanced perspective that builds on a comparative analysis of intergovernmental configurations that underpinned constituent units' participation in CETA in the four formal federations Canada, Belgium, Germany, and Austria. It shows, firstly, that joint decision-making is only one mode of intergovernmental trade policy coordination that needs to be distinguished from others. Second, joint decision-making rarely leads to a joint decision trap as actors seek to bypass the institutional constraints entailed in this mode of intergovernmental coordination. The study has implications beyond the field of trade policy as it contributes to the comparative analysis of intergovernmental relations in Canada and Europe.

Keywords
Canada; CETA; EU; federalism; intergovernmental relations; joint decision-making; trade policy

Issue
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1. Introduction

Trade policy has emerged as a new domain for the comparative study of intergovernmental relations (Broschek, 2023a; Broschek & Goff, 2020a; Egan & Guimarães, 2022; Freudlsperger, 2020; Paquin, 2022). At first glance, this is surprising, considering that the power to initiate and conduct trade agreement negotiations has been a prerogative of higher-level governmental tiers. In most federations, authority over trade was formally vested at the federal level (Watts, 2008, p. 195). The EU as a quasi-federal system is no exception. From Rome to the Treaty of Lisbon, the community method was further extended, consolidating the supranational level's formal jurisdiction (Garcia, 2020; Woolcock, 2015).

Although allocating powers within a federal system is notoriously conflict-laden, furnishing the federal level with exclusive trade policy jurisdiction was rather uncontroversial. Creating internal markets and promoting economic welfare was a key goal of modern state-building and political unification (Bartolini, 2005; Egan, 2015; Hueglin & Fenna, 2015). This has changed, however, over the past decades. Trade policy has not only become more contested by civil society actors but also by regional and constituent units. First, the scope of trade policy agreements has expanded significantly since the 1970s and 1980s (Baccini, 2019; Baccini et al., 2015; Young, 2016). With the inclusion of non-tariff trade barriers, trade policy began to affect jurisdictions of lower-level tiers, directly or indirectly (Kukucha, 2008). Second, in Europe, trade policy has become increasingly politicized in recent years (De Bièvre & Poletti, 2020; Duina, 2019; Leblond & Viju-Miljusevic, 2019). Both factors variously mobilize governments from lower-level tiers to shape trade politics and policy.

CETA offers a fascinating glimpse into the potential implications of this trend: That constituent unit would play a role in this agreement became evident before negotiations started. It was the provincial government of Quebec—not the federal government—who took the initiative to relaunch negotiations of a bilateral trade agreement in 2007. However, the EU responded only reluctantly to the Canadian initiative. One important reason was that the European Trade Commissioner Peter

Mandelson perceived the Canadian provinces as a potential obstacle to successful trade negotiations (Schram, 2019, p. 97). Ironically, it was regional units within the EU, rather than the Canadian provinces, that impeded the ratification process.

This raises the question: Does the rise of regional units as stakeholders in trade policy-making create a joint decision trap with the potential to jeopardize future trade agreement negotiations? Regional opposition to recent trade agreements suggests that this may be the case. One expectation derived from the Belgian case is that regional units will continue to participate more actively in trade policy-making. Their new self-assertive role has at least the potential to create a joint decision trap, especially under heightened politicization (Bollen et al., 2020). Indeed, Belgium still has not ratified CETA. At the same time, however, Germany—the prototype of joint decision-making—has. Although several Land governments articulated concerns about current trade policy agreements or were even opposed to CETA, they eventually ratified the agreement in the Bundesrat, the second chamber, in December 2022.

I use CETA as a case study to advance the following argument. First, the emergence of joint decision-making as one particular mode of intergovernmental policy coordination, among others, is contingent upon federalism's historically established institutional configuration. The analysis reveals that while joint decision-making does not apply to the Canadian case, it can capture European multilevel trade policy-making under certain conditions. More specifically, only if trade agreement provisions transcend the exclusive jurisdiction of the EU does joint decision-making surface as a mode of intergovernmental coordination between the supranational and member state level and, potentially (but not necessarily), between the member state level and regional units.

Second, I focus in particular on the implications of joint decision-making for trade policy. In line with existing research, my findings confirm that formal veto power alone cannot explain ratification failure (Benz, 2016, 2020; Benz & Broschek, 2013a; Benz et al., 2016; Scharpf, 2011; Scharpf et al., 1976). What matters are meaningful opportunities for regional units to be included in the trade policy cycle prior to the ratification itself (for trade policy, see in particular Freudlsperger, 2020). I argue that despite the importance of joint decision-making as a mode of intergovernmental coordination, especially in the EU, it is rather unlikely that multilevel trade policy-making will increasingly be subject to the joint decision trap.

2. Joint Decision-Making in Multilevel Trade Policy: Theoretical Expectations

Joint decision-making represents a distinct mode of intergovernmental coordination. Although research has identified variations of joint decision-making (Benz et al., 2016; Heinz, 2012; Scharpf, 2011), on a general level, this mode encapsulates a configuration where governmental tiers are institutionally required to collaborate in decision-making processes. Scharpf et al. (1976) originally identified joint decision-making as the main mode of intergovernmental coordination in Germany, concluding that it entails significant—yet not insurmountable—institutional constraints for effective policy-making. The notion of a joint decision trap, in particular, suggests that these constraints have the potential to endogenously paralyze the political system (Scharpf et al., 1976, p. 54). Although this may cause frustration among policy-makers over time, this institutional configuration is difficult to disentangle as the short-term benefits, particularly the power to block (or threaten to block) political change, don't incentivize long-term reform (Scharpf, 2006). In the 1980s, Scharpf then demonstrated the potential for extending the concept beyond the German case, and its applicability to European politics (Scharpf, 1988). But is joint decision-making also the dominant intergovernmental mode for trade policy coordination, and is trade policy-making subject to a joint decision trap?

Comparative federalism research offers different models for analyzing intergovernmental relations comparatively (Behnke & Mueller, 2017; Benz & Broschek, 2013b; Bolleyer, 2009; Schertzer et al., 2018; Schnabel, 2020; Simmons, 2017). To analyze multilevel trade policy-making, I use a simple distinction of four modes of intergovernmental policy-making that can be mapped on a continuum between the two institutional principles that underpin, in various ways, every federal system (see Table 1): The separation of powers (or self-rule) on the one hand; power-sharing (or shared rule) on the other (Broschek & Goff, 2020b, p. 15; Skogstad & Bakvis, 2012, p. 7).

Federal systems that emphasize a separation of powers offer opportunities for unilateral action. This can be harmful if the decisions taken by one jurisdiction transgress the boundaries of others, generating negative externalities (Bednar, 2009). Unilateralism, however, can also take other, less antagonistic forms like competition or mutual adjustment (Benz, 2012; Scharpf, 1997). In the case of trade policy-making, the question

Table 1. Modes of intergovernmental relations.

Separation of powers		Power-sharing
	Unilateralism — Consultation — Cooperation — Joint decision-making	

is whether higher-level governmental tiers use their formal authority to act without considering constituent units' preferences.

Consultation is one step closer on the continuum toward power-sharing. Here, higher-level tiers with authority to make decisions invite constituent units' feedback on trade policy agreements in different stages of the policy-making process. Although they are free to ignore concerns, a consultation process can generate soft pressure on higher-level tiers, especially in times of polarization when trade policy is more salient. Cooperation, then, represents a stronger form of collaboration. The federal level and constituent units work together to shape trade policy provisions that affect the latter. However, intergovernmental collaboration remains voluntary. If no agreement can be reached, the federal level still has the discretion to withdraw and decide on its own terms. Finally, joint decision-making only applies to intergovernmental configurations where the higher level has no such exit option. In this case, the final decision to ratify a trade agreement is contingent upon either unanimous or significant support from constituent units (Scharpf, 1988, 2011).

Constituent units seek to shape trade policy for different reasons (Broschek, 2023a, 2023b; Broschek & Goff, 2022; Freudlsperger, 2018, 2020). As trade policy agreements began to impinge upon their jurisdictions through behind-the-border measures, constituent units in Europe became increasingly concerned about a creeping loss of authority and their ability to provide key social services. The politicization of trade policy since about 2013 has further amplified this trend. While concerns over authority are also a driving force in other federations outside Europe (for the US, in particular, see Freudlsperger, 2023; Jaursch, 2023), regional economic preferences are often more dominant (Broschek & Goff, 2022; Kukucha, 2008). Regardless of what type(s) of preference motivate(s) their engagement, the institutions of federalism position both constituent units and the federal level in different ways to address the need for trade policy coordination.

Accordingly, I formulate two different theoretical expectations regarding the emerging mode of intergovernmental trade policy-making: First, the more a federal system aligns with the separation of powers in the field of trade policy, the broader the corridor for different modes of intergovernmental trade policy coordination, which can switch between unilateralism, consultation, or cooperation, depending on the preferences of the federal level.

Second, the more a federal system aligns with power-sharing in the field of trade policy, the narrower the corridor for different modes of intergovernmental coordination: Trade policy coordination is more likely to take the form of joint decision-making.

The mode of intergovernmental policy coordination has important implications for the power of constituent units to shape trade policy content. Federal systems that lean more towards a separation of powers tend to favor higher-level governmental tiers since they ultimately have formal jurisdiction over trade policy. Therefore, they enjoy considerable freedom regarding their responsiveness to constituent units' preferences and how they seek to engage these actors through consultation or even cooperation. Ratification failure, therefore, is unlikely as long as the federal level supports a trade agreement.

By contrast, joint decision-making furnishes constituent units with veto power. The federal government is not able to ratify an agreement without constituent units' consent. Accordingly, ratification failure is a potential scenario. Two conditions are crucial in this respect.

First, if a trade policy agreement is politicized, joint decision-making will likely result in a stalemate. However, research has shown that deadlock is less common than one would expect as political actors, in anticipation of this problem, seek escape routes (Benz et al., 2016; Falkner, 2011; for trade, in particular, Gheyle, 2022; Scharpf, 2011). Second, the system of intergovernmental relations is of particular importance here. A dense, highly institutionalized system of intergovernmental relations offers channels for policy coordination between and among governments to address concerns early on and to negotiate positions based on common ground. It also strengthens executives and their institutional self-interest, shielding them to a certain degree from the pressures of party politics. Both can contribute to mitigating politicization and help avoid ratification failure in a configuration of joint decision-making.

