

# Historical Institutionalism and the Varieties of Federalism in Germany and Canada

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This article uses two contrasting case studies, Canada and Germany, to illustrate how varieties of federalism evolve on diverging developmental pathways. Applying a historical institutionalist framework, the article explains how different forms of institutionalized relationships between governmental tiers grow out from early institutional alignments and become self-reinforcing. As federal institutional designs variously embody constraining and enabling elements, this institutional legacy has important consequences for the scope of entrepreneurial politics. Institutional variation, therefore, is likely to generate different adjustment paths in federal systems.

When the socialist Co-operative Commonwealth Federation (CCF) came to power in Saskatchewan in 1944, the Douglas government transformed the poorest province in the federation into a pioneering laboratory. Within a comparatively short time-frame, the CCF government fundamentally changed the machinery of government, created a professional public service, and introduced highly innovative policies in areas such as regional economic policy, agricultural policy, health, education, and welfare. In doing so, the CCF government not only created a lasting legacy for the province, but also for Canadian politics and society as a whole (Johnson 2004). The experience of the Douglas government is only one striking example of what might be called “province-building” initiatives. The Lesage government of Quebec (1960–1966) or the Lougheed government of Alberta (1971–1985), among others, provide prominent examples where provincial governments have exploited their institutional resources to implement far-reaching reform initiatives.

In contrast, rather than tackling reform issues at the level of constituent units, *Länder* governments in Germany usually turn to the federal level whenever they want to launch political change. For example, election campaigns on the *Land* level frequently are preoccupied with issues that are ultimately legislated on the federal level. Moreover, it is a persistent pattern in German politics that *Länder* have

attempted to more firmly entrench their right to participate in federal legislation instead of developing capacities to act independently within their own sphere of governance. Even when the preferences of fiscally strong *Länder* governments ultimately changed in the 1990s and they sought to increase their capacities for autonomous action, they were not able to do so. They found themselves caught in the “joint-decision trap” (Scharpf 1988) from which they were unable to escape unilaterally.

This article uses historical institutionalism in order to illustrate how federal systems evolve on different pathways. It argues that the varieties of federalism manifest themselves not only in diverging, path-dependent institutional trajectories, but also in the way federal systems simultaneously generate varying modes of adjustment. The way institutions are constructed historically is crucial to our understanding of how federal systems variously respond to pressures for change. Federal systems locate territorially defined actors in differently institutionalized authority relationships that are already in place. Entrepreneurial agents are thus confronted with pre-existing institutional arrangements that shape and confine the aims to which they aspire and the repertoire of strategies they might employ to change the established status quo.

Therefore, the historical evolution of federal systems can be understood as a dual process combining patterns of stability and gradual change.<sup>1</sup> Path dependence explains the stable momentum within the dynamics of institutional development. Within the boundaries of a path-dependent institutional core, however, there always exists a varying scope for gradual adjustment (Thelen 1999). This scope for dynamical adjustments within path-dependent arrangements is largely dependent on how rigid these institutions are, that is, how they combine enabling and constraining properties.

Building on these theoretical foundations, I argue in this article that historical institutionalism can help tackle two questions of considerable importance to comparative federalism scholarship. First, it offers a powerful analytic lens for exploring how a federal system, instead of a unitary state, emerges from the interplay of critical antecedents and rather contingent events. This question refers to the origins of federal systems, an issue that has already received much attention in the literature (Riker 1964; Stepan 1999; Rector 2009; Ziblatt 2006). Yet, largely unexplored is the second and highly inter-related question. This question is concerned with the long-term development of federal systems and asks why different federal trajectories evolve after a critical juncture has generated a federal outcome. Historical institutionalism emphasizes that early events causally influence later developments (Pierson 2004). The origins of federal systems, therefore, shape the evolution of succeeding federal trajectories. More specifically, path dependence provides that the institutional pillars of a federal order are often stably reproduced over time. The distinct configuration of federal institutions emerging from the

critical juncture determines, at the same time, how federal systems develop different adaptive routines to cope with demands for change.

The first section of the article develops the theoretical argument in more detail. It demonstrates how historical institutionalism can contribute to understanding the origins and dynamical development of federal systems. Building on the distinction between inter- and intrainstitutional mechanisms, which captures two fundamentally different forms of institutionalized relationships between governmental tiers, the second section introduces analytical yardsticks that allow recognition of varieties of federalism. To illustrate my theoretical point, the third and fourth section compares two contrasting cases, Canada and Germany. The two case studies demonstrate how critical junctures set the stage for diverging, path-dependent institutional trajectories. These contrasting institutional configurations, in turn, variously define the scope for entrepreneurial politics and, hence, dynamical adjustments in both federations.

## Historical Institutionalism and the Study of Federal Development

Historical institutionalism is frequently associated with the notions of critical junctures and path dependence. The concept of critical junctures sheds light on constitutive elements of historical causation: the things that take place early in a sequence, which become amplified, are therefore “remembered” (Pierson 2000). From that analytical angle, federalism and the way it is institutionally organized is often a consequence of critical antecedents, combined with unexpected and relatively contingent events, rather than of voluntary and deliberate choices among political elites. Even though prevailing interests and ideas are likely to have an impact on the early formative periods of federal systems, the critical juncture concept reminds us that institutional outcomes are not simply a reflection of the dominant preference structure at that time (Capoccia and Kelemen 2007; Slater and Simmons 2010). It thus avoids circular reasoning, a serious problem William Riker’s (1964) influential framework to the study of state formation was criticized for. As Rufus Davis or Michael Burgess point out, Riker’s approach conflates the anticipated effects that state-builders expect from the adoption of a particular institutional option with its historical origins and formation (Burgess 2006; Davis 1978). Similarly, Ziblatt posits that wanting federalism is not enough: “. . . one clear lesson of this book is that the *effects* of federalism cannot explain its *origins*” (Ziblatt 2006, 12, italics in original).

