

**Solving the Gordian Knot:
The Federalism Commission and the Reform of the German
Federal System**

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Abstract:

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How do the fundamental institutional rules of a political system evolve or change? When can they be altered, and by whom? Basic constitutional rules like federalism belong to the meta-rules that structure the political game in advanced democracies. As such they are hard to change because they usually are subject to large set-up costs, involve multiple constituencies, and are conditioned by the entrenched interests of a variety of powerful key actors. The (failed) reforms of a federal system thus present opportunities to examine whether and how the basic rules of the game can be changed.

Theories about constitutional and institutional change can be divided into normative, interest-based, and non-rational explanations. They fit quite neatly into current divisions within the new institutionalism in political science, between historical-institutionalism, rational choice and sociological institutionalism (Hall and Taylor 1996). Historical-institutional explanations emphasize path dependence, stickiness, and “lock-in” effects, whereas rational choice underscores the contested nature of institutional development and the distribution of power and strategic interactions of key actors in society. Sociological explanations highlight the non-rational effects of political discourse and the impact of the recognition heuristic (Immergut 2006).

After German unification and the creation of the European Union in the early 1990s, federalism became widely regarded as at least partially responsible for the German “*Reformstau*” or “reform gridlock”. This paper briefly examines the evolution and the repeated efforts to reform the federal system of (West) Germany. The main focus is on the work of the “Federalism Commission” from 2003 to 2004 and the final adoption of its proposals to reform the German federal system in May 2006. Utilizing historical-institutional, rational, and sociological explanations, the paper will assess whether the changes of federalism in Germany represent primarily the (un-)intended consequences of prior normative commitments and path-dependent development of institutions, whether they are the results of deliberate choices and self-interested utility maximization of powerful key actors in German politics and society, or whether they are the non-rational outcomes of political discourse, cognitive framing and recognition heuristics among decision makers, or perhaps a combination of all three.

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Introduction

Scholarly assessments of the development of German federalism since reunification in 1990 have differed markedly. Whereas some scholars see a “re-federalization” of the Federal Republic (Münch and Laufer 1997), others diagnose the emergence of a “disguised unitary state” (Abromeit 1992) after the joining of the five new states of Eastern Germany. Such contradictory assessments point to an apparent paradox, namely that the current federal system is said to be a threat to the functioning of the German polity while at the same time being in danger of collapsing. In other words, the federal system has been undermined to such a degree as to become almost obsolete, but simultaneously it is still strong enough to block decision-making in the Federal Republic (Thaysen 2003, p. 14). How is it that a system that is judged to be dying is at the same time accused to threaten the efficiency, if not the survival of the political system of Germany?

Figure 1: The Federal Republic of Germany

Germany’s federal system has come under severe criticism in recent years (Hrbek and Eppler 2003). Among the main causes for the pressure to reform German federalism are the unification of West and East Germany in 1990 and the deepening integration of the Federal Republic of Germany (FRG) into the European Union, especially since the 1993 Maastricht Treaty. Unification and Europeanization have had a major impact on federal-state and inter-state relations in the Federal Republic of Germany (Jeffery 1999, Sturm 2001). German unification and European integration are simultaneously reinforcing and challenging earlier trends affecting the German federal system. The Federal Council, or *Bundesrat*, as the most important federal institution at the national level¹, is “sandwiched” between the forces that undermine the system from both above and below. Globalization (Langguth 2000), growing differentiation of *Länder* capacities and interests (Jeffery 1999), and party system changes (Sturm 2001)

¹ The Federal Council or *Bundesrat* is the “second legislative chamber” rather than the “upper house” of the German parliament since it represents the governments or cabinets of the *Länder*, rather than their legislatures, and because it is not a popularly elected body. Representation is roughly based on state population, with each Land having between three to six votes, which can only be cast *en bloc* or otherwise will be counted as invalid. (see Gunlicks 2005).

increase the pressure for reform of co-operative federalism, whereas historical path dependence (Lehmbruch 2002), national political culture (Umbach 2002), and European integration (Börzel 2002) are said to reinforce the co-operative federal system and prove resistant to reform.