3. Case Study Analysis: Intergovernmental Trade Policy-Making and CETA

3.1. Case Study Design

When does joint decision-making emerge as a mode of trade policy coordination (as opposed to other intergovernmental modes), and what conditions promote or mitigate stalemate and, eventually, the joint decision trap? The following study uses CETA as a case to examine the configuration of intergovernmental trade policy coordination. As one of the most encompassing trade policy agreements of our times (Fafard & Leblond, 2013; Kukucha, 2013; Schram, 2019, p. 70), CETA represents the general trend of increased intergovernmental trade policy coordination, despite the fact that the federal (or supranational) level enjoys formal exclusive jurisdiction. First, CETA entailed provisions that affected, directly or indirectly, jurisdictions of the provinces and member states, including those of regional or constituent units in decentralized or federal states. Second, in several European member states, CETA, like other post-Lisbon trade agreements, was highly politicized, especially between 2014 and 2017 (De Bièvre & Poletti, 2020; Gheyle, 2019; Leblond & Viju-Miljusevic, 2019; Meunier & Czesana, 2019). Increased issue salience and

contestation manifested themselves not only in mass demonstrations in major European cities like Berlin, Brussels, or Vienna but also in sustained lobbying efforts of civil society organizations and political party organizations calling upon regional units—such as the German Länder—to block the ratification of CETA and other pertinent trade policy agreements (Broschek et al., 2020; Gistelinck, 2020; Siles-Brügge & Strange, 2020).

CETA thus offers an excellent test case as it allows for examining the fundamental challenge for federal systems—even if jurisdictions are formally exclusive, policy interdependencies create a need for intergovernmental coordination (Benz, 2020; Benz & Broschek, 2013b; Bolleyer, 2009; Bolleyer & Thorlakson, 2012). The EU-Canada comparison entails two perspectives: a comparison across federal systems (Canada and the EU) and a comparison within the EU (the EU and its federal member states; see Fossum & Jachtenfuchs, 2017). Accordingly, I conceptualize not only Canada but also the EU as a federal system or, more specifically, as a multilevel federation (Keating, 2017). Rather than understanding the EU as a distinct form of an international organization established by its member states, the comparative federal perspective suggests that it can be analyzed as an instance of federal state-building (Fossum & Jachtenfuchs, 2017, p. 471).

Conceived this way, the EU comprises at least three orders of government: supranational, member-state, and regional levels. While the relationship between the EU and its member states has always been a constitutive element of the EU polity, the regional level has emerged because of territorial rescaling. Its role is highly contingent upon the member state under consideration (Hooghe et al., 2010; Jeffery & Wincott, 2010; Keating, 2017; Tatham, 2018). For the purpose of this study, I focus exclusively on EU multilevel trade policy-making in the three member states that are formal federations: Austria, Belgium, and Germany. I expect that only in federal systems do constituent units have a potentially significant, constitutionally entrenched role in foreign and European affairs. By contrast, Canada represents a federation comprising two orders of government (10 provinces and three territories).

One point of entry into analyzing the EU through a comparative federalism lens is intergovernmental relations (Fabbrini, 2017; Fossum & Jachtenfuchs, 2017). At this empirically observable intersection of political arenas, governments representing different constituencies interact to address the challenge of policy coordination. From a comparative perspective, Canada's federal architecture is almost exceptional in epitomizing a separation of power (or self-rule), an institutional characteristic further accentuated through the combination with Westminster democracy (Broschek, 2020, 2021). Accordingly, modes of intergovernmental relations are expected to be flexible, with a comparatively strong role of the federal government. Joint decision-making is a rare intergovernmental mode in Canada, and it does not capture federal-provincial coordination in trade policy. The federal government controls the entire trade agreement formation process, including the ratification of agreements. From a formal procedural point of view, the provinces would only enter the trade policy-making process in the implementation phase when agreement provisions require the adjustment of domestic law within their jurisdictions (Paquin, 2020).

By contrast, the EU's three-tiered federation combines a separation of powers and power-sharing. Efforts to strengthen supranational self-rule in trade policy-making through the Lisbon Treaty have been constrained—again—through the scope and depth of recent trade policy agreements. The EU Commission reluctantly declared that it would consider CETA a mixed agreement. As a result, the agreement requires ratification in all member states. The Commission insisted that, from a legal point of view, it considers the agreement as falling within exclusive EU competence (European Commission, 2016). This assertion proved to be wrong. In May 2017, the European Court of Justice ruled in its "Opinion 2/15" on the European Union-Singapore Free Trade Agreement that provisions covering non-direct foreign investment as well as dispute settlement mechanisms are not within the EU's jurisdiction (European Court of Justice, 2017).

Consequently, joint decision-making unambiguously captures the institutional configuration of trade policy configuration in the EU when we look at the relationship between the EU and its member states. Although the Lisbon Treaty provided a space for member state involvement through the Council (Garcia, 2020), member states now have a veto through the ratification process in the case of mixed agreements. What is less clear, however, is if the inclusion of regional units prompts a twofold multiplication of this configuration in EU multilevel politics (Hrbek, 1986) and whether this additional intergovernmental layer contributes to a joint decision-trap in trade policy. Formally, at least, only the Belgian Regions and Communities and the German Länder have a constitutional right to approve the ratification of mixed agreements.

CETA has been in effect provisionally since September 2017. The Council of the EU eventually authorized and signed CETA on a provisional basis, and subject to several exemptions that are included in the two formal decisions (Council decision 2017/37, 2017; Council decision 2017/38, 2017), the Joint Interpretative Instrument as well as 38 statements submitted by the Commission, the Council, and several member states. As of April 2023, 18 member states (including the UK as a former member state) have ratified the agreement, while the ratification of 10 member states is still pending. Constituent units in all four federations were variously involved in the trade policy-making process, contingent upon the institutional configuration of federalism that positioned them in different ways. As the summary Table 2 presents, only Belgium has not yet ratified the

Table 2. Case studies overview.

Case	Number of constituent units	Trade Policy Politicization	Modes of IGR in CETA	Degree of intergovernmental trade policy institutionalization	Ratification of CETA
EU	28 member states (including the UK)	Variable, dependent on member state	Joint decision-making	*Moderate-high*	Supranational level: Yes (signed) Member state level: No
Austria	Nine Länder	High	Consultation, unilateralism;	*Moderate-high*	Yes
Germany	16 Länder	High	Joint decision-making	*Very high*	Yes
Belgium	Three regions, three communities	High	Joint decision-making	*Very low*	No
Canada	10 Provinces, three territories	Low	Cooperation	*Low-moderate*	Yes

agreement. In the following sections, I will examine the institutional configuration that produced different modes of intergovernmental coordination to include constituent units and their implications for CETA.

3.2. Austria: Between Consultation and Unilateralism

The institutional foundations of Land government participation in trade policy were laid in the early 1990s before Austria joined the EU. The Länder anticipated further constraints through EU accession on their already limited ability to regulate and provide key social services. Eventually, they accepted a transfer of legislative authority to the supranational level in exchange for constitutionally entrenched participation rights in European affairs within the domestic institutional framework. The Austrian Länder reached an agreement with the federal level to create a new procedure for Länder participation, the so-called *Länderbeteiligungsverfahren*, constitutionalized through the new Article 23 of the Federal Constitution. This new provision guaranteed the Länder not only timely access to information regarding future and ongoing negotiations on the supra-and international level but also the right to submit two types of resolutions in the consultation process.

The first is the so-called uniform opinion. The Länder can invoke this provision whenever European negotiations affect their jurisdictions. It is binding insofar as the federal government is only allowed to deviate from the Länder position if it can make a compelling argument related to supranational or international constraints. The federal government is also obliged to inform the Länder in writing about these circumstances. The second type entails a more general opinion pertaining to questions not directly affecting Land competencies. These general resolutions are not binding but often have a political effect, especially if supported unanimously (Broschek et al., 2020; Bußjäger, 2006).

The Länder articulated their concerns through resolutions in accordance with Article 23. It is noteworthy that CETA was not the first agreement that mobilized the Länder. They had already engaged in other trade-related matters, most notably the General Agreement on Trade in Services (GATS) in 2003. However, increased trade policy salience and politicization resulted in a heightened activity level of Land governments (and parliaments) since 2013 (Broschek, 2023b; Broschek et al., 2020). Between 2014 and 2017, the Austrian Länder adopted three uniform opinions and one general opinion on trade agreement negotiations, which did not exclusively focus on CETA. Rather, Land governments initially began to address Transatlantic Trade and Investment Partnership (TTIP) but extended their positions within a very short time frame to also cover CETA and the Trade in Services Agreement (TiSA).

Issue salience was a catalyst for rather than a cause of these activities. The main concerns articulated in the four opinions were very similar to those raised in the context of GATS in 2003. Although the Länder repeatedly acknowledged their support for trade liberalization, they were highly critical of the depth of certain provisions entailed in recent trade agreements. In essence, the Länder consistently rejected provisions that they expected would limit their constitutional authority, most notably investor-state dispute settlement mechanisms (ISDS), the negative list approach, and the creation of committees to promote regulatory regulation. In this respect, they emphasized their constitutional authority to provide key public services such as water supply, waste management, infrastructure, education, and health. Moreover, Land governments expressed concerns that provisions facilitating deep

economic integration would contribute to the erosion of established regulatory standards in consumer protection, animal welfare, environmental standards, and social services (see also Broschek & Goff, 2022).

Accordingly, the Länder took advantage of their constitutional right to launch intergovernmental policy coordination through consultation. It is remarkable that all nine Länder were able to formulate unanimous resolutions across party lines through their horizontal peak organization, the *Landeshauptleutekonferenz* (Council of Land Governors, LHK), and opposed CETA in its current form. The Austrian Bundesrat echoed these concerns. In May 2016, the Standing Committee for European Affairs recommended considering Land governments' concerns and called upon the federal government to refrain from a provisional implementation of the agreement (Österreichischer Bundesrat, 2016). However, in the case of trade policy, the separation of powers prevailed. The Austrian Bundesrat not only lacks the veto power of the German Bundesrat, but it is also not composed of Land governments. Its members are elected by the Land legislatures. On 14 October 2016, the federal Vice Chancellor Mitterlehner sent a letter to the secretariat of the LHK, informing Land governments that, in the federal government's view, all concerns had been addressed (Bundesministerium für Bildung, Forschung und Wissenschaft, 2016). The federal government eventually used its prerogative and ratified the agreement unilaterally in 2018 with majority support in both chambers, the Nationalrat and the Bundesrat.

3.3. Germany: Joint Decision-Making Without the Joint-Decision Trap

At first glance, intergovernmental trade policy-making seems to reveal important similarities to the Austrian case. First, recent trade agreements did not trigger the German Länders' trade policy involvement, as they have participated in this field since at least the late 1990s. Second, like the Austrian Länder, they adopted trade-related policy resolutions much more frequently due to heightened politicization and the negotiation of high-profile trade agreements such as TTIP, CETA, or TiSA since 2013. Third, the main concerns expressed by the Austrian Länder essentially mirrored those identified by the German Länder: Although they support trade liberalization in principle, the Länder argue that provisions such as ISDS or regulatory cooperation represent a potential threat to their capacity to regulate, to provide key public services, and for social and environmental standards in general.