Critical junctures demarcate a relatively brief period of historical openness during which structural constraints are significantly “relaxed” (Capoccia and Kelemen 2007, 343). This does not mean that they take place in a historical vacuum. The historical context still shapes the repertoire of available alternatives in causally significant ways. It is thus necessary to identify such critical antecedents

that structure the range of possible outcomes during a critical juncture. According to Slater and Simmons (2010, 887), critical antecedents are "... factors or conditions preceding a critical juncture [that] combine in a causal sequence with factors during a critical juncture to produce divergent long-term outcomes." Critical antecedents establish the historical and ideological context during periods of far-reaching institutional change and frame the set of available solutions (see also Béland 2009). They are crucial for reconstructing how entrepreneurial actors perceive federalism as a viable solution to the problem of state formation.<sup>2</sup> Yet, while critical antecedents are useful to pinpoint possible alternatives such as a unitary or a federal organization of the state, the literature on critical junctures stresses that, in addition, small and contingent events or developments ultimately push the outcome into one direction or the other (Capoccia and Kelemen 2007; Mahoney 2000; Pierson 2004). Such contingent events often enter the scene in the guise of economic crisis or war with unexpected and unpredictable long-term consequences for the process of state formation.

While the burgeoning literature on the origins of federal systems has concentrated primarily on the discussion why a federal outcome emerges from a critical juncture, historical institutionalism can also contribute to answering on the second question, asking what variant of federalism crystallizes over time. A historical institutionalist framework thus reminds us to look at the institutional alignments that happen early in a sequence to determine how varieties of federalism emerge from contingent historical origins. Mechanisms of reproduction provide that an institutional choice becomes self-reinforcing and persistent over time. In case of political institutions, power-based mechanisms of reproduction are of particular importance. This type of mechanism can help explain how early stages in a temporal sequence place certain actors in a position allowing them to shape an institutional configuration most consistent with their goals and interests (Mahoney 2000, 521). Over the course of time, this first mover advantage is perpetuated. Power-based mechanisms thus reproduce a contingent institutional outcome because its rules and distributive consequences are conducive to the consolidation of a power structure which favors certain societal or political actors at the expense of others.

For that reason, institutional building blocks of federal systems such as the allocation of competences, the second chamber or the system of intergovernmental relations display a high degree of variation, reflecting different federal trajectories across time and space. Once a specific configuration of federal institutions has taken shape early in a historical sequence, path dependence drives its consolidation and amplification over the course of time. Efforts to reverse this institutional "meta-path" of federal systems are unlikely to succeed. Not only will political costs for switching to an alternative federal institutional design be increasingly prohibitive, but also certain political actors can take advantage of historically

constructed power asymmetries to stabilize established authority relationships (Pierson 2004; Mahoney 2000; Orren and Skowronek 2004).

Finally, theories of gradual change inspired by historical institutionalism illuminate how federal systems, within a given path-dependent institutional configuration, prompt varying modes of adjustment (Mahoney and Thelen 2010). Certain features in federal systems such as the distribution of competences are challenged by distinct groups of actors on a more or less ongoing basis. Adjustment refers to the patterns of change on the systemic level that result from this push and pull between status quo defending actors and entrepreneurial agents. The degree of institutional rigidity embodied in the political context and the targeted institutions is likely to foster different patterns of change over time. Whereas constraining institutional environments tend to favor status quo defending actors, leaving entrepreneurial agents with only a limited set of reform strategies, enabling institutional environments expand the scope for entrepreneurial politics (Mahoney and Thelen 2010). This has important consequences for innovation and flexible adjustment in federal systems and, ultimately, how much substantial change is likely to occur in different variants of federal systems. In particular, as will be demonstrated, conversion and displacement are important patterns of gradual change more easily achieved when institutional rigidity is low.

### Varieties of Federalism: Inter- and Intrainstitutional Mechanisms

Federal systems combine shared rule and self-rule (Elazar 1987). Most basically, this is achieved through two types of institutional mechanisms that variously permeate federal systems.<sup>3</sup> Intrainstitutional mechanisms establish authority relationships of shared rule. This type of institutional mechanisms reflects Montesquieu's idea of *distribution des pouvoirs*. The idea presupposes an antecedent unity within which the constituent units and the federal level are jointly exercising power. As a consequence, authority and power resources are shared among territorial actors. An intrainstitutional governance structure creates a high degree of institutionalized interdependence and tightly couples territorial power holders. In contrast, interinstitutional mechanisms put emphasis on self-rule. They correspond to Montesquieu's idea of *séparation des pouvoirs* because territorial authority relationships are established through a clear separation of powers. Rather than collaborating within an antecedent unity, constituent units are performing state functions more independently from each other (see also Schultze 1990). As a consequence, interinstitutional mechanisms couple territorial power holders rather loosely.

Historically, a federal organization of the modern state is part of a larger developmental process that Stein Rokkan has called political structuring (Flora, Kuhnle, and Urwin 1999). The notion of political structuring captures the historical construction of political institutions through which state authority is

exercised within a given territory. Federal institutions register the salience of center–periphery conflicts during that process. Opposition of peripheral actors in some cases urged modern state builders to establish institutional provision that would limit the reach and scope of authority exercised through the central state. This process of federalization was itself internally differentiated, depending on whether federal institutions were more intra- or interinstitutional in nature. Whereas some federal systems put more emphasis on institutionalized collaboration among territorial power holders through intrainstitutional mechanisms, others foster autonomy and the separation of powers through the dominance of interinstitutional mechanisms.