Federal systems are dynamic and contested, i.e. they are constantly facing the pressure to adapt to centrifugal and centripetal forces, often simultaneously. In Germany centripetal forces dominated from 1949 to the 1970s, as evidenced by the constitutional reforms of the grand coalition government from 1966-1969, particularly its financial reforms. Since the 1980s the conditions have changed. Mostly due to the impact of European integration centrifugal tendencies have increased. This is evident in the regionalization processes occurring in countries neighboring Germany as well as in the recent debates regarding the necessity to reform the federal system in the Federal Republic (Renzsch in Hrbek and Eppler 2005, p. 7).

The paper will look at these competing influences on the evolution of the German federal system and in doing so, will try to answer the following questions: How do the fundamental constitutional or institutional rules of a political system evolve or change? When can they be altered, and by whom? Basic constitutional rules like federalism belong to the meta-rules that structure the political game in advanced democracies. As such they are hard to change because they usually are subject to large set-up costs, involve multiple constituencies, and are conditioned by the entrenched interests of a variety of powerful key actors. The (failed) reforms of a federal system thus present opportunities to examine whether and how the basic rules of the game can be changed.

Theories about constitutional and institutional change can be divided into normative, interest-based, and non-rational explanations. They fit quite neatly into current divisions within the new institutionalism in political science, between historical-institutionalism, rational choice and sociological institutionalism (Hall and Taylor 1996). Historical-institutional explanations emphasize path dependence, stickiness, and “lock-in” effects, whereas rational choice underscores the contested nature of institutional development and the distribution of power and strategic interactions of key actors in society. Sociological

explanations highlight the non-rational effects of political discourse and the impact of the recognition heuristic (Immergut 2006).

In the comparative public policy literature, federal systems have been analyzed primarily from the point of providing institutional veto points to frustrate or prohibit policy change for and by disinterested or opposed individuals and groups. In the literature on American public policy, federalism is often seen as an institutional context that provides for competition and diffusion of new ideas and policies between the federal and state governments and among states, i.e. the “laboratories for policy innovation.” This paper looks at federal institutions from both perspectives, i.e. as veto points for interest-driven actors to prohibit policy change and as access points for idea-driven actors to infuse policy innovation. I argue that it is this interplay between interests and ideas within a given institutional context that best explains policy decisions. Federal institutions provide both opportunities to veto or slow down policy change and opportunities to disseminate and test policy innovation. To be sure, one premise of this paper is that it is not the institutions *per se* that produce veto effects, but rather the political actors who make use of institutional veto potentials. Veto points are thus nothing more than constitutional “opportunity structures”, whose utilization depends on the choices made by political actors.

The paper focuses on the work of the “Commission for the Modernization of the Federal System” (“Federalism Commission” for short) in Germany from 2003 to 2004 and the final adoption in May 2006 of its proposals to reform institutional arrangements that had become widely regarded as responsible for the German “*Reformstau*” or “reform gridlock.” Integrating historical-institutional, rational, and sociological explanations, the paper will assess whether and to what degree the recent changes of federal arrangements in Germany represent the (un-)intended consequences of actors’ prior normative commitments and subsequent path-dependent development, whether they are the results of deliberate choices and self-interested utility maximization of powerful key actors in German politics and society, or if they are the non-rational outcomes of political discourse, cognitive framing and recognition heuristics among decision makers with competing ideas and ideologies.