Beneath the surface, however, the German case differs profoundly from Austria's. While the federal level is formally obliged to consult with Land governments, their participation is de facto more powerful as they must eventually ratify mixed trade agreements directly through the Bundesrat. The intergovernmental mode, therefore, is joint decision-making: the Länder have the authority to block the ratification of trade agreements, which was a realistic scenario in the case of CETA (Broschek et al., 2020). The institutional foundations for this strong form of power sharing were laid in the late 1980s and early 1990s in the context of the Single European Act and the Maastricht Treaty, both of which required approval by the Bundesrat. The Länder were able to gain major concessions from the federal government, entrenching new participation rights in European affairs through the Gesetz zur Einheitlichen Europäischen Akte in 1986 and the new Article 23 Basic Law in 1992 (Kropp, 2010).

Like in Austria, resolutions on CETA emerged from the Länders' engagement with TTIP. Overall, the Länder adopted five resolutions on trade policy between 2013 and 2017. The first two resolutions focused directly on TTIP (Deutscher Bundesrat, 2013, 2014), while the others addressed trade policy and trade policy agreements such as CETA more generally. The most encompassing and detailed resolution was issued in 2015 (Trade Policy for All: Towards a Responsible Trade and Investment Policy) and entails 39 points (Deutscher Bundesrat, 2015), which were updated in 2017 (Deutscher Bundesrat, 2017).

Although these resolutions indicate general support for EU trade policy, Land governments were far less unified in terms of whether they would support CETA ratification than their Austrian counterparts. Land coalition governments led by Christian democrats were generally in favor, while social democratic and Green party-led governments were either opposed to CETA in its current form or undecided. Since abstention counts de fact as an opposed vote in the Bundesrat, the ratification remained in limbo (Broschek et al., 2020).

Three factors facilitated the agreement and, eventually, the successful ratification in the Bundestag and Bundesrat in December 2022. First, the federal government was able to buy time, thanks to a pending ruling of the German Federal Constitutional Court on the constitutional conformity of the agreement. The case was resolved with a decision in February 2022, which opened the door to the ratification process. Second, by that time, the period of increased politicization and issue salience of trade policy had already passed. Other issues, most notably the Covid-19 pandemic and the Russian invasion of Ukraine, dominated the political agenda. Third, and perhaps most important in this context, German federalism features a highly differentiated and institutionalized system of intergovernmental relations. The resolutions on trade, in particular, were not simply an outcome of Bundesrat debates. Rather, they emerged from intense horizontal coordination within several sectoral peak organizations over the years, most notably the Conference of Ministers for the Environment, Economic Affairs or Consumer Protection (Broschek et al., 2020, p. 223), which were then also discussed vertically in close collaboration with the federal level. As Freudlsperger (2018, 2020) has shown, these opportunities for close, ongoing intergovernmental coordination are crucial to

facilitate a less conflictual and more problem-oriented mode of interaction in trade policy. While party politics and politicization influence these negotiations, the strong institutionalization of intergovernmental policy coordination also shields Land governments to a significant extent from the immediate effects. Basic concerns over ISDS, moreover, were shared across party lines. The opportunity to participate in trade policy coordination throughout much of the entire trade policy cycle, combined with easing politicization dynamics after 2018, eventually paved the way out of the potential joint decision trap.

3.4. Belgium: A Joint Decision-Trap Despite Power Separation

Belgium made headlines in October 2016 when the minister-president of the Walloon Region, Paul Magnette, declared the region would not ratify CETA. In fact, two of the three regions, Wallonia, and the Brussels-Capital Region, along with the French-language community, opposed the agreement for the same reasons as the Austrian Länder (Egan & Guimarães, 2022; Parlement de la Région de Bruxelles-Capitale, 2016; Parlement Wallon, 2016). By contrast, the Flemish Region supported the agreement (Bursens & De Bièvre, 2023), as did the German-language community.

While some concerns had been addressed in the aftermath of the announcement through high-level negotiations, Belgium's signature is still pending. Thus, it is the only country in this study that has not yet ratified the agreement.

Belgium and Germany are similar insofar as constituent units are very powerful. They participate through joint decision-making, which affords them a veto in the ratification process. In the case of Belgium, however, this appears like a paradox, contrary to the theoretical expectations, as it is a federation based on the separation of powers. Why?

Belgian federalism emerged from a gradual process of constitutional reform that started in the 1970s. The fourth state reform eventually marked the transition from a decentralized unitary state to a formal federation in 1993 (Swenden & Jans, 2006). Unlike German federalism, which epitomizes the principle of power-sharing, the federalization of Belgium was inspired almost entirely by the principle of separating powers between and among governmental tiers. Yet, in the case of foreign affairs, including trade policy, joint decision-making results from one particular constitutional provision: the so-called *in foro interno, in foro externo* principle. Already established in the third state reform of 1988, the principle was fully entrenched at the level of the regions in 1993. It stipulates that the communities and regions enjoy full competencies over the external aspects of a policy that they own domestically (Bursens & Massart-Piérard, 2009). Since encompassing trade agreements such as CETA inevitably affect regional jurisdictions, this rather unique constitutional provision creates—de facto and de jure—a requirement to coordinate and find consensus. In other words: The federal level is dependent on the approval of constituent units.

While in the German case, the highly differentiated and institutionalized system of intergovernmental relations, combined with a "buying time" approach pursued by the federal government, enabled governmental actors to avoid stalemate and ratification failure, both factors were absent in Belgium. Although Europeanization has intensified pressure on both governmental tiers to institutionalize intergovernmental policy coordination (Beyers & Bursens, 2006), these nascent structures are still weak (Bursens & De Bièvre, 2023; Egan & Guimarães, 2022). The institutional configuration of Belgian federalism, with its strong emphasis on separating powers, has—reinforced through the linguistic division—perpetuated the existence of rather isolated political arenas where party politics dominate. This represents a significant impediment to effective policy coordination across these separate domains within a pan-Belgian framework. Accordingly, the effect of partisan politics and the politicization of trade policy was felt much more directly than in the dense web of intergovernmental relations in Germany.

3.5. Canada: Effective Cooperation

Canada is the only case in this study that represents cooperative federalism, strictly speaking. The institutional configuration of federalism is similar to Belgium, as it strongly emphasizes the separation of powers. Formal institutional elements that would incentivize power sharing are weak and limited. However, Canadian federalism has no equivalent to the *in foro interno, in foro externo* principle. Accordingly, and in line with the theoretical expectation, joint decision-making is not an option. On the more informal level of intergovernmental relations, unilateralism, consultation, and cooperation variously characterize policy coordination between and among governments, depending on the policy sector (Schertzer, 2020; Simmons, 2017).

All three modes of intergovernmental coordination surface in the field of trade policy, depending on the trade agreement and approach of the federal government. Whenever a trade agreement potentially affects provincial jurisdictions, the federal government is incentivized to coordinate with the provinces as it cannot enforce compliance with provisions in this area (Fafard & Leblond, 2013; Kukucha, 2008; Skogstad, 2012). Since the late 1970s, the federal government and the provinces have established a rudimentary framework for consultation, the so-called C-Trade. However, it lies within the federal government's discretion to decide if it prefers to act unilaterally, consult, or cooperate more closely with the provinces. Moreover, most relevant exchanges rarely happen within C-Trade, but are ad hoc. For this reason, the Canadian provinces and territories have repeatedly demanded that the federal government

enter into negotiations for a more formal intergovernmental framework for trade policy coordination (Council of the Federation, 2010, 2011).

Arguably, the cooperative approach underlying CETA was not all down to the EU's demand that the provinces be included. Considering the depth and scope of the agreement, it is difficult to imagine a unilateral approach, nor one that would exclusively rely on consultation. Indeed, CETA negotiations have been described as an exceptionally effective form of cooperation (Kukucha, 2015, 2020; Skogstad, 2012). This degree of close coordination has never been reached again, not even in the renegotiation of the North American Free Trade Agreement in 2018, which marked a serious threat to Canada (Paquin, 2020, 2022). Unlike constituent units in Europe, participation of the Canadian provinces materialized in more than just resolutions. In addition to resolutions adopted through the Council of the Federation, the peak intergovernmental organization that serves as a forum for the provinces and territories to coordinate their positions horizontally, the provinces were also able to participate more directly. Provincial and territorial governments were part of the Canadian delegation during several negotiation rounds, received information from the chief federal negotiator in real-time, and were able to directly shape Canada's negotiation position in those areas that affected their jurisdiction (Hederer & Leblond, 2020; Kukucha, 2020; Paquin, 2020).

Important differences compared to their European counterparts facilitated this cooperative approach. The Canadian provinces neither operated in a highly politicized environment nor did they pursue any political goals like, for example, environmental or social standards. Moreover, the provinces had no concerns about a potential loss of institutional authority due to ISDS, regulatory cooperation, or a negative list approach. Regardless of what political party formed the provincial government, all provinces (and territories) perceived CETA primarily as an opportunity to strengthen economic ties with Europe. This was further reinforced when TTIP negotiations began to stall: The provinces considered CETA an opportunity to gain a first-mover advantage in the European market over the US. Only the province of Newfoundland and Labrador decided to withdraw from the CETA process until a conflict over fishery policy was settled in 2016 through the creation of a Fisheries Innovation Fund in support of the regional industry.

4. Conclusion

Although joint decision-making was originally identified as the dominant mode of intergovernmental coordination in German federalism, research has shown that it is not a German idiosyncrasy. Its broader applicability has proven particularly useful in multilevel policy coordination in the EU. Considering the comparatively high degree of institutional rigidity entailed in joint decision-making, existing research has been interested in determining the conditions that promote or prevent stalemate and the joint decision-trap. The potential deadlock inherent in joint decision-making has animated much of this research.

The field of trade policy lends itself particularly well to testing the applicability of joint decision-making and its implications for intergovernmental policy coordination in more depth. First, trade policy today is a domain increasingly populated by governments representing different territorial scales. In particular, constituent units in federal states have emerged as actors with the authority to variously participate in trade policy-making. Second, at least in Europe, trade policy has become increasingly politicized between about 2013 and 2018. Both conditions are conducive to the joint decision trap.

Against this backdrop, this study examined how, and with what effects, constituent units in the four formal federations that have been part of CETA participated in trade policy coordination. Although it confirms that joint decision-making can play a role, it is not a ubiquitous mode. Depending on the historically established institutional configuration of federalism, constituent units, and the federal level can rely on different modes of intergovernmental coordination. Only in two out of the four federations—Germany and Belgium—did constituent units participate through joint decision-making. In Austria and Canada, unilateralism, consultation, and cooperation prevailed. It is also noteworthy that only in one case—Belgium—did constituent units prevent the ratification of CETA.

