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A More Efficient and Accountable Federalism?  
An Analysis of the Consequences of Germany’s  
2006 Constitutional Reform

SIMONE BURKHART, PHILIP MANOW and DANIEL ZIBLATT

The German federal reform adopted in 2006 aims to enhance efficiency and accountability of governance by disentangling the intertwined levels of government and by reducing the veto rights of the Bundesrat, Germany’s strong second chamber. In this article, we assess the degree to which reform in these areas has been fulfilled. In particular we ask if the reform will i) accelerate the legislative decision-making process, ii) expand the freedom of political action of the federal government and iii) disentangle the competencies between the intertwined levels of German government. Our analysis shows a remarkable gap between the ambitious goals of reformers and the reality of the actual reform outcome.

INTRODUCTION

Throughout the 1990s, Germany’s complex federal system was frequently identified as one of the main obstacles to dealing effectively with the social and economic challenges of German unification, globalisation and Europeanisation. After years of academic and political discussion, a major first step towards reforming Germany’s federal system was achieved in the summer of 2006. Aiming above all to streamline Germany’s well-entrenched system of federalism, the reform was the most far-reaching change to the German constitution since its adoption in 1949.

Two broad themes animated reformers’ efforts. First, in the words of Brandenburg SPD Premier Matthias Platzeck, the reform sought to ensure that governance in Germany would operate ‘faster, better and more efficiently’.

For many years one of the main barriers to efficient governance at the federal level in Germany has been the threat of an oppositional veto in Germany’s strong second chamber, the Bundesrat. If the opposition party dominated the Bundesrat – which has been the rule rather than the exception in the last 30 years – party political conflicts between the government and the opposition were carried over into the second chamber, diminishing the government’s ability to implement its political agenda. The consequence was that policy was often hammered out behind the closed doors of the Bundestag and the Bundesrat conference committee, a process that generated opaque compromises between the federal government, the opposition, and the Länder, and was also criticised as time-consuming, inefficient and incoherent. Thus, the first objective of the reform was to reduce the veto rights of the Bundesrat in order to make legislative process more efficient and more accountable.
A second goal was to ‘disentangle’ the system of ‘joint decision-making’ (Politikverflechtung). Originally ‘joint decision-making’ referred to an elaborate system of jointly planned and financed programmes (Gemeinschaftsaufgaben and Finanzhilfen) in politically salient policy areas, such as regional economic policy, higher education, basic and applied research, social housing and urban renewal. Federal grants to states or provinces are of course quite common in federal systems. What is unusual in the German context is that, by the 1970s, the Länder obtained constitutional guarantees ensuring that such grants could no longer rest simply on bilateral agreements between the federal government and individual Länder, but had to be based on general legislation requiring agreement of the Bundesrat or various contractual arrangements with the consent of all Land governments. These weighty requirements have been increasingly criticised as cumbersome barriers to effective policy-making. They have, according to critics, generated a tendency towards political stalemate despite a great deal of consensus on policy problems facing Germany. Indeed, in the wake of German unification, as policy debates have often taken on a zero-sum redistributive character, policy-making appears to have become heavily biased toward the status quo, leading, in some diagnoses, to a stalled political system without the ability to confront serious challenges.

This paper evaluates the adopted federal reform in order to assess the degree to which reform in these two areas has been fulfilled. Our main purpose is to identify the scale of the gap between the ambitious goals of reformers and the reality of actual reform outcomes. We do so in two steps. First, we utilise a counterfactual analysis of past legislation to simulate the legislative process and outcomes before 1998 had the new constitutional provisions already been in place. In particular, we ask in which precise policy areas the reduction of oppositional veto rights would actually have occurred. And to what degree would the institutional changes have ‘sped up’ Germany’s legislative process? In the second step of our analysis, we explore the dynamics of ‘disentangling’ politics in a case study of university reform in Germany in 2006–7. Here, we look at the trends entailed in the politics of the high-profile Exzellenzinitiative that was intended to bolster the international status of German universities, but that ironically has been carried out in a context in which the higher education reform has ultimately run at cross-purposes with the reform of Germany’s federalism.

Both the evidence in the counterfactual analysis and the case study suggest the need to qualify any claims that Germany’s federal system will be fundamentally altered in the ways intended by reformers. First, our analysis of how the legislative process would have looked in the past had the current constitutional provisions been in place, casts doubts on the sweeping claims about far-reaching legislative change, as forecast, for example, in the Bundestag’s own research unit. While our findings suggest that the proportion of the all-important ‘consent laws’ (which require a majority in the Bundesrat) will likely drop under the reform, the reduction will be less than has been expected. Moreover, the reduction in the incidence of the ‘consent requirement’ in controversial policy areas such as labour, social affairs and health (where policy stalemate has been so prevalent), will be less substantial than has been expected. Finally, according to our findings it is unlikely that the reform will increase the speed with which the legislative process operates in Germany. Thus, overall, our findings suggest that the effects of the reform will fall far short of the aims of the reformers.
Similarly, the case study of the *Exzellenzinitiative* suggests that even in the area of university education – in principle, an area that falls entirely under the jurisdiction of states – there is a persistent tendency in the German political system for an interlocking of federal and state politics. For a variety of reasons that we explore, it is unlikely that the reform will disentangle federal and state politics even in what counts as a ‘most likely’ case of university education. Moreover, the dynamic of persistent interlocking is also observable in other policy areas, including recent changes to the federal funding of day care, an area ostensibly not under the direct purview of the federal government. But the excellence initiative is particularly revealing because the simultaneity of federal reform and the *Exzellenzinitiative* exposes an irony at the heart of German federalism: in the precise moments that major projects of ‘disentangling’ Germany’s federalism take place, joint undertakings of federal and state authorities continue to occur, reinforcing pre-existing patterns of politics.