Figure 2: The Basic Model and Figure 3: The Model Applied to Germany

The paper concludes that the perceived problem pressure to modernize and “europeanize” German federalism that had built up since German unification and the creation of the European **Union** reached a tipping point in the early 1990s and at this critical juncture punctuated institutional path dependencies and changed key actors’ preferences that led to the establishment of the Federalism Commission in November 2003 with the goal of ending the reform blockage of the German federal system. But an abortive tit-for-tat deal between the federal government and the state prime ministers, on the one hand, and the asymmetric interests of the *Ministerpräsidenten* of the rich states and those of the poor states caused the initial failure of the Commission’s work in December 2004. Ultimately, however, the political discourse involving the leaders of both major parties, cognitive framing provided by party programs and official public statements stressing the necessity of reform, and prior commitments to modernization pervasive across all political parties opened a new window of opportunity after the federal elections of September 2005 that led to the compromise of the new Grand Coalition government of CDU/CSU and SPD and the eventual adoption of the Commission’s proposals in the spring of 2006.

Between Reformstau and Modernisierung

The core feature of the German federal system is the implementation of federal laws by the *Länder* in exchange for the states’ participation in the federal legislative process via the *Bundesrat*. This system of intergovernmental relations has been labeled “co-operative federalism”, “administrative federalism”, or “executive federalism” (Lehmbruch 1999). It was created by the constitutional convention at Herrenchiemsee and the succeeding deliberations of the members of Parliamentary Council who wrote the Basic Law from 1948 to 1949. Their intent to limit bills requiring the states’ consent to a relatively small number (20 to 30 percent at the most) turned out to be a significant miscalculation. Another of their objectives, namely to ascribe to the Federal Council the role of a counterweight to party politics, was similarly undermined by the tendency for partisan conflicts to spill over into the *Bundesrat* (Langguth

2000). From the very beginning, the members of the Federal Council would meet in and prepare their voting decisions in party caucuses before Federal Council plenary sessions, usually once a month on Fridays. Especially in the area of education policy the work of the *Bundesrat* was hampered by the partisan division into SPD-led state governments in the so-called *A-Länder* and state governments controlled by the CDU/CSU in the *B-Länder*.

Table 1: Distribution of Seats in the Federal Council (September 2006)

Thus the critics of German federalism have variously emphasized shortcomings such as “unitary federalism” (Hesse 1962, Abromeit 1992), “interlocking decision making traps” (Scharpf 1976), and “semi-sovereign state” (Katzenstein 1987). Very few other democratic systems are marked by such a tangled web of “checks and balances” as the German one, combining a separation of powers, interlocking competencies, as well as a contrary distance from power (*Machtferne*) that make decisive governing exceedingly difficult (Langguth 2000). This has repeatedly raised the issue of governability in Germany, especially since Scharpf in 1976 stated his famous concept of the *Politikverflechtungsfalle*, the trap of interlocking policies that impedes both the federal and state governments, as a structural problem of German federal system (Scharpf 1976).

Several other trends contributed to the increasing salience of the debate over the reform of German federalism: because of increasing pressures on public finances it became less feasible to resolve conflicts between the federal and state governments through financial compensation deals. The “buying” of votes of smaller states in the *Bundesrat*, which can be traced back to the earliest days of the Federal Republic, became more difficult (Renzsch in Hrbek and Eppler 2005, p. 8). Voting behavior had changed markedly as well; electoral volatility was increasing, and it became clear to both large parties that a majority in the Federal Council would from now on be of only short duration, because the party governing at the federal level during the first two-thirds of the parliamentary term would regularly be losing state elections. Different partisan majorities in the *Bundestag* and the *Bundesrat* would no longer be the exception but rather the norm. Additionally, the changing constellations of interests between the

Länder, independent of any political party blocs, seemingly demanded disentanglement. Especially in the areas of federal-state relations, finances, and European affairs new interest constellations emerged that had little to do with party competition, and the complex mixture of partisan and regional interests now dominant in the Federal Council made political decision making ever more difficult (Renzsch in Hrbek and Eppler 2005, p. 9).

The reform of German federalism has been a topic of political discussion since the 1980s and acquired special saliency after German unification. Many critics of the current German federal system advocate a “competitive federalism” that envisions a disentangling of functions with the goal of strengthening the legislative authority and competences of the states and thus the state parliaments, resulting in more autonomy, subsidiarity, and competition of the *Länder* (Margedant 2003).