The case of CETA provides an opportunity to extend the analytical focus of comparative intergovernmental policy-making. While existing research tends to be centered on the EU, the inclusion of Canada contributes to a better understanding of the variety of modes through which governments cope with coordination problems across jurisdictions. As a next step, the ongoing implementation of CETA offers one potential avenue for analyzing in more detail how federal systems shape the role of constituent units in trade policy coordination after trade agreement negotiations have been concluded (see also Hederer & Leblond, 2020). Another avenue is the extension of units of observation that transcends formal federations by including regionalized unitary member states such as Italy and Spain.

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Article

Show Me the Money: Side-Payments and the Implementation of International Agreements in Federal Systems

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Abstract
Federal systems face specific challenges in fulfilling their international commitments. In cases of shared jurisdiction, the federal government needs the sub-federal level to contribute to the implementation process. Both Canada and the EU have used side-payments to bring and keep on board reluctant and opposing provinces and member states in the implementation of international agreements. However, both cases have experienced the limits of this strategy. This article aims to make a theoretical contribution by identifying the causal conditions and processes that help explain the success and failure of using side-payments to encourage sub-federal support for the implementation of an international agreement. Based on the study of the implementation of the Paris Agreement in Canada and the EU, I develop a two-fold argument. First, side-payments can be an effective tool to persuade sub-federal governments if they are generally interested in contributing to implementation. They do not work for governments of powerful entities that are unwilling to implement. Second, sub-federal governments react to other actors' conduct. Side-payments can keep reluctant governments of weak entities on board only as long as no alliance of powerful sub-federal entities is formed that resists the implementation of an international agreement.

Keywords
Canada; European Union; federalism; implementation; international agreements; Paris Agreement; side-payments

Issue
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1. Introduction

Federal and decentralized political systems have generally been considered less capable than unitary and centralized states of fulfilling their international commitments (Jacobson & Brown Weiss, 1995; König & Luetgert, 2009; Levy et al., 1995; Mbaye, 2001; Raustiala & Victor, 1998). Federal systems face specific challenges in fulfilling their international commitments. Especially in cases of shared or sub-federal jurisdiction, the federal government depends on the sub-federal level to contribute to the implementation process (Gordon & Macdonald, 2014; Macdonald, 2014; Paquin, 2010).

As part of the 2015 Paris Agreement, Canada and the EU committed to reduce substantially their greenhouse gas (GHG) emissions. Both parties now face the challenge of keeping sub-federal authorities, their provinces and member states, respectively, on board with implementation. In cases of sub-federal resistance, federal governments need to find ways to ensure lower-level compliance with the Paris Agreement obligations. Forms of resistance include sub-federal refusal to adopt the necessary policies within their own jurisdiction and attempts to obstruct the intergovernmental implementation process or initiatives launched by federal institutions.

To counteract such instances of sub-federal resistance and to keep and bring sub-federal governments on board with implementation, both Canada and the EU have used "side-payments," i.e., instruments to induce actors to take actions that they consider to be a deterioration in the

status quo (Cappelletti et al., 2014; Kabir, 2019; Scharpf, 1988). In general terms, the implementation approaches of Canada and the EU allow for differentiated effort, i.e., sub-federal entities that are less capable of climate action have been expected to contribute less to the implementation process than others. In addition, means that provide financial support for climate action measures have been established, such as the EU's Modernisation Fund and Canada's Low Carbon Economy Fund. Lastly, Canada and the EU have used forms of bilateral concessions, including Nova Scotia's exemption from Canada's coal-phase-out plan and additional financial support or special treatment regarding the energy structure of EU member states in Central and Eastern Europe. Sub-federal resistance to implementation and the use of side-payments thus occur in both fully-fledged federations and federalized international organizations.

Despite these multiple attempts to encourage sub-federal support, several provincial and member-state governments have continued their resistance, including Alberta under Kenney, New Brunswick under Higgs, and Poland under Morawiecki. This observation suggests that the effectiveness of the side-payment strategies of Canada and the EU is limited. This article asks under what conditions side-payments are successful in keeping or bringing sub-federal governments on board with the implementation of an international agreement.

As side-payments may be particularly necessary in situations where reluctant actors have the right to veto a collective decision or the autonomy to refuse to cooperate or act (Scharpf, 1988; Taylor, 1980), their study has a firm place in international relations and federal studies literature. Scholars have addressed side-payments as a strategy to entice states into international cooperation arrangements and build alliances (Davis, 2008; Kabir, 2019; Poast, 2012; Sælen, 2016), and to promote certain policies in developing countries (Brandi et al., 2022). Others have also studied how side-payments are used to buy domestic support for international agreements that are thought to create intra-state losers (Hays et al., 2005; Mayer, 1992). Similarly, existing literature in the fields of comparative federalism and EU politics has examined how side-payments have been used to persuade sub-federal entities to accept modifications in the division of tasks between the two levels of government (Anand & Green, 2011; Cappelletti et al., 2014), as well as EU policies and decisions towards greater integration (Carrubba, 1997; Moravcsik, 1993; Scharpf, 1988; Taylor, 1980; Thielemann, 2005). Research on international cooperation has found that side-payments are particularly effective in cases of strong asymmetry between the actors involved (Barrett, 2001, 2005; Fuentes-Albero & Rubio, 2010; Sælen, 2016). With respect to EU integration, it has been argued that only small, weak member states can be bought off (Moravcsik, 1991, pp. 25–26; Moravcsik & Vachudova, 2003, pp. 27–30).

This article contributes to this literature by identifying the conditional configuration under which side-payments are effective in federal systems. I study the implementation of the Paris Agreement to explore the causal conditions and processes that help explain the success and failure of side-payments used to persuade Canadian provinces and EU member states to contribute to the implementation process. Based on this analysis, I develop a dynamic, twofold argument. First, side-payments can be an effective tool to persuade the sub-federal governments if they are generally interested in contributing to implementation. However, they do not work for governments of powerful entities that are unwilling to implement. Second, sub-federal governments react to other actors' conduct. Side-payments can keep reluctant governments of weak entities on board only as long as an alliance of powerful sub-federal entities that resist the implementation of an international agreement has not formed.

In the following sections, I first present my analytical framework before examining the developments on both sides of the Atlantic since the adoption of the Paris Agreement. I then develop a theoretical argument on the causal conditions and processes for side-payments to be effective. In the last section, I summarize my contributions and suggest future avenues of research.

2. Analytical Approach

I understand side-payments in the broadest sense as instruments to induce actors to take actions that they consider to be a deterioration of the status quo (Cappelletti et al., 2014; Kabir, 2019; Scharpf, 1988). This conceptualization thus entails multiple ways of incentivizing sub-federal governments to contribute to the implementation process, which I categorize into three strategies (Table 1). Federal systems can persuade sub-federal governments to implement by explicitly supporting sub-federal implementation measures, for instance, by providing funding, by offering concessions to sub-federal governments in return for their contribution to implementation, or by making a political trade-off regarding expected contribution to implementation. As the empirical analysis below demonstrates, Canada and the EU have used all three strategies in the context of the implementation of the Paris Agreement. A side-payment strategy is considered effective if it succeeds in keeping or bringing sub-federal governments on board with implementation.

To study the implementation of the Paris Agreement in Canada and the EU, I conduct a structured, focused comparison (George & Bennett, 2005). Combining in-depth analysis with a comparative approach is particularly fruitful in identifying relevant causal conditions. Unlike static comparisons, it is sufficiently sensitive to dynamic processes within the cases. Due to the lack of a comprehensive theoretical framework on the effectiveness of side-payments, I pursue an inductive approach. Literature in the areas of international compliance, comparative federalism, and Canadian and EU politics

Table 1. Side-payments in the Paris Agreement implementation in Canada and the EU.

Side-payment strategy	Definition	Canadian examples	EU examples
Implementation support	Instruments that explicitly support implementation measures in sub-federal entities, especially through financial means.	Low Carbon Economy Fund.	Modernisation Fund, Just Transition Mechanism.
Cross-policy agreement	Instruments that do not directly contribute to implementation but are an integral part of a cross-policy package to promote the implementation.	Federal support of pipeline extension.	Watering down of rule-of-law mechanism.
Burden-reducing measures	Instruments that relieve sub-federal governments of burdens, including exemptions from implementation policies or burden-sharing solutions.	Equivalency agreements, exemptions from coal phase-out, burden-sharing approach.	Exemptions from coal subsidies phase-out, free ETS allowances, effort-sharing decision.

provide clues about potential explanatory conditions, which serve to formulate questions to structure the analysis of the two cases (Table 2). I pay particular attention to the sub-federal willingness to implement in terms of policy preferences (Jensen & Spoon, 2011; Treib, 2003) and implementation incapacities and obstacles (Chayes & Chayes, 1998; Chayes et al., 1998). Moreover, besides the power argument introduced before, other research areas have also referred to power as an important condition to understand sub-federal conduct (Anand & Green, 2011; Börzel et al., 2010; Raustiala & Victor, 1998; Watts, 1996, pp. 57–60).

With regard to the implementation of the Paris Agreement, I operationalize these three conditions as the general willingness of sub-federal governments to engage in climate action, domestic implementation obstacles such as the social and economic relevance of hard-to-decarbonize industries or lack of financial capacity, and the relative power within the federal system resulting from a sub-federal unit's economic wealth or size in terms of population (see Supplementary File). More specifically, I coded the party platforms of the sub-federal governments in power since the negotiation of the Paris Agreement in terms of their climate action agenda (Figure 1). Concerning implementation obstacles, I take into account the economic relevance of polluting industries in the sub-federal entities and their financial capacity in terms of GDP per capita (Figures 2 and 3). To account for their power position, I created a combined indicator considering the sub-federal entity's size in terms of GDP and population (Figure 4).

Studying Canada and the EU in parallel strengthens the causal inferences we may draw from the empirical analyses. Both federal systems have extensively used side-payments as a strategy to keep and bring sub-federal governments on board with implementation.

Table 2. Guiding questions for structured, focused comparison.

Question	Condition	Operationalization
How does the sub-federal government's willingness to implement affect the effectiveness of side-payments?	Willingness to implement	Climate action agenda in the platform of the senior ruling party.
How do sub-federal implementation obstacles affect the effectiveness of side-payments?	Implementation obstacles	Share of the contribution of hard-to-decarbonize industries to GDP; lack of financial capacity in terms of GDP per capita.
How does the sub-federal entity's relative power position affect the effectiveness of side-payments?	Relative power position within the federal system	Share of population and GDP within Canada/the EU.