The following analysis proceeds in three steps. First, we provide a partial summary of the content of the recent federal reform, laying out the crucial features of the reform. Second, we present the findings of our counterfactual analysis. Third, we discuss the case of the high-profile *Exzellenzinitiative* that altered the governance and financing of German universities. We conclude by asking what might help explain the gap between reformer’s goals and the likely outcome of the recent reforms.

**CONTENT OF REFORM**

A central feature of Germany’s most recent federal reform was the reduction of the proportion of laws requiring Bundesrat approval, or consent (making up what has come to be called ‘consent legislation’), which had in the past involved over 50 per cent of federal legislation, including virtually all important legislation. The reason so-called consent legislation was targeted was that it was a procedure that had increased the influence of the states on federal legislation, opening opportunities for partisanship to play itself out between the Bundestag and Bundesrat. The intended consequence of any effort to reduce the need for consent legislation was, in effect, to reduce the power of any opposition, which once in control of the Bundesrat, could influence, or even block, legislation. In exchange for the reduction of consent legislation, the states were to receive more independent legislative powers.

The principal changes which the reform has brought about in the area of Bundesrat ‘consent requirements’ for federal laws have been enacted by new formulations of Articles 84 and 104 of the Federal Constitution, officially the ‘Basic Law’ (GG). The previous Article 84, Para. 1 GG had been what its critics called a ‘blank cheque’ for the expansion of the consent requirement, accounting for approximately half of all cases in which that requirement was triggered. The expected reduction in the proportion of consent legislation due to the reform is based narrowly on the new formulation of this Article. Previously, Article 84, Para. 1 always required Bundesrat consent if a federal law included the establishment of an agency or administrative proceedings at the state level in the execution of a law. Since, in one of the distinctive features of Germany’s unusual federal system, the execution of federal laws, falls in the purview of the states, it had made sense that a law which impinges upon states’ administrative responsibility ought to require their agreement. However, Article 84, Para. 1 over time became...
increasingly controversial because early rulings of the Federal Constitutional Court had caused the consent requirement to not be confined exclusively to those features of federal laws that defined their execution, or that established agencies, but rather expanded the requirement into areas that include what German constitutional theory calls ‘substantive’ concerns, i.e., the policy content of laws. At times when the political majorities in the Bundestag and the Bundesrat differed, this far-reaching interpretation of Article 84 Para. 1 was used by the opposition to block the political agenda of the ruling parties. Partisan blockades and/or mutually unsatisfactory compromises arrived at in the Mediation Committee between the two chambers were the result, understandably attracting the attention of critics, experts, and to some degree the public. It was this condition that prompted the move to the reformulation of this constitutional article.

In contrast to the status quo, the newly reformulated Article 84 now provides three different options for drafting legislation, which determine whether it will be a ‘consent bill’ (requiring Bundesrat approval) or a ‘consent-free bill’ (not requiring Bundesrat approval). The first option for the federal government when formulating a bill is simply to abstain from specifying any details of the administrative procedure for the implementation of a law (as it was already free to do in the past), making a bill ‘consent-free’ and thereby eliminating the Bundesrat’s right of veto on that particular law. The second and new legislative option available to the federal government is one in which the federal government lays down administrative procedures guiding implementation, but couples these recommendations with the option for the states to adopt their own administrative regulations of a specific federal law; in exchange for in effect ‘loosening’ tight administrative homogeneity among the states, federal law of this type will not be susceptible to Bundesrat veto and thus will also be consent-free. Finally, the third option open to the federal government is that it can stipulate, as it has in the past, the administrative proceedings of laws without allowing states the discretion to diverge from the federally set standards (Article 84, Para. 1, Clauses 5 and 6); in this case, the bill requires consent, as has hitherto been the case. Thus, the only actually new stipulation is the second option, contained in Article 84, Para. 1 Clause 2, which provides for the option of divergent implementation of administrative provisions by the states.

Despite these new constitutional reforms, all other consent-related stipulations of the Constitution have remained in force, including the second most important trigger of the consent requirement, Article 105, Para. 3, governing taxation law. Additionally, new consent-related stipulations have in fact been created with a new amendment, Article 104a Para. 4. The new Paragraph 4 requires the states’ approval in the Bundesrat in all cases in which federal laws require that states expend revenue or render services in the implementation of a law. The text of the constitution states that consent is required whenever a law ‘establishes grounds for duties on the part of the states to provide payment benefits, benefits in kind of monetary value, or comparable services to be rendered to third parties’.

In addition to altering the requirements of consent legislation and thereby aiming to increase the efficiency of the legislative process, the second major goal of the reform was the separation of spheres of jurisdiction between levels of government. In order to rearrange the distribution of jurisdiction and legislative competencies between the
Federation and the Länder, substantial changes were made to the core legislative tools at the disposal of the federal government. In particular, two of the major types of federal legislation that the federal government had frequently deployed in Germany in the past to increase the federal government’s legislative responsibility were altered. The first, called ‘framework legislative power’ (Rahmengesetzgebung – Article 75 of the Basic Law before the reform), had previously allowed the federal government to set only key general aspects of legislation, leaving the details to be determined by the legislatures of the individual Länder, thereby easing the process of getting complex legislation through the federal legislative process. The second major type of federal legislation was what has been called ‘concurrent legislation’ (konkurrierende Gesetzgebung – Articles 72 and 74 of the Basic Law before the reform) which refers to areas that originally were meant to be governed by the Länder, though over time, the authority for legislating had often fallen to the Federation because the federal legislature had expressed a ‘need’ for a federally uniform rules.

With regards to both ‘framework’ and ‘concurrent’ legislation, some of the main legislative tools to expand the scope of the federal government, have been altered. The former had come under frequent criticism in recent years and was, unsurprisingly completely abolished by the federal reform, delegating legislative competencies either to the federal level or to the Länder. Likewise, with concurrent legislation, the reform represented a significant departure from the past since the constitutional alterations changed the catalogue of the concurrent legislative powers and legal matters are now assigned exclusively to either the Land or the Federation. In six areas of policy, such as the rules pertaining to university admissions and university degrees, the Federation is able to pass legislation in the area of concurrent legislation. However, the Länder have the possibility of enacting deviating laws. In practice, this means that the regional legislators are now also entitled to pass laws in these areas of policy.