Throughout the 1990s public debate in Germany was framed by the concept of *Politikverdrossenheit* or political antipathy.² This phenomenon had appeared shortly after German unification and became so prominent that in 1992 the term *Politikverdrossenheit* was selected as the “word of the year” by the media (Völkl in Falter, Gabriel, Rattinger, Schoen 2006, p. 57ff). Political antipathy was seen both as the cause and the consequence of the populace’s dislike of politics in general and citizens’ resentment of specific aspects of political life, and the gridlock presumably caused by the federal system was blamed for contributing to *Politikverdrossenheit*.

In the late 1990s, the federal system had thus gained preeminence as a topic of public discussion and scholarly discourse about reform in Germany. Political conditions seemed especially conducive to initiating a reform of German federalism: the mounting pressure from unresolved problems “necessitated” political reform in the eyes of observers from across the political-ideological spectrum (Thaysen, in APUZ B 29-30, 2003). The *Ministerpräsidentenkonferenz (MPK)*, the conference of

² Arthur B. Gunlicks refers to *Politikverdrossenheit* as “a growing ... public disenchantment with the lack of clear decision making responsibility and accountability that exists currently in the German political system” (Gunlicks 2005, p. 1295). Although the specific meaning of *Politikverdrossenheit* is controversial, most observers argue that it entails all kinds of “criticism, unhappiness, fears, discomfort, and political prejudices” and manifests itself in

German state minister-presidents, started working on the topic, as were two joint commissions of the federal government and the state governments, one of them dealing with a reform of fiscal relations and the other with a revision of the competences of the *Bund* and the *Länder*. In the spring of 2003, Brigitte Zypries, the Federal Minister for Justice, presented “cornerstones” for a reform of federalism, and on March 31, 2003, the newly constituted “Federalism convention” of the state parliaments passed the “Declaration of Lübeck” regarding the revision of German federalism (Thaysen 2003, p. 14).

On October 16 and 17, 2003, the *Bundestag* and the *Bundesrat*, respectively, inaugurated a “Commission for the Modernization of the Federal System” or, in short, “Federalism Commission”³. The commission, under the joint chairmanship of Edmund Stoiber, the minister president of Bavaria, and Franz Müntefering, the chairman of the SPD faction in the *Bundestag*, was charged with developing reform proposals to modernize the German federal system, with the objectives to improve the capacity to act and make decisions of both the federal and state governments, to assign more clearly political responsibilities, and to increase the functional effectiveness and efficiency of the federal system. The commission was to examine in particular the division of legislative competences between the federal and state governments, the responsibilities and rights of the *Länder* in the policy-making process at the federal level, and the financial relations between the federation and the states. The commission was to consist of 32 voting members, 16 members each from the Federal Council and the Federal Diet (plus an equal number of substitute members, also with voting rights, from each chamber). There were four representatives of the federal government and six representatives from all of the state parliaments who serve as non-voting members with the right to be heard and make proposals only. In addition, there were three permanent guest members, with the right to speak and make proposals, but no vote, representing the national peak organizations of local governments. Finally, 12 experts would be unanimously appointed

decreasing election participation, the electoral successes of radical right and left wing parties, and the loss of confidence and trust of citizens in political actors and institutions (Völkl in Falter, Gabriel, Rattinger, Schoen 2006).

³ The official German name is “*Kommission von Bundestag und Bundesrat zur Modernisierung der bundestaatlichen Ordnung (KOMBO)*”. It is also often referred to as *Bundestaatskommission* (Federal State Commission) or *Föderalismuskommission* (Federalism Commission).

by the other commission members, all of them advisory members only, without the right to vote or make proposals. The commission first met on November 7, 2003 and thereafter once a month on a Friday after the regular *Bundesrat* session until the fall of 2004 to finish its work. All commission decisions required a two-thirds majority of its voting members (*Bundesrat* Pressemitteilung 183/2003, Oct. 17, 2003).