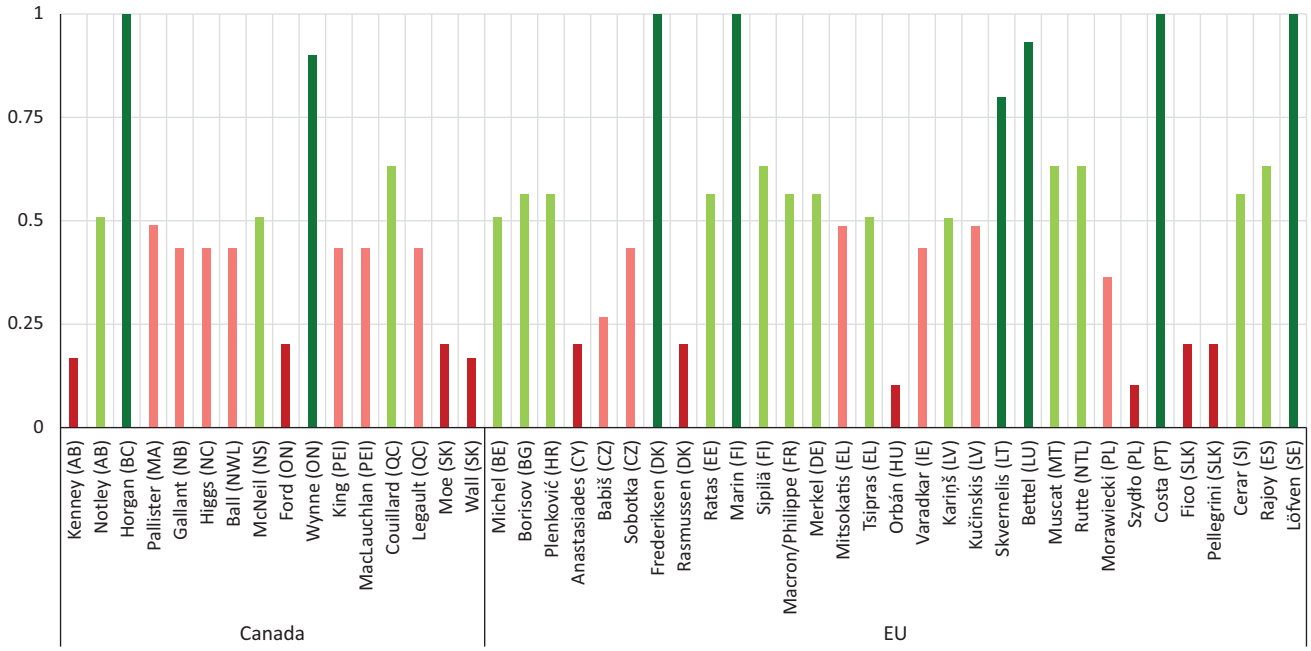

Figure 1. Climate policy preferences of sub-federal governments in Canada and the EU. Notes: The cases are labelled using the names of the heads of government; red = rejection of climate action and green = support of climate action.

Also, as the figures indicate, the governments of the Canadian provinces and EU member states differ in the conditions that can be expected to make side-payments necessary and potentially also affect their effectiveness. In more general terms, both Canada and the EU are characterized by a system of intergovernmental relations in which executives are key players in decision-making processes, operating based on consensus-based decision-making and the possibility of non-participation and opt-outs (Bakvis & Skogstad, 2020; Fabbrini, 2017; Fossum, 2018). While the EU is not a fully-fledged federation, it can be understood as a federal system (Fossum & Jachtenfuchs, 2017; Kelemen, 2003). In the case of the Paris Agreement, the commitment to reduce GHG emissions was formulated at the EU level—not at the member state level, meaning that the EU as a whole is responsible for effective implementation. Furthermore, focusing on an international climate agreement implies

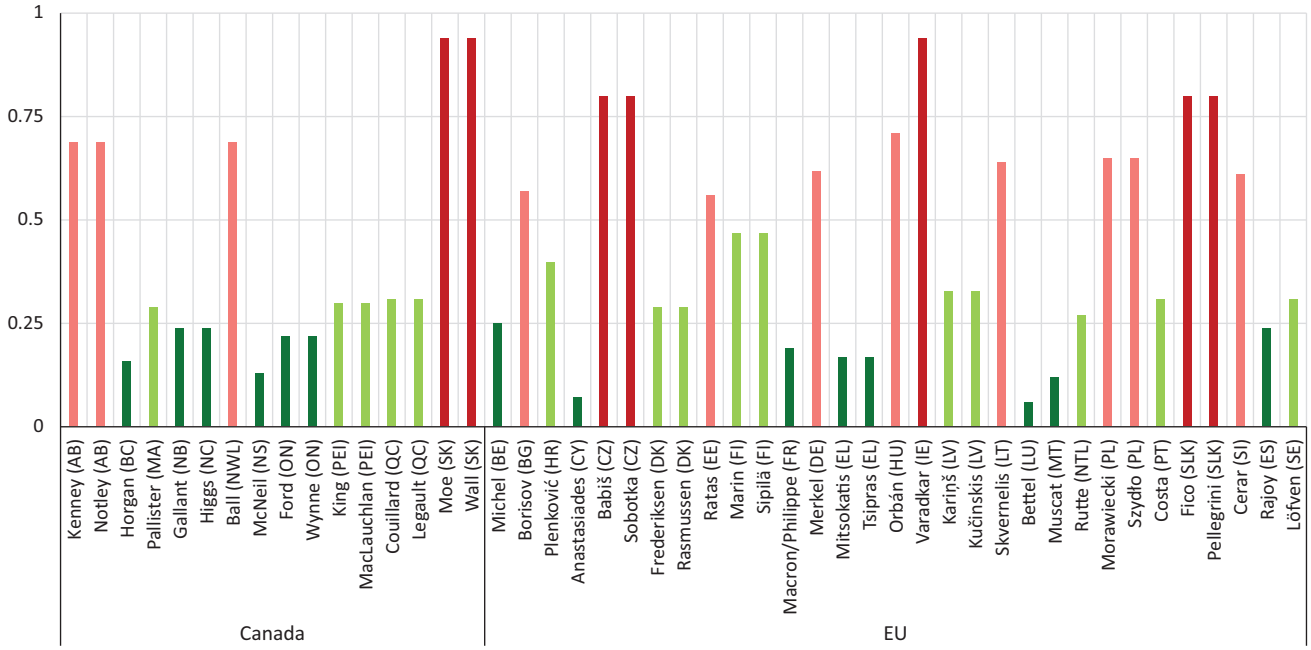

Figure 2. Relevance of polluting industries within sub-federal entities in Canada and the EU. Note: Red = high relevance and green = low relevance.

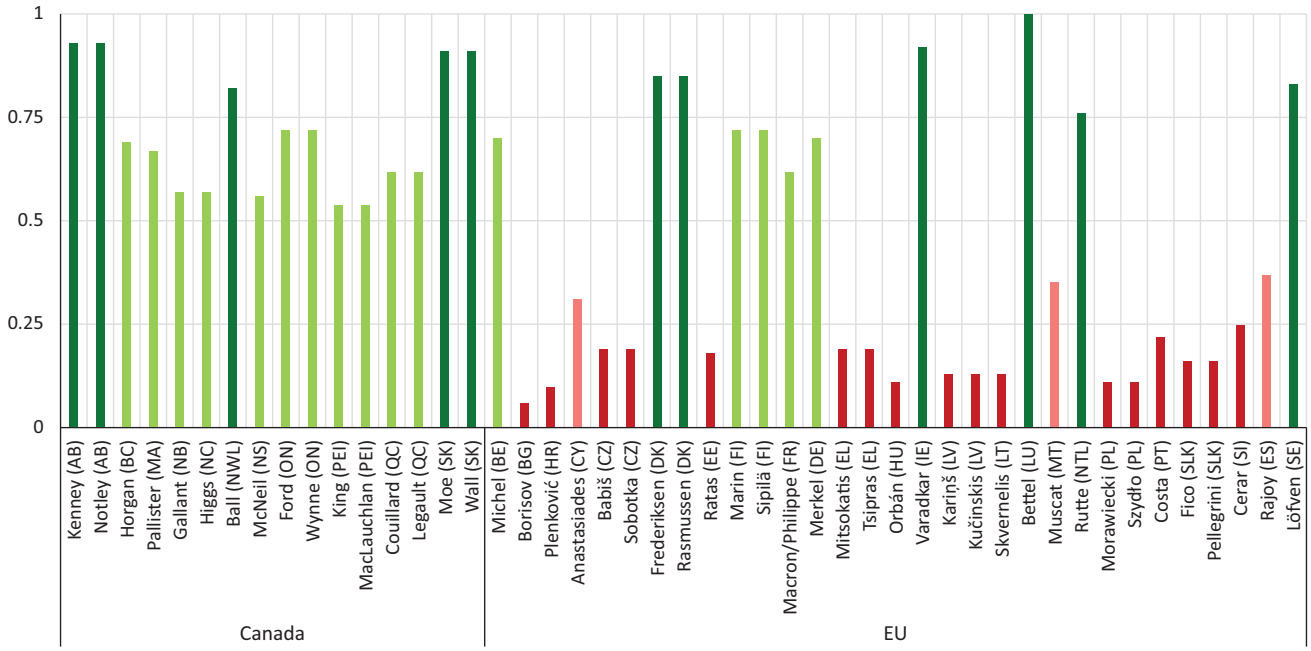

Figure 3. Financial capacity of sub-federal governments in Canada and the EU. Note: Red = low capacity and green = high capacity.

a relevant role for sub-federal governments since climate policy requires action across a wide range of policy areas, including environmental protection, energy, natural resources, transportation, and industrial and economic development. Thus, it represents a policy field in which sub-federal governments cannot be ignored.

While the article focuses on identifying the relevant causal and contextual conditions, and not the causal mechanisms per se, grasping the processes at play is essential to understand the dynamics and interactions between the actors and the conditions. For data collection and analysis, I thus adopt tools from process-tracing methodology (Beach & Pedersen, 2013). When collecting and analyzing my data, I focus on traces, accounts, and sequences of events (Beach & Pedersen, 2013, pp. 99–100), which helps deduce the relevant causal conditions and processes. As this article is interested in effectiveness, sequences are particularly important to