The result of both of these reforms mean that the Länder are awarded considerably more authority: 17 areas or sub-areas of the former concurrent and framework legislation have been devolved to the Länder. This affects, for example, the management of the states’ penal systems, the laws governing shop closing hours, restaurant laws, the remuneration and appointment of Land civil servants, and large areas of university law. The Länder have also acquired the ability to pass laws that deviate from the federal level in six areas of policy. Conversely, six matters were transferred to and/or newly created as exclusive legislate powers of the Federation, including, for example, defence against dangers of international terrorism.

COUNTERFACTUAL ANALYSIS: THE EFFECTS OF FEDERAL REFORM

How have all of these changes affected the proportion of consent laws, thereby possibly reducing legislative delays or party blockades in the Bundesrat? This question has recently been assessed for the first time in a valuable study by the Research Service of the Bundestag. This study uses a counterfactual analysis of the percentage by which the proportion of consent laws would in fact have been reduced during the fourteenth and fifteenth parliamentary terms, had the new stipulations on consent implemented under the federal reform been in force since 1998. The major finding of the study was that the changed consent stipulations proposed under the reform would have approximately
halved the proportion of consent laws in the fourteenth and fifteenth parliamentary terms (from 55.2 per cent to 25.8 per cent in the fourteenth term and from 51 per cent to 24 per cent in the fifteenth term). The results of this study thus at first glance seem to confirm the views of those who expected the reform to yield a considerable disentanglement of the German federal structure.

However, the Bundestag Research Service study had a limited scope. The study asked the following relatively narrow question: what percentage of legislation would have been consent-free if the federal reform had already been in force in 1998? While a useful first step, merely counting the number of laws permits a very limited prognosis of whether the numerous expectations promised by the reform would in fact be realised. A range of questions remain unanswered. For example, to what extent would the reform actually affect highly controversial and important legislation in key policy fields? In his important contribution Zohlnhöfer addresses this question with regard to economic policy-making. We will discuss the broader effect of the reform and analyse if the expected halving of consent legislation also affects politically controversial bills and if different policy areas are affected to differing degrees. In addition, we will assess to what extent the government’s political scope of action will be increased under the new stipulations. And finally we evaluate if the reduction in the number of consent laws due to the federal reform in fact will ‘accelerate the decision-making process’?

To do so, we incorporate data on the hypothetical change in consent requirement from the Research Service’s own research into a more comprehensive data set for German legislation activity. A starting point of our analysis is to point out that a fundamental, but arguably problematic, assumption sits at the core of the Research Service’s findings. The main claim that the constitutional changes would prompt a dramatic reduction in ‘consent legislation’ is based on the assumption that the federal legislative process would in the future, as a matter of principle, grant the states the right to diverge from the stipulations of administration proceedings and to the establishment of agencies in all legislation that has hitherto required consent under Article 84 Para. 1. Moreover, unclear wording of the new version of Article 104a Para. 4 raises numerous difficulties, which the authors of the study were able to overcome only by way of interpretation of the new stipulations. While the study interprets the new Article 104, Para. 4 restrictively, it simultaneously assumes that the federal government will, with respect to Article 84 Para. 1, generously surrender its authority to the states. The results of the study of the Research Service thus risk overestimating the number of laws that will lose their consent requirements and underestimating the increase in new consent factors.

We now turn to our three core questions at the basis of the evaluation of the reform: (1) which kinds of laws will trigger the consent requirement in the new environment?; (2) will legislation move more rapidly?; and 3) is the estimation of a 50 per cent reduction of consent laws realistic?

**Issue #1: Which laws are most likely to lose their consent requirement? And, for which laws will new consent factors be created?**

The central findings of the study by the Research Service of the Bundestag state that the proportion of consent laws would have been reduced by over 50 per cent, to about 27
per cent legislation, during the last two parliamentary terms, had the reform been in force. In order to be able to assess the effect of the reform more precisely, it would be helpful to know which of the laws which have hitherto required consent would most likely be consent-free under the reform. The same applies to those laws which are newly to require consent under the new stipulations. Important issues are: which policy areas are particularly involved in these two cases; how politically controversial will the laws be that hitherto gave required consent, but are now consent-free; and how controversial are those that will now require consent, but previously did not?

To answer these questions, we can first ascertain the proportion of bills considered during the fourteenth and fifteenth parliamentary terms, the ‘controversial’ or partisan nature of which can be measured on the basis of their rejection by the opposition in the vote on the third reading in the Bundestag (i.e., directly prior to submission of a law to the Bundesrat). This type of legislation is reported in the second row of Table 1. As shown in the last column in Table 1, the consent requirement for 46 per cent of these controversial laws would be removed, so that the proportion would drop from approximately 48 per cent to approximately 26 per cent. By contrast, for laws passed by consensus (reported in the first row below), consent reduction is higher (dropping by approximately 51 per cent). Thus, while the consent requirement is not halved in the case of controversial laws – as is the case for non-controversial laws – a clear effect of the reform could nevertheless be identified, even for politically controversial laws.

Table 1 also demonstrates the robustness of these same findings, if we use an alternative measure for partisan/political controversy. Rather than using voting behaviour of the opposition in the Bundestag as an indicator, we can instead use the probability that opposition parties will force the calling of the Mediation Committee to deal with a bill (reported in the third row of Table 1). Here too, the reduction in the consent requirement is below average: it would amount to a 44 per cent drop in the proportion of laws for which the consent of the Bundesrat has hitherto been mandatory. Moreover, in the case of consent bills rejected or tabled (row four in Table 1), the drop in consent requirement is far above average. However, these results are based on a very small
number of cases, since during the period under consideration a total of only 14 of all consent laws initially passed by the Bundestag were not enacted. Nine of these bills, or 64 per cent, would not have required consent had the reform been in effect.