Reconstructing diverging federal trajectories therefore requires to uncover how inter- and intrainstitutional mechanisms variously underpin the architecture of federal systems. I suggest to focus on three institutional dimensions:

- (1) The *allocation of competences* can be either dualistic or integrated. A dualistic allocation of competences enables territorial power holders to act autonomously within their own jurisdictions. Intrainstitutional mechanisms, in contrast, provide for institutionalized interdependence by functionally assigning responsibilities to both governmental tiers. Whereas the federal level has the competence to legislate, constituent units have the authority to implement legislation within the federation.
- (2) Institutional provisions ensuring *constituent units' participation in federal legislation* can be either weak (interinstitutional) or strong (intrainstitutional). The most obvious intrainstitutional mechanism intended to safeguard the interests of constituent units in federal legislation is a strong second chamber, but such provisions can also be found in other arenas of federal decision making like the cabinet (Smiley and Watts 1985).
- (3) The *system of intergovernmental relations* can be either weakly or strongly institutionalized. Given their dualistic nature, interinstitutional settings basically allow for two interaction modes between territorial power holders. They can either act unilaterally or establish a system of cooperative federalism. Intrainstitutional settings, in contrast, require actors to establish highly institutionalized routines both vertically and horizontally in order to cope with the functional division of authority. Moreover, unlike interinstitutional systems of cooperation, which always remain voluntary, intrainstitutional mechanisms tend to create systems of joint decision making. Systems of joint decision making differ from cooperative federalism in that actors are enforced to negotiate. Under the condition of joint decision making, no one actor is able to unilaterally exit negotiations and alter the status quo single-handedly (Scharpf 1988). This is one important reason why intrainstitutional mechanisms are more constraining than interinstitutional mechanisms.

As noted above, inter- and intrainstitutional mechanisms variously permeate federal systems (for an exploratory assessment, see Broschek 2009, chapter 5). In this respect, the two case studies examined here are prototypical as they represent the empirical endpoints of a continuum ranging from a purely interinstitutional to a purely intrainstitutional federation. While in other cases both institutional logics are more intermingled, they nevertheless tend to lean towards either pole. The federal systems in the United States and Australia are more interinstitutional in nature, in Switzerland and Austria, in contrast, intrainstitutional mechanisms are more pronounced. Yet distinguishing the two types of institutional mechanisms is useful for more than simply detecting the development of varieties of federalism. Since the degree of institutional rigidity tends to be higher in case of intrainstitutional mechanisms, this analytical distinction can also serve as a valuable point of entry into the investigation how federal systems develop different adaptive routines to respond to demands for change.

### Sources of Path Dependence in Germany and Canada

The federal systems of Germany and Canada represent almost prototypically contrasting principles of institutional design. Whereas in Canada a dualistic allocation of political authority is the central feature of the federation, German federalism is characterized by a highly integrated allocation of competences. An instructive survey of institutional arrangements in the six classical federations by Lori Thorlakson (2003) clearly highlights these peculiarities. For example, most jurisdictions are assigned exclusively to each governmental tier in Canada, while this type of policy allocation is rather insignificant in Germany (Thorlakson 2003). Even though German federalism exhibits a large number of policy areas formally falling under concurrent legislation, most jurisdictions are occupied by the federal level. The main function of the *Länder* within the federal system is policy implementation. The dominance of bureaucracy on the level of constituent units responsible for implementing federal legislation is one significant constant of Germany's "semisovereign state."<sup>4</sup>

Participation in federal legislation is a second indicator for varieties of federalism. Institutional provisions facilitating constituent units' participation in federal legislation are poorly developed in Canada. This is perhaps most obvious with respect to the Senate, which ranges *de facto* among the weakest second chambers within the world of federations. In contrast, *Länder* participation in federal legislation is one of the most preeminent characteristics of German federalism. The German *Bundesrat* is very powerful, having its hand not only *de jure*, but also *de facto* in most important areas of federal legislation.

A third indicator relates to the possibility of joint decision making. The high degree of interdependence between both governmental tiers in Germany is also

reflected in the system of intergovernmental relations. Joint decision making is the dominant interaction mode, pervading all important areas, while real cooperation is rare and unilateralism virtually existent (Kropp 2010; Scharpf 2009). In Canada, a system of joint decision making only exists in the area of the Canada Pension Plan as well as in the area of constitutional politics. Besides that, the federal government and the provinces have either established a system of cooperation (bi- or multi-lateral) or act unilaterally. Moreover, if compared to Germany, intergovernmental relations in Canada have always been rather weakly institutionalized and formalized (Bolleyer 2006).

Both federal systems, therefore, correspond to different institutional logics. If we want to understand why the two federal designs display substantial variation today, we need to, in the words of Paul Pierson (2004, 47), “go back and look.” Not only was the adoption of a federal system itself a contingent outcome of the critical junctures in Canada (1864–1867) and Germany (1866–1871) as heightened historical openness made available more than just one solution. Moreover, after a federal solution had been adopted, for a relatively brief period the direction of each federal pathway remained an open question. The two diverging paths of federal development have been significantly shaped by institutional alignments that happened early in the formative stages. Whereas intrainstitutional features have evolved as defining features in Germany, they experienced a loss of significance in Canada. There interinstitutional elements turned out to be more conducive to the interests of territorial actors from both governmental tiers.

### Germany

In Germany, pre-existing confederal arrangements like the Holy Roman Empire and the German Confederation (1815–1866) have always been designated to balance two different goals of territorial governance: the preservation of constituent units’ autonomy and intrainstitutional power-sharing through confederal institutions (Green 2003). The option to create a federal order more interinstitutional in nature by preserving a significant degree of autonomy on the level of constituent units was, therefore, not entirely beyond the bounds of possibility. Indeed, traces of dualistic authority distribution were carried over from those earlier arrangements and found their way into the constitution of the German Empire. On the one hand, Article 4 of the constitution gave legislative powers over a wide range of subjects and matters to the federal *Reichstag*, whereas the constitution did not specify competences of the states. In addition, Article 2 established the superiority of federal over state law. Both provisions can be seen as a necessary concession Bismarck had to make to the strong unitarian ambitions of the liberal national movement. On the other hand, the states were left with considerable autonomy in areas such as social welfare, education and cultural policies.



Bavaria and Württemberg were even able to wrest asymmetrical provisions from the constitutional compromise (*Reservatrechte*), granting them more autonomy than other states in areas such as taxing, postal services and railway policy (Nipperdey 1992; Winkler 2002).