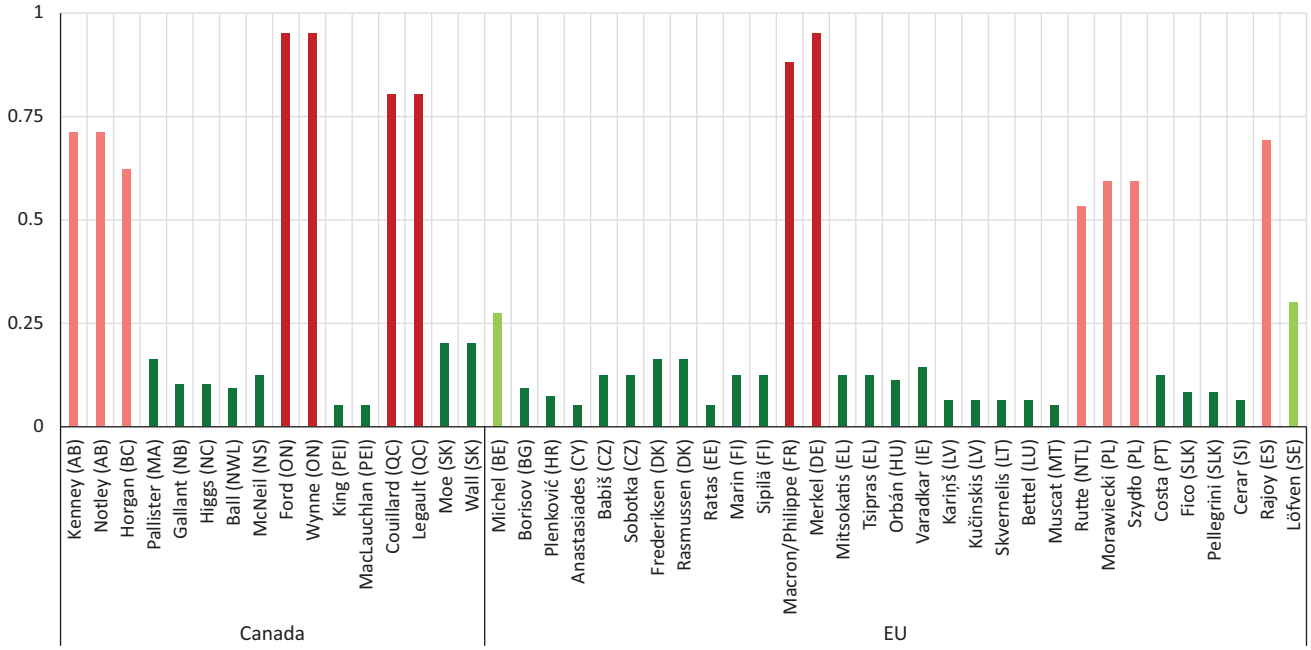

Figure 4. Power of sub-federal governments within Canada and the EU. Note: Red = powerful position and green = weak position.

trace effects back to their causes. For example, empirical fingerprints, such as instances where sub-federal governments exhibit support for implementation when offered side-payments or cases where their support diminishes upon their discontinuation, serve as compelling evidence highlighting the significant impact of these side-payments.

In order to ensure the internal validity of the analysis, I rely on triangulation using three different data sources (see Supplementary File). First, I studied official documents, including agreements, communications, conclusions, and communiqués of Canadian and EU intergovernmental meetings and press releases of executives on both sides of the Atlantic. I considered a total of 46 documents. Second, I searched Factiva and Google News for news articles on the implementation processes in Canada and the EU and the conduct of the multiple sub-federal governments. I applied a data saturation strategy (Morse et al., 2002), i.e., I collected articles until I could not find additional information. In total, I studied 510 articles. Third, I conducted eight semi-structured interviews and three background talks with officials from provincial and member state ministries working on climate action, energy, and intergovernmental relations, as well as practitioners from the federal and EU levels. Several interview partners had worked for other sub-federal entities before their current positions, or had experience on both levels of government, i.e., they could provide insight beyond their current jurisdiction.

I study the collected data by focusing on the key decisions and frameworks that have led to particular sub-federal resistance and for which Canada and the EU have used side-payments to bring sub-federal governments on board. For the Canadian case, I concentrate on the Pan-Canadian Framework on Clean Growth and Climate Change (PCF) and the adoption of a carbon pricing mechanism. As for the EU, I examine the decisions on the EU's roadmaps for 2030 and 2050. My study thus centers on pan-Canadian and pan-European schemes rather than policies and measures adopted by the sub-federal governments within their jurisdictions. My period of interest ranges from December 2015, i.e., the adoption of the Paris Agreement, to December 2021.

3. The Implementation of the Paris Agreement in Canada and the EU

3.1. Canada

In order to achieve Canada's climate target effectively, Prime Minister Justin Trudeau initiated a process of intergovernmental cooperation between the federal and provincial governments. At the First Ministers' Meeting in March 2016, federal, provincial, and territorial government heads adopted the Vancouver Declaration (Office of the Prime Minister, 2016). They committed to meeting Canada's GHG mitigation target and agreed to strengthen intergovernmental coordination and cooperation in climate action. Based on the Vancouver Declaration, the federal and provincial environment ministers drafted the implementation strategy over the following months in the Canadian Council of Ministers of the Environment. In December 2016, the first ministers adopted the PCF (Government of Canada, 2016), designed as the collective basis for coordinated and effective Canadian climate action. Carbon pricing is a critical element of the PCF. Provinces were asked to introduce either a carbon tax or an emission trading system with a minimum price of 50 CAD/tonne. Alternatively, the federal government would introduce a pan-Canadian carbon price that would cover the provinces that do not have their own pricing mechanism. Furthermore, provinces formulated concrete provincial climate targets in the PCF.

The approach that asked provinces to define their climate targets independently allowed the challenging baselines of the energy-intensive provinces, namely Alberta and Saskatchewan, to be accommodated. Provinces that are able to do more, do more; those that face domestic challenges to implementation do less. This differentiated strategy was widely accepted. Besides signing the PCF, climate-progressive provinces, including British Columbia's Premier Christy Clark, have publicly spoken out in favor of such a differentiated approach. This procedure can be understood as a form of horizontal side-payment among the provinces.

Several provinces, such as British Columbia under John Horgan and Ontario under Kathleen Wynne, did not have to be persuaded. These provincial governments had a clear climate agenda and did not face significant internal implementation obstacles (Figures 1–3) and were, therefore, natural allies in the implementation process (Interviews 2 and 3). While the federal government managed to incorporate most provinces and territories in the pan-Canadian plan, Manitoba and Saskatchewan did not sign the PCF and consequently did not commit to any climate targets. However, Manitoba's Premier Brian Pallister decided to join the PCF in February 2018, leaving Saskatchewan under Premier Scott Moe, the only province outside the framework.

The federal government and parliament adopted several policies to support provincial implementation measures and incentivize the provincial leaders to support the implementation of the Paris Agreement. Funding was especially important. Several provinces had requested financial support to contribute to the Paris Agreement implementation, for instance, to promote renewable energies within their jurisdiction (Interview 7). As one interviewee put it pointedly, "the only way the federal government can compel provinces to do something the federal government wants them to do is to throw money at them" (Interview 5). Accordingly, the federal level created instruments such as the Low Carbon Economy Leadership Fund and the Low Carbon Economy Challenge. However, only provinces signed on to the PCF have access to the Leadership Fund, i.e., Saskatchewan

has not been eligible for funding since the beginning. When the Manitoban government decided to join the PCF in 2018, it explicitly stated its wish to access the conditional funding mechanisms as its key motivation for joining the PCF (Government of Manitoba, 2018), indicating the effectiveness of this side-payment tool.

Multiple provinces that face structural challenges to implementation have received compensation from the federal government or have been exempted from federal provisions. For instance, the federal government negotiated equivalency agreements with Alberta, British Columbia, Nova Scotia, and Saskatchewan on exemptions from the federal coal phase-out plan or concerning the release of methane from the oil and gas sector in order to accommodate provincial peculiarities.

The federal government has also used exchanges across policy fields to obtain provincial support. A politically particularly relevant example of such bilateral side-payments has been the federal support for oil pipelines for Alberta. Notably, the approval of the Trans Mountain Pipeline expansion project in 2016 was a crucial concession by the Trudeau government in return for Rachel Notley's Alberta Climate Action Plan, which included a cap on emissions from the oil sands sector and a carbon price (Interview 8). In 2018, the federal government even acquired the pipeline system to ensure the completion of the expansion and to secure Alberta's support for the federal climate plan (Interviews 7 and 8).

Two specific events challenged the federal government's strategy to keep the provinces on board and the generally broad consensus among the provinces regarding the intergovernmental implementation process. With the election of Doug Ford over Wynne in Ontario in June 2018, Trudeau lost a strong advocate of his climate action and implementation strategy. In addition, a federal court halted the pipeline expansion project in Alberta. The election of Ford and the court ruling led to the governments of Alberta and Ontario deciding to withdraw from the PCF in the summer of 2018 (Interview 3). As a result, the largest province in terms of population and economy, Ontario, and the two main oil-producing and polluting provinces, Alberta and Saskatchewan—taken together responsible for three-quarters of Canada's GHG emissions—were no longer part of the PCF. Alberta, in particular, stated publicly the power position the province holds regarding the implementation process:

> So today I am announcing that with the Trans Mountain halted, and the work on it halted, until the federal government gets its act together; Alberta is pulling out of the federal climate plan. [...] And let's be clear, without Alberta, that plan isn't worth the paper it's written on. (Notley, 2018, as cited in Tasker, 2018)

Notley's statement further indicates that the degree to which provinces have strong leverage in the Paris Agreement implementation context results not only from their size and economic power but also from their contribution to Canada's GHG emissions (Interviews 6 and 8).

With the materialization of this new group of resistance against the intergovernmental implementation plan, Manitoba's government also decided in October 2018 to leave the PCF. The election of Jason Kenney in Alberta in April 2019 further strengthened the group of opposing provinces, which became a veritable block of resistance against Trudeau's Paris Agreement implementation plan. These opposing governments have publicly discredited and attacked the Trudeau government and its climate policies, with Alberta emerging as the leading force of opposition. Open tensions between Alberta and the federal government had already begun at the end of Notley's tenure, despite her general willingness to contribute to implementing the Paris Agreement, and were exacerbated when Kenney came to power. Both premiers distanced themselves from Trudeau and his climate agenda, aware of the federal government's unpopularity in Alberta (Interviews 5 and 6). Besides public criticism and the lack of climate action within their jurisdictions, the "resisting" governments also actively challenged federal implementation measures. The strongest manifestation of this joint resistance occurred when Alberta, Ontario, and Saskatchewan contested the federal Greenhouse Gas Pollution Pricing Act at their respective provincial courts of appeal starting in 2018.

Unwilling governments of large provinces, especially Kenney's in Alberta and Ford's in Ontario, became lost causes for the Paris implementation (Interview 3). As a result, following the government changes, Prime Minister Justin Trudeau halted the multilateral intergovernmental implementation process with provincial premiers and focused on bilateral negotiations to bring reluctant provincial governments on board or to collaborate with willing provincial leaders (Interview 6).

Although generally less aggressive, after the provincial elections in 2018, New Brunswick also joined the resistance block under the new government of Blaine Higgs (Interview 5). Only after the federal elections in the fall of 2019 that confirmed Trudeau's government in power and resulted in a strong result for the Green Party in New Brunswick did the provincial government start distancing itself from the resistance club. Hence, the Higgs government's abandoning its opposition to implementing the Paris Agreement was not a consequence of Canada's side-payment strategy. Rather, strategic considerations regarding elections led the government to become more willing to engage in climate policy.

Table 3 outlines the key implementation decisions, the side-payments instruments, and the moments of sub-federal resistance. Generally, we could observe an emergence and stabilization of the group of resisting provinces, which advanced substantially when the large provinces of Alberta and Ontario joined Saskatchewan in its opposition. Consequently, when Canada decided to

Table 3. Key events of the Canadian implementation process.