Thus, the first conclusion to be drawn is that one can assume that the reduced consent requirement rate would also affect relatively important and/or controversial laws. However, the drop in the consent requirement rate tends to be below average for controversial laws. Even lower effects in controversial laws would thus have to be expected if the federal government were to grant the states the right to diverge in procedural matters less often in the case of politically controversial bills.

An additional finding is that different policy areas are affected by the new stipulations to very different degrees. In the following, we provide a detailed report by policy area of how great the effect for the political process at the federal level would be. Strikingly, the area of fiscal policy would hardly be affected at all; here, only 12 per cent of laws which have hitherto been consent laws would become objection laws (i.e., laws to which the Bundesrat may merely register its non-binding objections). Since the reformers consciously avoided any reorganisation of federal–state relations in the fiscal realm, the consent requirement, too, remains unchanged under Article 105 Para. 3 GG. However, it is worth noting that precisely this area has traditionally been characterised by a particularly high degree of conflict between governments and their opposition. The reform would also provide significant relief or disentanglement in the areas of health, social and economic policy, which are also highly controversial. Based on its rather questionable (see below) premises, the Research Service study found that in the fourteenth parliamentary term, for example, only four of a total of 27 consent laws in the area of health would have required consent if the reform proposals had been in force. Inasmuch as future socio-political reforms with the goal of reducing social insurance contributions will frequently also contain a component regulating tax policy, the findings in this respect relating to greater freedom of manoeuvre for the federal government could be considerably dampened in these policy areas. A survey of the specific policy area disentanglement effects is shown in Figure 1.

In addition to the reduction of the consent requirements due to the new formulation of Article 84, Para. 1, the effects of the new consent factor which is to be provided under the new Article 104, Para. 4 is worth addressing. Does this new stipulation concern particularly controversial laws? Will this new addition to the constitution increase consent requirements in certain areas? The report arrives at the conclusion that during these two parliamentary terms, a total of 48 laws would have been covered by this new provision. That figure is heavily dependent on the interpretation of the new stipulations. But regardless of how high the Research Service study estimates the number of these newly mandated consent laws, an analysis of their controversial nature shows that these laws would in all probability be controversial to an even greater degree than average. The proportion of controversial laws among all government bills (as judged by the criterion of their rejection by the largest opposition party during the third reading in the Bundestag) was 31 per cent on average during the period of investigation. This proportion is considerably higher, fully 56 per cent, if only those laws are considered for which the newly formulated Article 104 would have applied. This suggests that the new regulation of Article 104 erodes some of the positive effects of the new formulation of Article 84.
Issue #2: Faster Legislative Proceedings?

A second core issue is the expectation of a considerably accelerated legislative process. This expectation is based solely on the assumption that long-drawn-out negotiation procedures between the government and the opposition, as well as a possibly deliberate protraction of legislative proceedings by the opposition, could be expected to occur less frequently for objection laws (laws that do not need the consent of the Bundesrat). However, it is crucial to take into consideration the fact that both the opposition and the majority of the states’ representatives have the means to determine the parliamentary schedule and to drag the legislative process out, for both types of laws, consent and objection laws. The opposition can, for example, extend legislative proceedings by delaying the committee hearings in Bundestag committees in which they hold the chair. The Bundesrat can also delay not only consent bills but also objection bills by sending them to the Mediation Committee. This procedure is in fact even a mandatory stipulation whenever the Bundesrat vetoes an objection law (Article 77, Para. 3).

Insofar as the majority of methods for delaying legislation are not primarily dependent upon the type of legislation, hopes for a general acceleration of the legislative process appear unfounded. To assess the effects of the reform on the duration for the law-making process, we can nonetheless compare the time needed to handle objection legislation and consent legislation, respectively. If objection laws are, on average, passed faster than consent legislation, then one would expect that the reduction of consent laws and the increase of objection laws would accelerate the legislative process only. To assess this, we have calculated the average duration of time
between the introduction of a bill and the promulgation of the respective law during the last two parliamentary terms. Based on this calculation, the average time-frame for objection laws was 201 days; for consent laws, it was 217 days. Thus, counter-intuitively, consent laws needed only 16 days more than objection laws to pass. As the sole basis of the expectation that legislative process would be accelerated, this difference hardly constitutes a significant basis for any confidence. Only if the reform had abolished the possibility of appeal to the Mediation Committee for objection laws in case of Bundesrat objections would we have expected a significant shortening of the average procedure.

Overall, therefore, no significant shortening of legislative procedures can be expected. Moreover, procedures will in fact be additionally prolonged for legislation in those areas in which Article 72, Para. 3 now gives the states the right of substantive divergence. For these laws a ‘time limit’ is to be instituted, under which federal laws will only enter into force six months after promulgation. This will cover laws on hunting, conservation and landscape management, spatial planning, water management and university admittance and degrees. For these areas, a considerably longer effective time-frame for the legislative procedure will thus have to be taken into account.

Issue #3: Is a reduction of consent requirements by 50 per cent realistic?

According to the study by the Research Service, the proportion of consent laws amounted to 27 per cent during the last two parliamentary terms. To what extent is this figure based on a realistic assessment? In a draft of the federal reform law, ministry officials estimated a reduction in the proportion of consent laws of only approximately 35 to 40 per cent – in and of itself an indication that the scenario described by the Research Service of the Bundestag may have been overly optimistic.