The federalism commission had originally been initiated by Franz Müntefering after the failed attempt by the federal Justice Minister Zypries to work out a reform between the federal government and the governments of the states in the early summer of 2003 (FAZ, Oct. 17, 2003, Nr. 241, page 1). Müntefering at the time suggested that the work of the Federal Government and the Federal Council on the reform of federalism needed to be “parliamentarized” because such a reform would require constitutional changes (FAZ, Nov. 8, 2003, Nr. 260, page 5). He suggested creating a joint commission consisting of 16 members of each the Federal Diet and the Federal Council. However, leaders of both the Green Party and the Free Democrats criticized the proposal as insufficient because the small parties would only be able to have one commission member each. The chair of the Green party faction, Christa Sager, and her counterpart from the Free Democrats in the Federal Diet, Wolfgang Gerhardt, suggested that the commission also needed to include members of the Land parliaments, so the states would not just be represented by members of their executives. Furthermore, the critics argued, the commission also needed to include separate representatives of the Federal government, as well as representatives of cities and communities since members from the *Landtage* and *Landesregierungen* would not sufficiently respect their interests. Finally, consultants such as academic experts and representatives of civil society should be included, but without the right to vote (FAZ, July 23, 2003, Nr. 168, page 5). On August 26, 2003, the leaders of all the four party factions in the *Bundestag*⁴ finally agreed on the composition of the Federalism commission.

⁴ Although with the PDS there were five parties represented in the 15. Federal Diet from 2002 to 2005, the two deputies of the PDS lacked the minimum quorum of five percent of all *Bundestag* members to form an official party faction and were thus counted as “*fraktionslose*” or non-caucus members of the Federal Diet.

Why did German policy makers chose to constitute the reform commission in this particular way? Of all the potential ways to put together a constitutional reform commission,⁵ German lawmakers chose the variant that sought a compromise between two models, that of the Mediation Committee between *Bundestag* and *Bundesrat*, and a constitutional convention. They charged an appointed but broadly representative commission of relatively small size to develop a reform proposal that would then be adopted by both legislative chambers, the *Bundestag* and *Bundesrat*, with the two-thirds majorities of votes required by the Basic Law, the German constitution, for constitutional amendments.

The selection of the specific members of the Commission was to ensure that in the end its results would be assured the necessary majorities in both the Federal Diet and Federal Council. Therefore its membership included the politicians who in the end would vote on the adoption of its recommendations, i.e. all the minister-presidents of the 16 states and the leaders of the main party factions in the Federal Diet.⁶

All in all, the commission included 32 voting members, consisting of 16 deputies of the Federal Diet and 16 members of the Federal Council. Each voting member had a substitute. The states were all represented by their minister-presidents; their substitutes were usually the chiefs of staff of the state chancelleries or state ministers of justice. The federal government's four representatives, although in a crucial role, were not given the right to vote but had only advisory status with the right to be heard and make proposals. The four included the Chief of Staff of the Chancellery, the Federal Minister of Justice, the Federal Minister of Finance, and the Federal Minister Consumer Affairs, Food, and Agriculture. The Federal Minister of the Interior was not a member of the commission. The administration of the

⁵ According to research by Princeton's "Project on Constitution Writing and Conflict Resolution" there are five main alternatives in use today for countries to devise and debate constitutional texts. Constitutional reform commissions or committees are based either on the Elected Constituent Assembly Model, the Legislature Model, the National Conference model, an executive directed process; peace negotiations, or some hybrid model that combines two or more of these approaches (<http://www.wws.princeton.edu/pwcr/drafting/models.html>, retrieved on Aug. 30, 2006).