Date	Event
May 2015	Communication of Canada's intended emission reduction target to the UNFCCC
November/December 2015	Paris Summit
March 2016	Initiation of the implementation process with Vancouver Summit
November 2016	Approval of the Trans Mountain expansion project by the federal government
December 2016	Adoption of PCF, without Manitoba and Saskatchewan, including recognition of a differentiated implementation approach
June 2017	Establishment of Low Carbon Economy Fund (Low Carbon Economy Leadership Fund & Low Carbon Economy Challenge)
February 2018	Manitoba joins the PCF
March 2018	Adoption of the federal Greenhouse Gas Pollution Pricing Act
From April 2018 onwards	Legal challenges of Greenhouse Gas Pollution Pricing Act at provincial courts of appeal and Supreme Court of Canada
May 2018	Purchase of the Trans Mountain pipeline by the federal government
June 2018	Change of government in Ontario
July 2018	Ontario's de facto withdrawal from the PCF
August 2018	Alberta's withdrawal from the PCF after ruling on the pipeline project
October 2018	Manitoba's de facto withdrawal from the PCF
November 2018	Change of government in New Brunswick
April 2019	Change of government in Alberta
June 2019	Re-approval of the Trans Mountain expansion project by the federal government
2020	Entry into force of bilateral federal-provincial equivalency agreements
April 2021	Communication of Canada's new emission reduction target to the UNFCCC

increase its emission reduction target in April 2021, the largest and most polluting provinces had already abandoned the implementation process.

3.2. EU

During the implementation process, the European Council, the institution of the EU's heads of state or government, has, in several instances, underlined that the EU and its member states have to develop solidarity mechanisms. Such mechanisms should consider the different starting points of each member state and their capacities to contribute to the EU's overall commitment (for instance, European Council, 2020).

Based on guidelines adopted by the European Council, the European Commission launched a process that has entailed both the definition of climate targets and the adoption of concrete legislation to set the EU on track to fulfill its 2030 climate commitment. Relevant communications of the Commission have been related to the goal of climate neutrality, the European Green Deal, and the increase of the EU's 2030 target from 40% to 55%. Also, regarding legislation, the Commission has proposed the relevant legislative acts, such as the new effort-sharing regulation, the Clean Energy for All Europeans package, including the regulation on Governance of the Energy Union and new renewable energy and energy efficiency directives, and more recently, the European Climate Law.

The EU has adopted several measures to implement its Paris Agreement target that consider the different national capacities and provide financial support to regions in need. Member states that are more economically developed and have already moved towards a more climate-friendly economy have been willing to support other member states in transitioning towards a more sustainable economic system. This assistance has been possible because several member states not only follow a climate action agenda but also face little internal structural obstacles to implementation, such as the governments of Xavier Bettel in Luxemburg and Stefan Löfven in Sweden (Figures 1–3). For instance, the new trading period of the EU's Emission Trading Scheme (ETS) includes the establishment of a Modernisation Fund

and an Innovation Fund, both of which are financed by the ETS and aim to support the modernization of the energy systems of low-income member states and innovation in the area of low-carbon technologies, respectively. In addition, the Just Transition Mechanism, including the Just Transition Fund, was established to support regions most challenged by a transition to climate neutrality. To benefit from the fund, member states have to develop territorial just transition plans. Furthermore, as part of the new effort-sharing regulation, which addresses the reduction of emissions not covered by the EU-ETS, the member states agreed to mitigate their GHG emissions targets by considering each member state's capacity. This approach can also be understood as a form of side-payment for member states with lower levels of economic development. Such mechanisms have enabled member states that are generally willing but lack financial resources, such as the governments of the three Baltic states or the Portuguese government under António Costa, to contribute to the implementation of the Paris Agreement by helping them to bear the implementation costs.

Poland has been a resistant member state from the beginning of the implementation process. The country saw a change of government right before the Paris Agreement negotiation with the PiS party taking power. On several occasions, the governments under Beata Szydło and Mateusz Morawiecki have attacked the European Commission's implementation strategy and the former Polish government that had agreed to the EU's Paris Agreement target. In the context of the implementation of the Paris Agreement, the public discourse of the Polish government, but also other executives such as Hungary's, has become increasingly politicized.

Regarding multiple EU decisions in the European Council and the Council of the EU, Poland was joined in its opposition by other member states, including the governments of Boyko Borisov in Bulgaria, Andrej Babiš in Czechia, and Viktor Orbán in Hungary. While several member states have regularly attempted to water down specific pieces of legislation, the resistance alliance did not hold regarding the landmark decisions, such as the target for 2030 or climate neutrality. Most opposing member states have tied their support for decisions at the EU level to specific conditions and have asked for financial compensation at every implementation step. Specifically, the creation of the Just Transition Fund was fundamental for Orbán's and Babiš's consent to the 2030 climate targets. As a result, the European Council adopted the new 2030 climate targets and endorsed the Just Transition Fund in its meeting in December 2020 (European Council, 2020). Besides recurring demands for funding, the Polish government has successfully insisted on maintaining the existing free allowances from the ETS and on an exemption clause regarding the phase-out of coal subsidies. These member state governments have also repeatedly urged the European Council to underscore the freedom of member states to determine their energy mix, including the demand to explicitly include nuclear energy as a climate-neutral technology or gas as a transition technology (European Council, 2019, 2020).

The endorsement of the increased 2030 climate target and the Just Transition Fund in December 2020 was part of the adoption of the EU's Multiannual Financial Framework for 2021 to 2027 and the Next Generation EU package (European Council, 2020). The Hungarian and Polish governments had blocked the EU's budget and recovery plan as the use of EU funds was to be conditional upon the respect of the rule of law. The adoption of both financial schemes was of major importance for the implementation of the Paris Agreement, with 30% of the expenditure being dedicated to climate action. The blockage by the Hungarian and Polish governments could be overcome through two concessions that watered down the new rule of law mechanism. The European Council decided that the mechanism cannot be triggered in general breaches of the rule of law, but only when those breaches have an unambiguous and direct negative effect on the EU's financial interests. Moreover, the heads of state or government agreed to delay the mechanism's actual application. These concessions represented relevant side-payments that compelled the Hungarian and Polish governments to consent to the financial frameworks, including funding for climate action.

The accommodation of the multiple demands for funding and exemptions has thus substantially helped to keep or bring member states on board with implementation. In addition, the German government under Angela Merkel played an essential part in the stability of the alliance of resisting member states. While the German government did not become an active opponent of the implementation process, it was a reluctant actor in multiple instances and delayed substantial decisions. For instance, Chancellor Angela Merkel was one of the heads of government who prevented the endorsement of the 2050 climate neutrality objective in the European Council meeting in March 2019. Once Germany had decided to support this target after months of reluctance, smaller member states, such as Bulgaria, Czechia, and Hungary, followed suit and gave their consent at the European Council meeting in December 2019. Only Poland opted out (European Council, 2019). In other words, the combination of side-payments in the form of funding and a German change of heart caused the collapse of the resistance club with regard to the 2050 objective.

Table 4 summarizes the EU implementation process, including implementation measures, side-payments, and instances of member-state opposition. In contrast to the governments of Kenney and Ford in Canada, Szydło and Morawiecki could not establish a strong group of member states to support their opposition. The smaller hesitant member states with low capacity or willingness were brought back on board through financial incentives or gave up their resistance when large member states became advocates for an implementation measure.

Table 4. Key events of the implementation process in the EU.

Date	Event
October 2014	European Council decision on the EU 2030 Climate and Energy Framework, including the announcement of the Modernisation Fund
March 2015	Communication of the EU's intended emission reduction target to the UNFCCC
November 2015	Change of government in Poland
November/December 2015	Paris Summit
March 2018	Adoption of ETS reform and creation of Modernisation Fund and Innovation Fund
May 2018	Adoption of Effort-sharing regulation (2021–2030)
November 2018	Commission proposal on climate neutrality by 2050
March and June 2019	European Council meetings without a decision on climate neutrality due to resistance of multiple member states
June 2019	Adoption of regulation on the internal market for electricity with exemption clause on phase-out of coal subsidies
December 2019	Endorsement of climate neutrality by 2050 by the European Council (without Poland) and reference to the planned Just Transition Mechanism
January 2020	Commission communication on Sustainable Europe Investment Plan, including Just Transition Mechanism
December 2020	Endorsement by the European Council of new 2030 target, and conclusion on Multiannual Financial Framework and NextGenerationEU, including Just Transition Mechanism and rule of law mechanism
December 2020	Communication of the EU's new emission reduction target to the UNFCCC
June 2021	Establishment of the Just Transition Fund

4. From Empirical Insights to Theorization

In both Canada and the EU, several governments, which have shown political commitment to climate action and do not face domestic implementation obstacles, have supported the implementation of the Paris Agreement from the beginning. Examples include British Columbia and Sweden. Such cases did not require that they be incentivized through side-payments to support the implementation process and have contributed to the creation of mechanisms to bring other reluctant governments on board. We have also witnessed on both sides of the Atlantic sub-federal governments that have been hesitant or even actively resistant to support the implementation of the Paris Agreement. This opposition has generally resulted from a sub-federal government's lack of willingness to engage in climate action or implementation obstacles. Implementation obstacles include the lack of financial strength (especially in the Central and Eastern European member states of the EU), the economic or social relevance of industries that are difficult to decarbonize, energy-intensive (such as the coal sector in Poland, the oilsands industry in Alberta, manufactory industries in Germany, or agriculture in the Canadian Prairies), or involve carbon-dependent energy production (as seen in Nova Scotia and Poland). Canada and the EU have launched systems of side-payments to keep or bring on board these reluctant governments that either lack the willingness or capacity to implement. Based on the empirical observations, I propose a two-fold argument regarding the effects of side-payments. The argument is dynamic and configurational as it accounts for how sub-federal actors react to a changing context, such as other actors' behavior, and how explanatory conditions jointly explain the effectiveness of side-payments. Figure 5 illustrates the causal conditions and the process, including their empirical manifestations, that help explain the success and failure of side-payments.