We too believe that it would be more realistic to estimate that the proportion of all laws that are consent laws will account for around 40 per cent, i.e. a reduction from the present estimate of around 10 to 15 per cent. Two assumptions that are at the basis of the Bundestag study are problematic and could in our opinion lead to systematic mis-estimates in the hypothetical proportion of consent requirement. First, of all, the study systematically overestimates the proportion of consent-free legislation that might result from the new formulation of Article 84, Para. 1. Second, depending on future court interpretations of Article 104a Para. 4, the Research Service report most likely underestimates the effects of the new stipulations which introduce new consent requirements.

Regarding the first assumption, it is certainly questionable to assume that in all cases of legislation which have hitherto required consent under Article 84 Para. 1, the Bundestag will in the future, as a matter of principle, grant the states the right to diverge from the implementation rules of those laws. Indeed, given the historical record, this is a bold assumption. To date, the Bundestag has already had the possibility of keeping a bill consent-free by leaving it without procedural regulations, or by splitting it up into a substantive, consent-free part and an executive, consent-requisite part. If this option has rarely if at all been taken advantage of in the past, we can assume that there were good practical or political reasons for that, given the fact that the opposition’s control of the Bundesrat if anything increased the incentive
to keep it consent-free. In fact, however, it is often not practicable to separate the
substantive and the purely implementation-related segments of a bill. In the frequent
cases in which such separation is not possible, the substantive stipulations in many
cases ‘stand and fall’ with the procedural stipulations of the bill. We must therefore
assume that the Bundestag has in the past often had a substantial political interest in
the formulation of the implementation-related stipulations and has not made use of
the possibility of dispensing with a stipulation of procedural rules, although this
option was theoretically present. Why should this change fundamentally in the future,
as the study by the Research Service assumes?

For this reason, it cannot be assumed that the federal government will no longer be
interested in a uniform nationwide solution in the future. Thus this first assumption of
the study appears to us unrealistic. This ‘maximum scenario’ – that the federal state
would completely abstain from imposing uniform procedures of implementation –
is thus unrealistic and systematically overestimates the potential reduction in consent
requirement. The federal government will undoubtedly continue to have an interest in
enforceable implementation rules, triggering the consent requirement in the future.
Even in the draft bill, it was stated that ‘stipulations of environmental procedural
law should regularly constitute an exception’.16 The curious term ‘regular exception’
itself reflects that unreality of the assumption that the federal government will
always grant the states the right to diverge in their implementation of legislation. Thus, even
halving the forecast proportion of consent laws would appear unrealistic.

Regarding the second point – that the effects of new consent requirements are
likely underestimated – it is useful to begin by pointing out the irony that the
reform will actually create a new consent ‘trigger’ (i.e. prompting the requirement
of Bundesrat approval) through the new Article 104a, Para. 4 GG. This new article
now triggers a veto possibility from the Bundesrat if a piece of federal legislation
requires the states to pay benefits, benefits in kind of monetary value, or what the con-
stitutional article awkwardly calls ‘comparable services to third parties’. Ironically,
given the broader goals of the constitutional reforms it may be that laws that could
in the past be adopted without the consent of the Bundesrat will now in fact require
consent. As one example, the recent and prominent Law for the Expansion of
Daytime Care adopted in the fifteenth parliamentary term against the objection of
the states would have been covered by this new requirement.

The original draft of the new formulation of Article 104a, Para. 4 lacked, in the
words of one of its sharpest critics, the most minimal level of ‘quality which one
has a right to expect of a constitutional guideline’.17 But even in its revised form,
the article still contains remarkable vagueness regarding the range of its applicability.
This is crucial because its range of applicability will determine how strongly, and
under which circumstances, the new consent trigger will apply. Given this vagueness,
it is also not yet clear how many laws will be affected by the new article. However,
what is unmistakable is that the expansion of its applicability to cover what the
wording of the article calls ‘comparable services’ could extend its applicability con-
siderably and even, in the words of one observer, ‘incalculably’.18 Moreover, while
the original version of the draft law stipulated a consent requirement only in cases
of ‘a considerable cost burden upon the states’,19 the ultimate wording of the law
states nothing of the sort, and it is presently ambiguous how the Federal Constitutional
Court would decide any future possible dispute. In this respect, a third serious concern arises: of the three types of payment identified in the clause (i.e. ‘payment,’ ‘payment in kind’ and ‘comparable services’) that could trigger a ‘consent’ requirement, Article 104a, Para. 3, Clause 1 specifically authorises the federal government to assume the expenditures involved for only the former, leaving no authorisation mechanism in place for the latter two, thus opening the way for increased use of consent requirements for future legislation.

Overall, the effects of these new formulations on the scope of action of the federal government depends on numerous uncertainties, and on the interpretation of the relevant constitutional articles by the courts. In the best case for the federal government, the Federal Constitutional Court could apply a restrictive interpretation of what constituted ‘payments in kind of monetary value and comparable services’, allowing full federal financing of ‘payments in kind of monetary value and comparable services’. Though unlikely, in this scenario the federal government could ‘ransom’ itself by assuming all expenses, thereby eliminating the need for state consent in the Bundesrat.20 Of course, such an outcome would be likely to generate the unintended effect that the states would try to achieve precisely this, by using their right of consent to force the federal government to assume full financing.

In the worst case for the federal government, the constitutional criteria ‘payments in kind of monetary value’ and ‘comparable services’ could be broadly interpreted and might then cover more laws than the Research Service study assumes, thereby increasing the number and proportion of laws that would trigger Bundesrat veto authority. Additionally, it is plausible to imagine that the ‘self-ransoming’ strategy of full federal financing of ‘payments in kind of monetary value’ and ‘comparable services’ to avoid the ‘consent’ trigger would be ruled unconstitutional since such a stipulation explicitly was not included in Article 104a, Para. 3, Clause 1. If so, the states would be granted veto power not only for the protection of their finances. Rather, their veto could then be used to block a law as a whole, or to make deals in other areas.21 That, however, constitutes ‘a requirement for consent with no justifying connections, which contradicts the legal logic of Article 84, Para. 1, 104a Para. 1 GG’. 22

As a result, paradoxically, precisely what was to have been prevented by the reformulation of Article 84, Para. 1 would then be written into another article of the Constitution. The fact that this problem was repeatedly pointed out in the Federalism Commission and later raised in hearings and statements, suggests that an unambiguous clarification of this issue could not be achieved for political reasons, and that ultimately, the desire to clearly curtail the power to block legislation concerning the political content of stipulations covered by Article 104a, Para. 4 was lacking (at least as regards payments in kind of monetary value and comparable services). Since an unambiguous clarification of these facts was repeatedly demanded, but never implemented, there is little hope that the Federal Constitutional Court will issue such an interpretation advantageous to the federal government. And in that case, there is reason to fear that ambitious state premiers will use such a ruling to try to compensate their reduced power by using the new formulation of Article 84, Para. 1.