Interinstitutional elements also remained important in the area of fiscal federalism. Unlike in Canada, the constitution provided for a highly decentralized allocation of taxing powers. While the federal level had only access to tariffs and certain indirect taxes, the states had exclusive jurisdiction over direct taxes. The result was a growing vertical fiscal imbalance in favor of constituent units. This growing gap between revenue-raising capacity and spending responsibilities made the Reich increasingly dependent on the so called *Matrikularbeiträge*, which was a system of fiscal transfers “bottom-up” from the states to the federal level (Nipperdey 1986; Ullmann 2005).<sup>5</sup>

Like all constitutional compromises, the constitution of the German Empire remained to some extent unfinished, open and potentially subject to change (Nipperdey 1992). Yet, during the formative period between 1866 and the 1870s the functional allocation of competences in combination with state executives’ participation in federal legislation via the *Bundesrat* surfaced as defining features of Germany’s federal system. As summarized in table 1, the critical junctures and path dependence framework can help illuminate this trajectory.

First, the outcome of the Prussia-Austrian War of 1866 was an important contingent event during the critical juncture which pushed the federal trajectory into the direction of unitarianism<sup>6</sup> and intrainstitutional power-sharing. Prussia’s victory over Austria implied the ultimate loss of the so called *großdeutsch* model of German unification. This *großdeutsch* model had long been the medium-sized states’ preferred route to the formation of a federal state (Green 2001). They considered a larger multi-national federation including Austria better suited to protect their autonomy. The emerging *kleindeutsch* model, which excluded Austria, however, rendered unnecessary any provision to accommodate ethno-cultural diversity within the framework of an interinstitutional arrangement. Furthermore, it paved the way for Prussian paramountcy within the federation and leveraged unitary at the expense of federalist orientations.

Second, pre-existing bureaucratic capacities on the level of the states represent a critical antecedent that significantly contributed to the evolution of an integrated rather than a dualistic allocation of competences. While the newly established federal level had no sufficient bureaucratic infrastructures, the states did. State building on the level of constituent units had already begun to take shape after 1648 when they increasingly became involved in the international system as self-determining actors. When the German Confederation was created in 1815, the medium-sized states were at the peak of their power, most of them maintaining

**Table 1** Sources of path dependence in the federal systems of Germany and Canada

|  | Germany   | Canada   |
|--|---|--|
| Contingency                            | Loss of <i>großdeutsch</i> pathway to German unification due to Prussia's victory over Austria in 1860  | Pressure towards federal solution in the wake of American Civil War and Trent Crisis   |
| Critical antecedents                   | Lack of modern bureaucratic capacities on the federal level/ temporal advantage of pre-existing bureaucracies on the level of constituent units | Experience with stalemate and deadlock in the United Province of Canada  |
| Power-based mechanisms of reproduction | Filling up of political space through the <i>Reichstag</i><br>Consolidation of reactionary forces through the <i>Bundesrat</i>                  | Filling up of political space through provinces/first wave of province-building<br>Filling up of political space through federal governments/FNP |
| Outcome                                | Intrainstitutional federal trajectory   | Interinstitutional federal trajectory  |

control through an extensive bureaucracy and a standing army (Green 2001; Winkler 2002). Such highly developed infrastructural capacities of constituent units can explain why a federal state was more likely to occur than a unitary one during the critical juncture (see Ziblatt 2006). Moreover, they also shaped the direction of the emerging federal pathway itself. The lack of modern bureaucratic capacities on the federal level provided that it could not adequately implement legislation without the support of the states.

Third, power-based mechanisms of reproduction further strengthened the intrainstitutional path of federalism in Germany. The *Reichstag* soon began to exploit the full potential of Article 4 of the constitution. Even though Article 4 lists competences of the *Reich*, jurisprudence considered this provision, in fact, as an area of quasi-concurrent legislation (Triepel 1907; Lehmbuch 2002). Since the federal level had not preempted all legislative areas immediately after 1871, there was still some scope for the states to maintain an active role in various policy areas. Yet contrary to what Bismarck had expected, with the notable exception of fiscal federalism,<sup>7</sup> the states did not jealously defend their remaining competences. The *Reichstag* thus got deliberately engaged into what Paul Pierson (2004, 71) has called the “filling up of political space.”

The early competitive advantage became self-reinforcing as the *Reichstag* successfully consolidated its role within the authoritarian framework of the German

Empire through increasingly expanding the scope of federal legislative activities. As a consequence, the unitarian features that had already been prevailing in the federal constitutional scheme became even further amplified in the late nineteenth century.<sup>8</sup> At the same time, power-based mechanisms contributed to more firmly entrench the *Bundesrat* as a countervailing force to the *Reichstag*. The *Bundesrat*, composed of representatives from the constituent units, had a two-fold function. It was destined to mitigate both democratic ambitions of the liberal national movement in the *Reichstag* and domination of federal arrangements by the regional hegemon Prussia. Even though the *Bundesrat* was not able to establish itself as the ultimate center of power, it clearly represented the federal element within the constitutional scheme. The *Bundesrat* ensured that state executives and their bureaucracies were able to sustain an important role for federal legislation (Nipperdey 1992). The power distributional consequences of this intrainstitutional setting proved to be well suited for the consolidation of executive and bureaucratic actors' interests from the states within the newly established federation. Hence, federalism in Germany evolved primarily through the states' active participation in federal legislation rather than through autonomous policy-making.

## Canada

Canadian federalism took a different pathway (table 1). As in the case of Germany, the reasons for this can be found in developments that happened early in the historical sequence. When the critical juncture opened up in the early 1860s, successful state formation was all but inescapable. In 1858, a first serious effort to found a new state in British North America failed due to resistance from Great Britain and the Atlantic colonies (Morton 1964). An external, contingent event, however, substantially changed contextual conditions and, thus, the prospects for state formation: the American Civil War.

The American Civil War in itself is certainly insufficient to explain the causes of Canadian confederation. The event, however, brought about a situation of heightened historical openness that weakened the position of those forces that had been traditionally opposed to the idea of confederation. The Trent Crisis of 1861 brought the United States and Great Britain on the verge of war. Even though it was finally possible to avert an open war, latent tensions continued to exist. In the wake of the Union's victory over the Southern Confederacy, media commentators and several politicians called for further expansion into the British North American Colonies (Waite 1962). Pressure increased on the colonial elites and the British motherland to make another serious attempt to create a union among the British North American colonies. In particular, the perceived threat of annexation removed Britain's reservations about the confederation project and contributed to foster

consensus among the colonial elite (Stevenson 2009). Yet, the adoption of a federal state was still by no means inevitable (Martin 1990).