First, side-payments appear to work less effectively or not at all for large, powerful sub-federal entities whose governments lack the willingness to contribute to implementing the Paris Agreement (path A in Figure 5). For example, Ontario and Alberta, major economic powers within Canada, could not be persuaded to abandon their resistance to the implementation of the Paris Agreement under the new Ford and Kenney governments, which have no political interest in climate action. The fact that Ontario does not face any relevant domestic implementation obstacles, such as highly polluting economic structures, suggests that capacity issues trigger the launch of side-payment strategies but do not condition the effectiveness of side-payments. The opposition

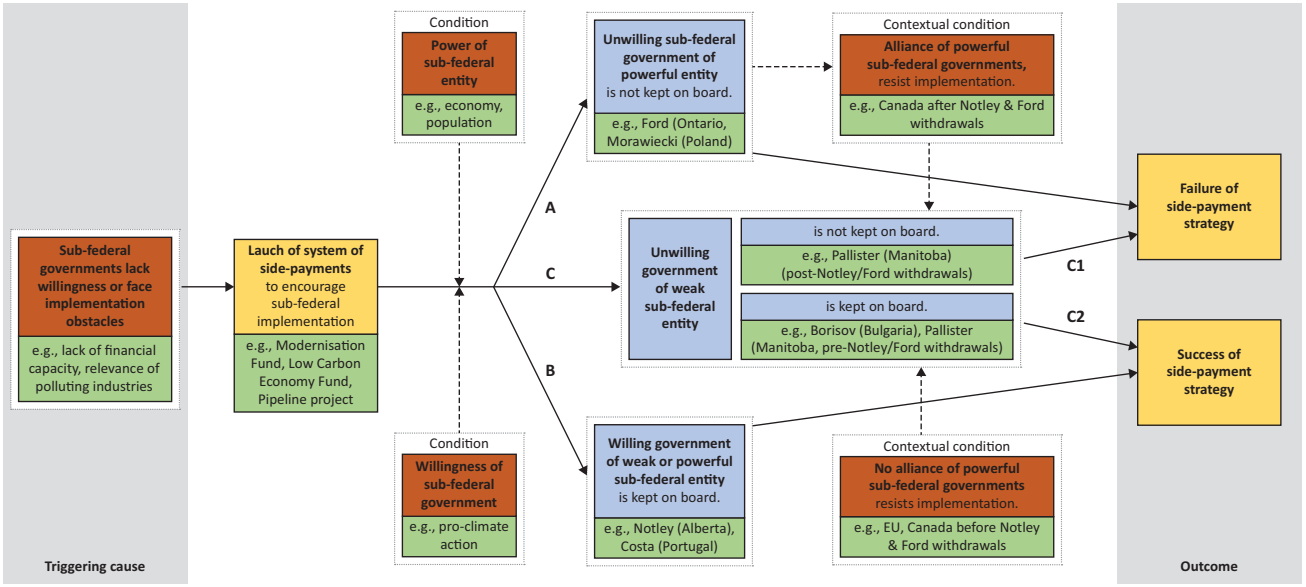

Figure 5. Conditions and processes explaining failure and success of side-payments.

to the implementation of Saskatchewan, a rather small province in terms of economy and population, and its resistance to side-payments demonstrates that having a high GDP per capita can also be a source of power to resist implementation and dismiss financial incentives. In the EU, Poland, the EU's fifth most populous member state, governed by an unwilling government and facing domestic obstacles to implementation, is a player constantly impeding the implementation process, despite the EU's repeated attempts to bring member states with lower levels of economic development on board.

From the power perspective, it has been argued that governments of powerful entities can bear costs resulting from non-implementation, such as losses in reputation or non-access to financial instruments, and thus resist pressure to implement more easily than weak entities (Börzel et al., 2010). The empirical observations complement this power-based argument by pointing to situations in which powerful governments, such as Alberta, can actually gain reputational benefits from non-implementation. The governments of Alberta have strategically decided to oppose implementation to avoid being sanctioned by their electorate for cooperating with the Trudeau government—one that is unpopular in this province at this time. Such a calculus related to political capital regarding credibility (Bourdieu, 1991; Jentges, 2017) is a privilege for powerful sub-federal governments that can more easily resist social or material pressures from federal institutions or other provincial and national executives, including positive incentives such as side-payments. Similar dynamics could be observed in Poland, where the PiS government not only rejects an ambitious climate policy but also publicly positions itself as unwilling to cooperate with the EU institutions and member states.

In contrast, side-payments can help overcome low implementation capacity and keep or bring governments of both weak and powerful sub-federal entities on board with implementation as long as they are generally willing to act (path B). For instance, side-payments have been an effective instrument for EU member states facing implementation challenges, such as low economic capacities or energy-intensive economies. Examples include the governments of Costa in Portugal and Jüri Ratas in Estonia. Similarly, Nova Scotia's opposition under the government of Stephen McNeil lessened after the federal government exempted the province from the coal phase-out plan. The Notley government in Alberta illustrates that side-payments can also work in cases where powerful entities face implementation obstacles, and the sub-federal government is generally willing to act. Alberta exited the implementation process as soon as the federal government's key side-payment, i.e., the Trans-Mountain Pipeline extension, was under threat of being withheld. This observation points to the importance of side-payments in keeping the Notley government on board, and that the role of sub-federal governments in the implementation process is dynamic and responsive to a changing context.

The second pattern concerns unwilling sub-federal governments of weak entities whose role in the implementation process is subject to a more complex chain of causal conditions and processes (path C). Several provincial and member state governments that have generally shown no interest in climate action have been kept on board and effectively engaged in the implementation process, or, if they deviated from the implementation process, regularly re-engaged. For instance, Croatia under Andrej Plenković or Czechia under Babiš agreed to the increase of the EU's 2030 emission mitigation target in line with the Paris Agreement in 2020 once their condition of financial compensation had been met by the European Council through the creation of the Just Transition Mechanism. However, while side-payments

appear necessary to incentivize weak entities' governments that are reluctant to contribute to the implementation process, they do not represent a sufficient explanation as Manitoba under Pallister or New Brunswick under Higgs indicate. Based on the empirical evidence and the sequence of events presented above, the conduct of the powerful entities appears to impact the governments of weak member states and provinces substantially. The effectiveness of side-payments for small, reluctant sub-federal governments broke down as soon as a group of powerful governments resisted implementation (path C1). For instance, Palliser's government in Manitoba followed a back-and-forth strategy regarding its role in the implementation process. But once Alberta and Ontario had withdrawn from the intergovernmental implementation process, Pallister's government also permanently joined the alliance of resisting provinces, i.e., side-payments, especially financial incentives, became ineffective. In the EU, we can also witness how the change of heart of a large member state towards support affected governments of small member states. Shortly after Germany under Merkel decided to no longer block the climate-neutrality objective in the European Council, small member states such as Hungary under Orbán or Bulgaria under Borisov also gave up their opposition and were persuaded by means of financial assistance (path C2).

If costs for implementation are neutralized through side-payments, other costs become important to consider, such as reputation losses. Small provinces or member states might have a harder time bearing these costs than powerful sub-federal entities or resisting pressure from their peers when they act alone. However, once an alliance of powerful entities that oppose implementation is formed, it becomes easier for governments of weak entities that are critical of the international agreement to manifest their opposition openly. They are then shielded by powerful entities, which can absorb much of the reputational damage and resist pressure from other actors.

5. Conclusion

When are side-payments effective at keeping sub-federal governments on board when it comes to implementing international agreements? The study of the implementation of the Paris Agreement in Canada and the EU has helped to develop a dynamic model that also addresses how the involved actors respond to each other's conduct. The comparative approach has specifically allowed for a better understanding of when sub-federal governments can be brought in through side-payments and has stimulated the development of a two-fold argument. First, if governments of powerful sub-federal entities do not want to contribute to the implementation of an international agreement, side-payments can be expected to have no effect on their opposition. On the other hand, willing sub-federal governments, whether weak or powerful, facing domestic implementation obstacles can be persuaded by means of side-payments. Second, unwilling governments of weak sub-federal entities can only be brought on board as long as there is no alliance of powerful entities resisting the implementation process.

On the one hand, this is good news for implementation. Side-payments can be an effective tool for hesitant sub-federal governments if they are generally willing to contribute to the implementation or are in a weak power situation. This limits the pertinence of the general assumption in the international compliance literature that federalism negatively affects compliance and implementation. Federalism has, for instance, allowed the Canadian government to work effectively on implementation with those sub-federal governments that are willing or that it has persuaded through side-payments. On the other hand, powerful, unwilling governments are "lost causes" that cannot be brought on board. Moreover, the support of small unwilling entities for the implementation process only holds as long as no alliance of powerful resisting governments is formed. Politically, this means that powerful, hesitant governments have a responsibility in that their behavior also affects the behavior of small sub-federal entities, as the effect of the reluctance of the German government to support implementation indicates.

In order to increase both the internal and external validity of this argument, further research is required. As a follow-up to my analysis, a second round of qualitative research should more specifically study the causal mechanisms at play, especially the calculations considering reputation, political capital, and implementation costs. Also, an analysis of additional policy fields would allow for testing the relevance of issue salience as a contextual condition and whether the argument also holds for regulatory agreements. Sub-federal resistance to the implementation of international agreements and the use of side-payments is, in fact, not specific to the Paris Agreement. For example, the Canadian government has responded to provincial opposition, especially from Québec, to the free trade agreements with the EU and the US and Mexico by creating several financial incentives mechanisms, such as the Dairy Processing Investment Fund and Dairy Direct Payment Program, to support the dairy industry against foreign competition (Government of Canada, 2022a, 2022b). Conducting a qualitative comparative analysis would provide one possible means to test the theoretical argument proposed here across federal systems and agreements.

The observations made suggest similar dynamics on both sides of the Atlantic regarding the demand for, use of, and effectiveness of side-payments despite the differences between Canada and the EU. Institutionally, the EU, for instance, differs from Canada in the requirement of unanimity in most of its climate-policy-related decisions and in the cooperation between EU institutions and member states during the negotiation of international agreements. In contrast, intergovernmental decisions in Canada are based on voluntary cooperation

and Canadian provinces are not involved in international negotiations by default. While the empirical observations made in the scope of this article indicate that these institutional features do not dismiss the validity of the argument developed here, future research should consider how such differences in the Canadian and EU federal models influence the effects of, or—more likely—the size of side-payments.

This article has aimed to contribute to the literature on side-payments specifically but also to the more general bodies of literature on comparative federalism and international compliance. Combining international relations with federal studies, an approach not new to the study of Canada (Simeon, 1972), has proved productive. The dynamic and configurational approach of this article has helped to refine the existing power argument (Börzel et al., 2010; Moravcsik, 1991; Moravcsik & Vachudova, 2003) by identifying the conditions under which powerful sub-federal governments can be persuaded, understanding the impact of powerful governments' behavior, and adding a causal mechanism surrounding political capital. I have also aimed to contribute to the debate on the "comparative turn" in Canadian political science (Turgeon et al., 2014; White et al., 2008) and, more recently, in the field of EU studies. In line with authors who have argued that studying the EU benefits from borrowing approaches and tools from comparative politics (Hix, 1994) and comparative federalism (Fossum & Jachtenfuchs, 2017; Sbragia, 1993), and from comparisons with the Canadian federation in particular (Fossum, 2018), this article provides a concrete example of the value of embedding the EU in comparative studies and abandoning the myth that has dominated EU studies for too long, namely that the EU is a sui generis organization unlike any other.

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Conflict of Interests

The author declares no conflict of interests.

Supplementary Material

Supplementary material for this article is available online in the format provided by the author (unedited).

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