Initial empirical evidence supports this sceptical evaluation of the reduced veto power of the Bundesrat. Recently, in a major interpellation (Große Anfrage), the Liberal Party (FDP) requested information from the government about the effect of
the federal reform. In its answer, the government listed the consent requirements of all laws (N=147) which were proclaimed between September 2006 and August 2008. According to this, the share of laws that did not require the consent of the Bundesrat dropped to 44.2 per cent (compared with roughly 53 per cent in recent decades) and as a result failed to meet the goal of around 35 to 40 per cent. In his forthcoming study, Höreth argues convincingly that the share of consent bills would have been only 10 percentage points higher (54.4 per cent) if the reform would not have been enacted while the government speaks of a 15 per cent reduction.23

More important than a pure comparison of numbers, however, is a deeper examination of those laws that lost the need for Bundesrat approval because of the reform. Only three of these 22 laws came along with higher media attention: a law to prevent the under-supply of physicians in rural areas and in East Germany; a law that regulates biometric data in passports; and legislation that changes parts of the existing anti-terrorism law. Apart from these controversial and high publicity laws, the remaining 19 laws, which according to the federal government no longer required Bundesrat consent, were passed with little notice or public debate. In 13 cases neither the Liberal Party nor the Green Party voted against the proposal. Thus there was no dissent between the established parties in half of these cases. For seven laws not even a parliamentary discussion took place and three of them were adopted unanimously.24

A CASE STUDY: THE EXZELLENZINIATIVE AS ILLUSTRATION OF THE CHALLENGES OF DISENTANGLING GERMAN FEDERALISM

In addition to increasing the efficiency of the legislative process, the reform aimed to distinguish more clearly between the legislative powers of Bund and Länder. By delineating their respective responsibilities and by strengthening the role of state parliaments, the reform was meant to enhance accountability, transparency and legitimacy. These goals had become particularly urgent in view of two factors: increasing political entanglements (Politikverflechtung) on one hand, and decline of state parliaments on the other.25 To address these challenges, the federal reform increased the exclusive legislative powers of the Bund (Article 71), delegated items of previously concurrent legislation to the Länder (Article 74), and eliminated federal framework legislation (Article 75; see above).

One way of assessing the overall impact of these changes is to examine a policy area that falls almost exclusively under state jurisdiction: higher education. Even prior to the reform, the federal government was limited to formulating framework provisions concerning higher education (Article 75), financing the construction of universities and university clinics (Article 91a), engaging in educational planning, and promoting research facilities and projects of national importance (both Article 91b). The reform changed some of these provisions. It eliminated federal framework powers and deleted the clauses regarding the construction of universities and university clinics and educational planning in Articles 91a and 91b. Moreover, it substantially revised Article 91b. Under the new version of this article, the federal government and the states are jointly responsible for fostering and funding university and non-university research facilities and projects, though federal funding requires approval by all states.
The extent to which these changes actually disentangled federalism is questionable. Recent initiatives indicate a continued reliance on the federal government for policy-making and funding in higher education. The public expects federal action in this policy area and attitudes are unlikely to change. The excellence initiative (Exzellenzinitiative) is a revealing case in point because its emphasis on joint responsibility (Gemeinschaftsaufgabe) and mixed financing (Mischfinanzierung) undermines the very premises of federal reform. The following discussion highlights the content of the excellence initiative, the legislative process that brought it about, and the implications it provides for the future of German federalism.

In an effort to create internationally competitive research centres, the federal government and the prime ministers decided to reward universities for postgraduate training, collaborative research clusters and overall strategies in the period of 2006–11. The federal government will contribute three-quarters of the total €1.9 billion, while the beneficiary states will fund the rest. After two selection rounds in 2006 and 2007, 39 graduate schools, 37 clusters of excellence, and nine overall strategies (the latter chosen among recipients of the first two awards) have been selected for funding. The hope is that this initiative for excellence will provide a boost toward attaining international reputation, attracting top-notch students, and halting the brain drain of some of Germany’s excellent researchers and scientists. Meanwhile, it aims to foster a spirit of competition among Germany’s institutions of higher learning, forcing not only the winners, but also the losers to reconsider their research strategies, priorities and strengths. In a recent speech at Harvard University’s Kennedy School of Government, State Secretary Frank-Walter Steinmeier approved of the initiative as an ‘accepted institution’ that may enhance Germany’s global competitiveness, suggesting that it is regarded as a success that will continue into the future.26

Proposed by Federal Chancellor Gerhard Schroeder in March 2003, the excellence initiative initially faced major opposition in the federal state commission on educational planning and research funding (Bund-Länder-Kommission für Bildungsplanung und Forschungsförderung, BLK). It took more than a year until this body, composed of federal and state ministers of education reached a consensus. Even after the BLK passed the initiative against the opposition of CDU-governed Hesse, several other CDU/CSU-led states voiced new objections during the Conference of Prime Ministers in April 2005. Some argued that Article 91b did not provide the federal government with competences to assess university structures;27 others demanded federal concessions to avoid a ‘distributional conflict at the expense of the Länder’ in view of the states’ limited funding possibilities.28 By 23 June 2005, after rejecting the idea of ‘elite’ universities, the federal government and the prime ministers finally agreed upon the excellence initiative under the mandate of Article 91b of the Basic Law.