The so-called Great Coalition, consisting of representatives of the United Province of Canada who initiated confederation, was divided on the question whether the new state should be unitary or federal. While the first preference among representatives from Canada West like John A. Macdonald or George Brown was a unitary state, it was clear from the outset that their counterparts from Canada East and the Atlantic colonies would never approve of such a solution. There still existed widespread reluctance or even outright opposition against the idea of confederation, especially in the Atlantic colonies where a significant part of the elite preferred a union among them. Hence, the Charlottetown Conference of 1864 was, at the outset, initiated by lieutenant governors from the maritime colonies who made yet another try to establish a Maritime Union. The Atlantic colonies' lack of enthusiasm for Confederation thus seriously jeopardized the project of state formation in Canada. While sketching out possible scenarios necessarily remains highly speculative, it is nevertheless certain that the political landscape north of the 49th parallel would look very different today had Nova Scotia, Prince Edward Island and New Brunswick ultimately refused to join the Confederation project. It seems reasonable though that some colonies would have become absorbed by the United States, while others would have emerged as unitary or federalized states.<sup>9</sup>

While contingency can thus make plausible why a federal solution eventually surfaced as a likely (but yet not a necessary) outcome during the critical juncture between 1864 and 1867, arguments involving critical antecedents and power-based reinforcement can illuminate why interinstitutional mechanisms evolved as defining features of federalism in Canada.

A critical antecedent leaving its imprint on the federal scheme of the British North America Act was the experience of deadlock and stalemate in the United Province of Canada (Stevenson 1993). Even though formally unitary in nature, the United Province of Canada operated in fact as a highly entangled, intrainstitutional federal system. The two sections of the colony, Canada East and Canada West, were equally represented in the legislature. Furthermore, with the arrival of responsible government in 1848 and the political realignment of 1854, in each section a two-party system emerged. These developments made it increasingly difficult to form a stable governing coalition for the whole colony. Due to the requirement of the double majority, the inability to act ratcheted up in the early 1860s. Between 1862 and 1864 four coalition governments broke up (Cornell 1962). In other words, the political system of the United Province in Canada was caught in what Fritz W. Scharpf (1988) has called the "joint-decision trap."

From the viewpoint of delegates from the United Province of Canada, confederation thus constituted a deliberate effort of disentanglement (Smiley 1987; Smith 1984, 1988). It was therefore rather uncontentious among most delegates that a dualistic allocation of authority should represent the heart of the federal constitution. For their part, advocates of a unitary state like John A. Macdonald or Alexander Galt considered this a second best solution since it allowed for setting up a strong federal government. As long as the federal government would obtain important jurisdictions alongside a broad range of intrusive powers such as the powers of disallowance and reservation, federalism appeared to be “relegated [...] to the parts” (Smith 1984, 272). From the viewpoint of those delegates who were more inclined to the federal principle *per se*, most notably Bleus from Canada East and Reformers from Canada West, the Quebec scheme did not constitute a serious problem as long as jurisdictions assigned to the provinces would remain exclusive in order to effectively protect constituent units from federal encroachment.

Separating rather than distributing authority between the two levels of government thus represented an important leitmotif for the federal constitutional design in Canada. At the same time, delegates were sharply divided over the roles and responsibilities of each governmental tier within this dualistic scheme. Accordingly, much of the Confederation debate was concerned with the meaning of sovereignty, the locus of residual power(s) and the scope of federal reserve powers (for a detailed discussion see LaSelva 1996; Romney 1992; Smith 1988; Vipond 1985). In order to reach agreement on these highly controversial issues, the delegates were either reluctant to ultimately clarify the exact meaning of these concepts or avoided to settle them at all. As a consequence, and despite the fact that the delegates were eager to clearly demarcate exclusive jurisdictions for each governmental tier in section 31 and 32 of the BNA Act, the federal constitutional scheme was fraught with severe ambiguities from the beginning.

Even though it remained highly ambiguous in relation to the concrete meaning of its underlying principles, the dualistic allocation of competences became subject to power-based reinforcement soon after Confederation was accomplished. Actors from both governmental tiers began to fill up the political space the BNA Act had provided to them. The federal government took advantage from the interinstitutional scheme to advance its strategy of economic development, the First National Policy (FNP).<sup>10</sup> Given the uneven regional impact of this developmental strategy, the FNP was a highly controversial program encountering resistance from various provinces, including Ontario. In this respect, it was not only crucial to dispose of exclusive constitutional jurisdictions in areas like commercial and railway policy. Moreover, the federal government also capitalized on the relative weakness of intrainstitutional checks. The FNP and, in particular, the protective tariff would not have been conducted so effectively if provincial governments have had their hands in federal legislation.

On the other hand, the provinces with support from the Judicial Committee of the Privy Council (JCPC), were able to constrain the federal government in using its reservatory powers and, simultaneously, to develop state capacities on the provincial level. In particular, landmark decisions such as *Citizens' Insurance Company versus Parsons* (1881), *Russell versus the Queen* (1882) and *Hodge versus the Queen* (1883) contributed to expand the scope of the property and civil rights clause by giving it a wide interpretation (Simeon and Robinson 1990; Stevenson 2009). Furthermore, the government of Ontario rejected any proposals aiming at joint action between the federal government and the provinces in certain matters such as liquor regulation.

Protagonists of the provincial rights movement upheld to the principle of strictly separating both intergovernmental tiers in order to act independently of any intrusion on behalf of the federal government (Vipond 1991). Oliver Mowat and the provincial rights movement never relied on weakly developed intrainstitutional mechanisms. Instead, right from the beginning they took advantage of the dualistic allocation of authority and got engaged in early forms of province building (Armstrong 1981; Vipond 1991). As liberal MP from Ontario David Mills has put it, federalism was meant to “[...] enable the different Governments to carry on their functions independently (sic) and without interference” (cited in Vipond 1991, 40f.). Similarly, any proposals aiming at joint action between the federal government and the provinces were rejected. Provincial efforts to carve out political space and to foster provincial autonomy early in the historical sequence can thus be considered as an important institutional prerequisite for several waves of province building at later points in time.