⁶ According to Scharpf (2006), this was one of the reasons why the Commission failed in its first attempt. He argues since the ultimate decision makers where involved in the negotiation processes, they tended to bloc certain proposals without proper consideration. Proposals that form the isolated viewpoint of one of the veto players looked disadvantageous would be rejected early on, even if they would be necessary for a balanced comprehensive solution.

commission was put in the hands of a civil servant from the *Bundesrat* and a consultant for the SPD party caucus in the *Bundestag*. Thus, as far as the distribution of power was concerned, the commission was based on the model of the Mediation Committee of the *Bundesrat*.

The character of a constitutional convention was embodied by the inclusion of non-voting members, i.e. two state parliament presidents, four party caucus leaders from state parliaments, three representatives of municipal peak associations, as well as twelve academic experts. Except for the experts, each advisory member also had a substitute. Including substitutes, but without participating civil servants, the commission numbered a total of 102 individuals (*Dokumentation der Kommission von Bundestag und Bundesrat zur Modernisierung der bundesstaatlichen Ordnung, 2005*).

The six non-voting members representing the state parliaments consisted of the two Presidents of the state parliaments of Schleswig-Holstein and Sachsen-Anhalt, plus four party caucus chairs from the diets of North-Rhine Westphalia (CDU), Hessen (FDP), and Baden-Württemberg (SPD and Green party). The three permanent guests on behalf of the municipal governments were the chief executive officers of the Diet of German Cities (*Deutscher Städtetag*), the Diet of German Counties (*Deutscher Landkreistag*), and the Federation of German Towns and Communities (*Deutscher Städte- und Gemeindebund*). Of the twelve academic experts who would present their opinions in a series of working groups and hearings, six were professors of public law, three came from the discipline of economics and public finance, and three were political scientists (see table 2).

Table 2: Composition of the Federalism Commission 2004 - 2005

In accordance with the hybrid character of the Commission were its relations with the public. Its plenary sessions were partially held in public and partially met in closed session. Working groups were closed to the public. Commission materials and reports were divided into public documents and those circulated only internally. According to one observer's judgment,

“the composition of the Commission and its internal hierarchy, which from the beginning put the strong minister-presidents on the one side and the federal government including

the SPD party caucus leader on the other side into the center of decision-making, as well as its distance from the public did not bode well for [the Commission's] work. This ensured that the decisive power brokers were involved and a resulting compromise would in all likelihood be implemented by law. But it was a major objective of the Commission to create more transparency and more accountable responsibility. To try to achieve these goals behind closed doors was hardly convincing (Renzsch in Hrbek and Eppler 2005, p. 10, my translation).⁷

Whether the exclusion of two specific issues, territorial restructuring and fiscal equalization, impacted the work of the Commission, as was occasionally argued, or not, is an open question.⁸ Declaring Article 29 of the Basic Law regarding the restructuring of the federal territories a “taboo issue” had been a pre-condition for the establishment of the commission. It would have been naïve to assume that small states, which have been fighting vehemently for their continuing existence, would change their position as part of a reform. The omission of the fiscal equalization law probably did preclude certain reform options, even if it is understandable there was little interest in unraveling the package deal agreed upon only a few years earlier in 2001 that regulated the Solidarity Pact and the Fiscal Equalization Law until 2019 (Renzsch in Hrbek and Eppler 2005, p. 11).

The Work of the Federalism Commission

The Commission for the Modernization of the Federal System or *KOMBO* was given only a short window of opportunity to realize its goals; its deliberations were framed, on the one hand, by the debate over a European constitution at the supranational, EU level, and, on the other hand, the work of the

⁷ Renzsch argues that the adoption of the Federalism reform in Switzerland by a referendum in 2004 and the federal modernization in Canada by citizens' assemblies provide examples for successful reforms by way of moving decision making processes in other hands than those of elected officials and politicians whose own interests are closely tied with the structures to be reformed (Renzsch in Hrbek and Eppler 2005, p. 10 f.).