Although the excellence initiative was passed prior to the federal reform, its fate was fundamentally intertwined with the latter reform. On 15 November 2004, when the BLK postponed negotiations on the excellence initiative until the results of the Federalism Commission became known, Baden-Württemberg’s Minister of Education Peter Frankenberg (CDU) asserted that ‘the fate of funding for excellent research is tied to the result of the federalism commission’.29 Apart from slowing down negotiations, the impending reform also made itself felt in other ways, because the
excellence initiative entailed a similar dispute with regard to interpretations of federal competences and funding capacities of states. There remain nonetheless tensions between the initiative and the federal reform: while the former sustains a federal role in higher education, the latter intended to end it.

This disjuncture raises important questions about the broader impact of the reform of the federal system. First, what explains the continued reliance on the federal government within the realm of higher education? And secondly, how can we make sense of existing demands for a federal role in higher education with the equally strong push towards disentangling federalism?

Even though the Basic Law places education under state jurisdiction for reasons connected to Germany’s pre-Second World War past, there have been significant pressures toward standardisation and centralisation of educational policy across Germany.30 The Council for the Sciences (Wissenschaftsrat), a national advisory body, was founded as early as 1957, followed by the Federal Ministry for Scientific Research in 1962 and the 1969 constitutional amendment that created joint responsibilities for higher education.31 Public opinion polls, time and again, point to demands for a greater federal role in educational policy. In the 2006 Bildungsbarometer, a survey undertaken by the Zentrum für empirische pädagogische Forschung (zepf), the majority of respondents were opposed to placing education under the exclusive legislation of the states, as was proposed in the course of the federal reform: 93 per cent of respondents supported the idea of making education subject to federal legislation, as did 92 per cent regarding educational planning, and 72 per cent regarding university tuition fees.32 The report further indicates that the public objects to educational decentralisation insofar as it is perceived to hurt equal opportunities, by introducing ‘winners’ and ‘losers’ into the realm of education.

Similarly, a recent study by the Bertelsmann Foundation (summarised in this volume) finds that a remarkable 91 per cent of Germans agree with the statement that ‘it is the responsibility of the federal government to ensure uniform standards for kindergartens, schools, and universities’.33 In their study, there is some variation across Germany’s states in the amount of public support for uniform education standards: east German states tend to be more supportive of a federal role in education and support is slightly less in Bavaria, Baden-Württemberg, Hamburg and Rhineland-Palatinate, though even in these ‘laggard’ states, approximately 90 per cent of interviewees prefer federally directed uniform standards in education.34 The degree to which these survey results truly capture German attitudes towards federal involvement in education is of course open to some question. But the evidence does suggest that given these various pressures, it is not surprising that the federal government has assumed a prominent role in formulating and funding the excellence initiative.

Moreover, this pattern is unlikely to change, despite the transformations the reform produced.35 In fact, soon after the federal reform passed into law, the FDP proposed a contest among universities of applied sciences (Fachhochschulen), modelled on the existing initiative for excellence.36 Similarly, Bündnis 90/Die Grünen demanded an extension of the excellence initiative toward teaching.37 Federal Minister of Education Annette Schavan has already indicated support for extending the excellence initiative beyond 2011, given the ‘important impulses’ it provides for German universities and the ‘joint responsibility of the Bund and the Länder to ensure the sustainability of this
success’. Evaluations are scheduled for 2009, yet these various proposals and comments suggest that the initiative – and thus the continuation of the federal role in higher education – is broadly accepted.

Thus, despite the federal reform, the interlocking of federal and state competencies persists. Public demand is one ‘proximate’ explanation of continued federal cooperation in the domain of higher education. But the institutional make-up of German federalism is also a crucial ‘contextual’ factor. Granting the Länder additional legislative powers without providing them with sufficient financial resources ironically creates further demands for federal action. While one response to this might include strengthening the Standing Conference of Ministers of Education and Cultural Affairs of the Länder, this body is seen as largely ineffectual. Another response is to increase the autonomous funding capacity of the Länder. The 2006 federal reform largely excluded the issue of increased government autonomy in fiscal policy, leaving it for a second and prohibitively intractable round of negotiations. A final, and most likely, possibility is that Germany’s multiple levels of government will simply remain interlocked.

The very creation of the excellence initiative provides a window onto these issues. The protracted nature of the excellence initiative’s negotiations stemmed at least in part from the limited funding capacity of various Länder. Lower Saxony’s Prime Minister Christian Wulff (CDU) opposed the excellence initiative even after the BLK (including Lower Saxony’s own minister of education) had reached an agreement in early April 2005. Wulff was concerned about his state’s 25 per cent funding responsibility if institutions of higher learning located in Lower Saxony won the competition. Comparing the excellence initiative with federal reform, one news source suggested that ‘union-led states thumped sole responsibility, yet internally they were unable or unwilling to shoulder research grants worth a billion euros’. Because of the limited funding capacity of the Länder, the excellence initiative in fact required a strong federal role. The excellence initiative thus illustrates the limits of disentangling federalism: the reform failed to trigger a change in attitudes regarding the role of the federal government in higher education and the limited financial resources of the Länder make it unlikely that this pattern is going to change any time soon.

CONCLUSION

Our evaluation of Germany’s 2006 reform of Germany’s federalism leads us to conclude that it is a reform that is unlikely to lead to an acceleration of the legislative decision-making process. Such an outcome would have only been achievable if the reforms had also eliminated the mediation process between the two chambers of the Bundesrat and Bundestag in cases of so-called ‘objection legislation’ (under Article 77, Para. 2, Clause 1). Without this, the reform’s effects will be less significant than its advocates had hoped. Nonetheless, it is worth noting that our findings also suggest that the reform will expand the freedom of political action of the federal government and its parliamentary majority, whenever the requirement to obtain the consent of the Bundesrat no longer exists.