Overall, these institutional alignments that took place during the formative years contributed to consolidate this historical pathway. While interinstitutional mechanisms became subject to self-reinforcement, remnants of intrainstitutional power-sharing were poised to experience further decline (Stevenson 1993). Despite the predominance of interinstitutional mechanisms from the very beginning, intrainstitutional mechanisms have not been entirely insignificant in the early days of Canadian federalism. They surfaced most visibly in the Senate and the federal cabinet. The Senate occasionally exercised its veto power to block federal legislation until the 1930s, but this was due to partisan politics rather than an expression of federal-provincial conflict. The ratio of defeated bills was comparatively high between 1867 and 1873 (98 percent); 1874 and 1878 (5 percent); 1911 and 1916 (7 percent) and 1922 and 1930 (7 percent) (Mackay 1963, 199).

As for the federal cabinet, the delegates from Canada East and Nova Scotia in particular placed their hopes in the ability of their ministers to have their hands in federal legislation so as to defend their regional interests. Yet they soon found the cabinet a rather ineffective device, especially when it came to the protection of French Canadians outside Quebec as it was the case with the New Brunswick

School Act or the execution of Louis Riel. It is a reoccurring pattern in the history of Canadian federalism that provincial efforts to launch intrainstitutional “voice” strategies in order to make the federal government more responsive to their needs fail. In turn, this has reinforced the interinstitutional logic because provincial governments can always seize the opportunity to “exit” and, therefore, develop their political aims within their respective sphere of exclusive authority. A lack of responsiveness from federal institutions generated negative feedback and explains, for example, why political actors from Quebec recognized during the 1880s that it would be more promising to exit federal politics and instead focus on dormant institutional power resources on the provincial level. W. L. Morton has also pointed out to this critical period which finally gave way to Quebec’s reorientation from “voice” to “exit”:

Most of all it forced on Quebec the choice between reliance on the national government for defence of minority rights in education [...], or a reliance on the self-government of Quebec to preserve the French language and Roman Catholic schools in that province, if need be alone. In short, the trend towards provincial rights and the return to the institutionalised duality of the period of the *Act of Union* had begun (Morton’s emphasis 1980, 217f.).<sup>11</sup>

## Diverging Trajectories: Path Dependence and Patterns of Adjustment in Germany and Canada

### Germany

Path dependence provided that the institutional foundations of Germany’s federal system basically reappeared even after new critical junctures in 1919, 1949, and 1990 had opened up alternative developmental pathways (Lehmbruch 2002). Self-reinforcing dynamics are particularly obvious in light of developments that followed the critical juncture of 1949. Despite the fact that the Parliamentary Council, whose members drafted the Basic Law, had to make several concessions regarding the design of federal institutions to the Allies, actors from both governmental tiers re-established the federal system in a way that reflected the deeper institutional path which had its roots in the federation of the German Empire.

Even though the critical juncture of 1949 thus made available an alternative route for the reconfiguration of the federal system, it was the intrainstitutional pathway that again surfaced within the framework of a stable parliamentary democracy. The federal government reoccupied a large part of jurisdictions formally falling under concurrent legislation. Predominance of the federal level over concurrent legislation was first achieved through the back door of Article 125 Basic

Law. This article provided that pre-existing federal law, which had already been pre-empted in the area of concurrent legislation during the German Empire and the *Weimar* Republic, would simply be carried over into the Basic Law (Scharpf 2009). In addition, the federal government was eager to take over further jurisdictions which it had either not already preempted or were still *Länder* responsibilities. *Länder* governments often voluntarily agreed to transfer jurisdictions to the federal level in exchange for a more extensive role in federal legislation through the *Bundesrat*.

Two constitutional reforms in 1955 and 1969 further amplified this process. The dual structure of taxation powers was eventually replaced with a system of joint taxation and the horizontal equalization scheme significantly expanded (Renzsch 1991). In addition, the constitutional reform of 1969 established the so called joint tasks in Article 91, which became another central element of Germany's system of joint-decision making. The joint tasks made previously exclusive jurisdictions of the *Länder* subject to joint planning and cost-sharing. While *Länder* governments denied the adoption of a comprehensive catalogue comprising nine areas of joint-decision making, the constitutional package eventually included three joint tasks (Scharpf 2009).

These developments further accentuated the intrainstitutional character of Germany's federal system and contributed to further increase institutionalized interdependence between the federal government and the *Länder*. The postwar federal reforms established an institutional framework that was more rigid than ever before. In many areas, remaining institutions of cooperative federalism were gradually transformed into arrangements of joint decision making, leaving no room for unilateral exit-options (Kropp 2010; Scharpf 2009). As a consequence, dynamical adjustments in and of the federal system were considerably complicated.

This has particularly been felt since the 1990s, when Reunification and Europeanization lead to an increasing demand for change in major policy areas such as health, pension, and tax policy. However, neither the conservative-liberal Kohl government nor the red-green coalition under chancellor Schröder were able to carry out consistent reform initiatives due to opposing majorities in the *Bundestag* and *Bundesrat*. As a consequence, federalism was blamed for causing permanent stalemate. In addition, fiscally strong *Länder* such as Bavaria, Baden-Württemberg, or Hesse urged for a major overhaul of the federal system. One reason for this was the massive fiscal transfer to the structural majority of economically weak *Länder*, which increasingly strained their own revenues. A second reason was their desire to expand their capacities for autonomous policy-making in jurisdictions such as regional economic, labour market, and social policy (Scharpf 2008; Ziblatt 2002).

Starting with the constitutional reform of 1992–1994, a sequence of reforms that finally culminated in the *Föderalismusreform I* between 2004 and 2006 has largely



been concerned with reversing the system of joint decision making.<sup>12</sup> “Trapped” in the historically evolved system of joint-decision making and lacking any exit-option, neither the federal nor *Länder* governments had effective opportunities to act unilaterally but were instead forced to find unanimous agreements. The highly rigid institutional arrangement provided the status quo defending coalition with an important power resource for channeling the agenda by determining what was negotiable, and what was not. Not surprisingly, fiscally weak *Länder* had discarded most controversial issues such as equalization and taxation from the agenda before negotiations even started.

Overall, the *Föderalismusreform I* might have succeeded in quantitatively reducing the matters subject to an absolute veto by the *Bundesrat*. Neither does it give *Länder* more autonomy in important jurisdictions, nor was the intrainstitutional pathway reversed. Potentially controversial matters which had been subject to stalemate in the past still need the approval of the *Bundesrat*. Fritz W. Scharpf aptly summarizes this main outcome of the reform:

In purely quantitative terms, this was the most extensive constitutional revision in the history of the Federal Republic. In terms of the original goals, however, the achievements are limited. [...] In the end, therefore, the reform did introduce a large number of generally desirable or at least innocuous constitutional amendments, but it did not make much progress towards its primary goal – to increase the policy-making autonomy of both levels of government (Scharpf 2008, 514f.).

## Canada

The persistence of interinstitutional mechanisms is a striking feature of Canadian federalism. Unlike in Germany, however, within these boundaries there exists a comparatively broad range of options to alter the historically established status quo. Canadian federalism clearly highlights that path dependence does not necessarily mean stickiness and stasis. On the contrary, since 1867 the federation has evolved in a highly dynamic fashion. Somewhat simplifying, this pattern has been described as cyclical (Black and Cairns 1966). Over the course of time, the ongoing push and pull between centrifugal and centripetal forces has led to a sequence of decentralizing and recentralizing trends. Beginning in the decades following Confederation, a first wave of decentralization substantially transformed the highly centralized scheme that had come into existence with the BNA Act. While the interinstitutional foundations became amplified over time, the provinces successfully challenged the dominant position of the federal government within this constitutional scheme.

In the wake of the Great Depression and World War II, however, the direction of change was temporarily reversed, and Ottawa was able to regain a predominant

role within the federation. This centripetal era was gradually superseded again with a second wave of decentralization driven by new province-building efforts, most notably those launched under Peter Lougheed in Alberta and Jean Lesage in Quebec. While this second wave of decentralization has been more durable than the first, the historical trajectory of Canadian federalism has not been evolving unidirectionally. Ottawa has tried to cope with the newly arising centrifugal dynamic with varying success. For example, while Trudeau's attempt to re-establish a strong federal government under the umbrella of the so called Third National Policy ultimately failed in the early 1980s, the Chrétien government's reform agenda of the mid 1990s appears to have been more successful. During Chrétien's tenure, the federal government was able to restore a comparatively strong position within the intergovernmental arena. This shift in power is most obviously reflected in the area of fiscal federalism and the debate on the vertical fiscal imbalance to the disadvantage of the provinces. Even though it is certainly indisputable that Canada still is a highly decentralized federation, Ottawa was able to regain strength through implementing a tough deficit elimination plan and off-loading health, education and welfare costs onto the provinces (Bakvis et al. 2009; Stevenson 2009).

These cursory sketched dynamics indicate that the scope for creative recombination is considerably larger in Canada than in Germany's intrainstitutional federation. While interinstitutional mechanisms are certainly not entirely without rigidities, they establish an institutional environment more conducive to entrepreneurial politics.

First, if compared with the functional allocation of powers, the dualistic division of competences provides more scope for the strategic redeployment of a given set of rules due to the ambiguity it entails. The dualistic allocation of competences is therefore particularly prone to entrepreneurial redefinition whenever jurisdictions are not clearly specified. This allows entrepreneurial agents to employ a strategy of conversion. Conversion describes a pattern of gradual change where established institutions are redirected to new goals, functions or purposes without formal change (Mahoney and Thelen 2010). The federal spending power, which was a crucial prerequisite for Ottawa's ascendancy in the mid-twentieth century, is a case in point. Constitutional ambiguity makes it extremely difficult to exactly determine where the scope of the spending power begins and where it ends. Faced with increasing opposition from the provinces in the way it made use of the spending power, the federal government actively cultivated the federal spending power doctrine. According to this wide interpretation, the federal spending power enables Ottawa to make payments even in areas of exclusive provincial jurisdiction. As this view has never been substantially challenged by the Supreme Court, it can be considered as a typical pattern of conversion: drawing on a number of articles in the BNA Act, most notably sections 91 (1A), 91 (3), 102, and 106, the federal government successfully reactivated latent institutional resources so as to

incrementally shift established authority relationships within the federation (Telford 2003).

In case of province building, conversion has often been involved as well. Unlike in Germany, where *Länder* governments usually pursue their goals by influencing federal legislation via the *Bundesrat*, provincial governments in Canada tap into the institutional power resources of their province itself rather than raising their voices in Ottawa. While province-building efforts of individual provincial governments like, for example, the Douglas and Blakeney governments in Saskatchewan, Lesage in Quebec or Lougheed in Alberta, have always displayed significant variation, they have in common that provincial governments were able to effectively transform their provincial state by enacting existing provisions in new ways and without formally changing the institutional framework.

The CCF-government under Tommy Douglas provides a good example. When it came to power in 1944, the Douglas government inherited a province with extraordinary social and economic problems, alongside a weak, patronage-driven civil service. The CCF-government initiated comprehensive reforms which comprised sweeping change on the level of public policy, most notably in the areas of industrial, resource, education, and social policy. Political change was also determined to build up provincial state capacities through improving efficiency of the civil service and the machinery of government. During the first eighteen months of its first tenure, the Douglas government carried out far reaching structural reforms at a remarkable pace: it enacted 196 new bills and established four new ministries as well as eleven Crown Corporations. Within their first term of office, total government expenditures rose by over 20 percent (Johnson 2004, 65).