However, that effect will not be uniform. The reduction in consent requirements will be least noticeable in fiscal policy, and most strongly noticeable in social
policy. However, in the light of the potential political goal of financing the German welfare state through tax revenues in the future, this prognosis should be considered as uncertain, since social and fiscal policy would then become ever more strongly interconnected. More importantly, great hopes for a significant reduction of the Bundesrat veto – especially the aim of halving the number of consent laws – rest on unrealistic assumptions. As our theoretical considerations suggest and the empirical evidence shows, the reform is likely to lead, at best, to only a marginal increase in autonomy for the federal government.

In addition to scepticism about claims of greater efficiency, the paper also gives us reason to question whether the German polity will in fact become substantially more accountable via the highly sought after separation or ‘disentanglement’ of competencies between the intertwined levels of German government. Even in the case of higher education, an area that is, in theory, entirely outside of the jurisdiction of the federal government, there are surprisingly new trends of entanglement taking place. The current dynamics at work, as demonstrated in the case study above, are not merely old legacies of interlocking responsibilities persisting into a fundamentally new federal regime. Instead, as its advocates and supporters frequently report with great enthusiasm, the recent Exzellenzinitiative represents the future of higher education in Germany which looks to contain continued and newly robust links between federal and state authorities in the financing and organisation of German higher education. Given the current high regard for the Exzellenzinitiative model, vocational schools and other institutions seem poised to follow a similar path.

While the chief aim of this paper has been to discern and describe the extent of the gap between the goals of reforms and the reality of reform, it is useful to reflect on a broader question: what explains the mismatch between reformers’ goals and the reform outcome? The reasons for the gradual and rather unimpressive constitutional amendments described above are numerous. These include, most proximately, a) the composition and working method of the Commission for the Modernisation of the Federal Constitution, which played a decisive role in the adopted reform, b) the role of the Constitutional Court during the deliberations, and c) the lack of a comprehensive strategy on the part of the federal government. In addition, more broadly, part of the explanation is surely related to the fact that public opinion in Germany is in fact remarkably resistant to ‘disentangling’ German federalism, especially in the area of university education. Finally, when coupled with resistant or indifferent public opinion, constitutional changes are subject to the same ‘path dependent’ institutional effects that make all fundamental institutional reforms difficult. Thus, in sum, German federalism remains constrained by deep historical roots, entrenched interests and a still intact institutional logic that remains at the heart of post-war German federalism.

NOTES
1. Quoted in the Frankfurter Allgemeine Zeitung, 7 March 2006.
gewesen wäre?’. Wissenschaftliche Dienste des Deutschen Bundestages, WD3 - 37/06 and 123/06 (Berlin: Deutscher Bundestag, 2006).

5. We argue that in methodological terms, education is a ‘most likely’ or least a ‘crucial case’ for reform since it remains, in principle under the jurisdiction of the states, thus making it more amenable to ‘disentangling’ reforms than other policy areas, though we recognise that in all political systems, federal laws have gradually become relevant to university education. Nonetheless, it represents an area where we would expect to see more, not less ‘disentangling’ of policy jurisdictions.


10. Gesetzentwurf zur Föderalismusreform, BR-Dhrs. 178/06, p.34.


13. For elucidations, see Georgii and Borhanian, ‘Zustimmungsgesetze nach der Föderalismusreform’, p.35 et seq.


16. BR-Dhrs. 178/06, p.35.


18. Ibid., p.8.


20. We would like to thank Prof. Hans Meyer for calling our attention to this aspect.


23. M. Höreth, ‘Geschweift oder doch erfolgreich? Über die kontroverse Beurteilung der ersten Stufe der Föderalismusreform’, in Europäisches Zentrum für Föderalismus-Forschung Tübingen (eds.), Jahrbuch des Föderalismus 2008 (Baden-Baden: Nomos, 2009 forthcoming). For the government position see printing matters 16/8688 of the Bundestag. The differences follow from varying interpretations of consent requirements of the old constitutional regulations. There is always some legal leeway to draft the same proposal as consent or as objection laws leading to different predictions about the impact of the federal reform.


33. For a summary, see T. Peterson, H. Scheller and O. Wintermann, ‘Public Attitudes towards German Federalism: A Point of Departure between Public Opinion and the Political Debate’, *German Politics* 17/4 (2008), pp.559–86.

34. Ibid.

35. University education is not unique. The continued ‘interlocking’ dynamic of state reliance on the federal government is also observed in the 2007 discussion on public day care for children under the age of three. In September of 2007, the Federal Minister Dr. Ursula von der Leyen (CDU) and the government agreed to provide additional incentives for Länder and municipalities to expand the existing day care system (to cover 35 per cent of all children under the age of three, at an estimated cost of €12 billion). The legal basis of the policy is Article 104b of the Basic Law, which permits federal funding in cases of significant investments toward improving structural conditions. However, this came under attack, and von der Leyen even considered a constitutional amendment (‘Ich bin es leid, ständig die alten Gräben zu schaufeln’, Interview with Dr. Ursula von der Leyen, *Süddeutsche Zeitung*, 8 Feb. 2007), though the eventual resolution of the issue involved the federal government meeting the demands of the states, and providing €1.85 billion towards the costs of operation between 2009 and 2013. For the debate, see German Parliament, Printed Matter 16/5805, 22 June 2007, pp.2–3.


39. Opposition to the excellence initiative is mostly limited to Die Linke, whose recent inquiry regarding the federal government’s assessment of the excellence initiative expressed concerns about the programme’s inherent elitism. See German Parliament, Printed Matter 16/6912, 2 Nov. 2007.


42. Lehmann, ‘Elite-Unis und Föderalismus ganz von vorn?’