Second, in addition to conversion, the interinstitutional nature of federalism in Canada enables entrepreneurial agents to unilaterally employ displacement. Displacement involves the removal of old rules and the introduction of new ones (Mahoney and Thelen 2010). This pattern of change occasionally occurred when the federal government introduced substantial changes to the structure of existing programs and transfers to the effect that the postwar model of “shared-cost federalism” (Banting 2005) was gradually reconfigured. The erosion of the postwar model began with the introduction of the Established Programs Financing (EPF) in 1977, which decoupled federal spending from provincial expenditures by amalgamating existing cost-sharing transfers for health and education into one block grant consisting of a cash and a tax component. This initial step was further reinforced when the EPF and the Canada Assistance Plan (CAP) were unilaterally replaced with the Canada Health and Social Transfer (CHST) in 1995. With cumulative savings of CAD 29 billion over three years, the 1995 federal budget contributed substantially to eliminate the federal deficit within only three years. The CHST significantly reduced the amount of payments to the provinces and

highlights the federal government's declining role for welfare related programs jointly provided with the provinces (Banting 2005; Bakvis et al. 2009).

## Conclusion

The analysis presented here underscores that federal systems respond differently to pressures for change (see for example, Braun 2011). A historical institutionalist framework directs our attention on the historical dimension of such internal differences among federal systems. From this point of view, it is necessary to reconstruct how federal systems are constructed historically if we want to understand how and why divergent dynamics evolve over time.

The varieties of federalism occur on both levels of federal dynamics: the rather stable institutional configurations and the patterns of gradual adjustment that take place beneath the path-dependent institutional core. As for the former, the sources for variation in federal institutional designs can often be found in the formative years. Early alignments explain how varieties of federalism become "locked-in" and congeal to form the power-based, path-dependent institutional foundations of federal systems. This, in turn, has important consequences for the question of how federal systems allow for flexible adjustments in and over time. Depending on how constituent units and the federal government are institutionally linked through interinstitutional or intrainstitutional mechanisms, the scope for entrepreneurial politics differs considerably. As for the former, the dualistic allocation of competences and exit options create an institutional environment that enables entrepreneurial agents to effectively employ displacement and conversion. Both patterns of gradual change can significantly alter the direction of federal development over time, even if status quo defending actors actively resist any such attempts. As for the latter, the functional division of competences, a strong second chamber and joint-decision making tend to advantage status quo defending actors. This tends to constrain substantial adjustment in the federal system, especially when there exists disagreement on the direction of change.

The purpose of gaining deeper insights into the origins of federalism is, therefore, not simply an exercise in history, aiming for a better understanding of what and why something happened in the nineteenth century. Since a critical juncture is responsible for setting in motion different trajectories, a profound understanding of this formative period can help make sense of many problems federal systems are coping with in the present. Early institutional alignments broadly demarcate the boundaries within which federal systems are constructed historically, and are thus crucial for the identification of typical patterns of change that federal systems are likely to exhibit. Both countries examined here have witnessed major reform attempts which largely failed. In Germany, ongoing efforts to redirect the federal system on an interinstitutional track have remained without

success since the early 1990s. By and large, the historically established institutional framework is still largely on path, generating a high degree of entanglement and joint-decision making. Likewise, recurrent calls for Senate reform in Canada did not yield any significant redirection of the federal institutional framework through a strengthening of intrainstitutional mechanisms. If compared with the German case, however, the interinstitutional path in Canada has nevertheless maintained a federal system highly conducive to innovation and flexible adjustment.

## Notes

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1. For a similar argument see Behnke and Benz (2009); Benz and Colino (2011); Johnson (2007).
2. A good example is a recently published study by Alison LaCroix (2010). LaCroix uncovers how the ideological roots of American federalism emerged from four different intellectual sources that shaped the drafting of the constitution: seventeenth century Anglo-American constitutional debates, continental European political philosophy as well as practical political experience in the North American colonial union and in the UK with Scotland and Ireland.
3. Similarly, Donald Smiley took up Karl Loewenstein's (1957) distinction between inter- and intraorgan controls in order to establish a typology of federalism contrasting inter- and intrastate federalism (Smiley 1971; Smiley and Watts 1985). As Jennifer Wallner (2008, 167) rightly points out, this distinction has a (largely untapped) potential for constructing a theory of change in federal systems. See also Broschek (2010, 2011).
4. The federal bureaucracy comprises only approximately 10 percent of the total number of all civil servants (Katzenstein 1987, 20). *Länder* implementation covers almost all policy areas except for the few jurisdictions enumerated in Article 87 Basic Law.
5. As Manow (2005, 227–228) has shown, an important consequence of the *Reich's* weak revenue raising capacity was that Bismarck was compelled to introduce social insurance-based welfare state legislation instead of a tax-based system, as he had actually preferred.
6. Unitarianism must not be confused with centralization. Having its roots in the second half of the nineteenth century, unitarianism has evolved as a paradigm in the federal arena because the path of centralization was impeded (Lehmbruch 2002, 72). As a surrogate for centralization, under the unitarian paradigm governments of both tiers committed themselves to coordinate their activities in order to achieve uniform solutions applying in the whole country (Triepel 1907, 53ff.; see also, Hesse 1962, 21).
7. For a detailed overview, see Ullmann (2005, 73–8).
8. Moreover, as Gerhard Lehmbruch (2002, 81) has emphasized, Prussian hegemony too had an important unitarian effect. The mere fact that Prussia comprised about two thirds of both the territory and the population within the federation fostered “unitarianism through diffusion.”

9. And indeed, Newfoundland, which refused to join Canadian federation until 1949, was able to achieve formal independence from Great Britain in 1907 until the arrival of Commission Government in 1934.
10. The FNP was a deliberate effort to establish a transcontinental nation state based on economic development. It was initiated under the conservative Macdonald government and contained a protective tariff, active immigration policy and railway construction. Despite their initial opposition against the central pillars of this policy paradigm, the Liberal Party carried on that program after it had assumed office. On the FNP in detail see Eden and Molot (1993); Fowke (1957).
11. Likewise, and even though provinces have no jurisdiction over monetary or banking policy, the Social Credit government under Aberhart attempted to “[...] attain the objectives of the movement by exploiting the power and position of the provincial legislature rather than by modifying national policy through securing legislative change in Ottawa” (Mallory 1956, 57).
12. For a detailed discussion of these events, see Burkhart (2009); Scharpf (2008, 2009).

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