⁸ See for example Gunlicks (2005) who states: “Two important issues—some would say issues crucial to any reform—were omitted from consideration: territorial reform and fiscal equalization. these have been major bones of contention in the federalism reform debate for decades; however, their inclusion in the deliberations would have brought bitter conflict into the deliberations and probably have doomed the enterprise from the beginning.” (p. 1291)

“Federalism Convention” of the German state parliaments at the sub-national level. The Federalism Commission gave itself until December 2004 to decide on and present an actionable legislative proposal to reform Germany’s federal system. How would this newest attempt to reform the German federal system proceed? And what were the chances for success of the German Federalism commission’s work?

The success of the Commission in overcoming the joint decision trap would require changes of the federal constitution, and such changes would have to be adopted by two-thirds majorities in both houses of the legislature. The “three frontiers of potential conflict” within the Commission were:

- between the governing coalition and the opposition in the *Bundestag*
- between the federal government and the *Länder* as a whole; and
- among the diverse groups of *Länder* whose combined votes amount to a blocking minority (24 out of 69 votes) in the *Bundesrat*, especially the gap between the fiscally strong and the fiscally weak states, (Scharpf 2005, p. 5)

The Federalism Commission started its work based on the optimistic assumption that given sufficient problem pressure, all participants would have a certain interest in escaping from their self-inflicted joint decision-making trap. In reverse logic, however, this also means that permanently interlocking policies are not just caused by the institutional specifics of the German federal system, but result to a significant degree from the behavior of policy actors or from the interactions of institutional logic and actors’ preferences. In the Federal Republic of Germany the “price of federalism” is defined by the institutional context of a federalist consensus democracy, which is marked by the institutionalized constraint to find a consensus. This gives all involved actors on both the federal and state level numerous veto points, which can be used to exert influence. This means that it is not the institutions *per se* that produce veto effects but rather the political actors who utilize veto powers. Veto points are thus nothing but “opportunity structures” whose utilization results from the decision of political actors. It follows that the success of a legitimate and appropriate reform policy hinges not only on structural tipping points or institutional “birth defects” but also on the competitiveness and ability to cooperate of political parties

and their representatives in a parliamentary federal system (Lhotta, Höffken, and Ketelhut in Hrbek and Eppler, 2005, p. 20).

The initial consensus underlying the creation of the Commission was a simple tit-for-tat deal: more regional responsibility in exchange for more freedom to act for the federal government (*Der Spiegel*, No. 14, March 29, 2004, p. 38). In other words, the *Länder* were to lose veto power (*Blockademacht*) in the Federal Council in Berlin but would gain more formative power (*Gestaltungsmacht*) at home. However, especially the much discussed recapture of state legislative powers and the clauses allowing “opting out” or “experimentation” would primarily benefit the *Länder* parliaments, whose representatives in the Commission had only a consultative role. The Commission’s 16 voting members representing the state governments, however, had a vital interest to maximize their own powers and not those of the state parliaments. The “mother of all reforms” did not die of a natural death. What was lethal was the fact that the reform would have to be implemented under just those conditions that the reform attempted to overcome (Lhotta, Höffken, and Ketelhut in Hrbek and Eppler, 2005, p. 15ff).

Critiques of excessive interlocking and a lack of efficiency and transparency as well as demands for disentanglement have long been standard arguments in the debates over German federalism (Hrbek and Eppler 2003). However, to effect changes not only requires adequate pressures and preferences for reform among the actors, but also sufficient majorities which are not easy to attain in system of dispersed governance. Thus the best chances for reforms exist when and where there is a convergence between the interests of the federation and the states and no other veto players are involved.

The relevant actors for the success of the federalism reforms in Germany all have strong institutional self-interests, both on the side of the federation as well as the states. The simple yet plausible formula that was designed as a master plan for federalism reform, i.e. “more regional authority in exchange for more freedom to act for the feral government”, underestimated these self-interests because it implied a trade of power shares that was not really desired by all actors, especially not the

state minister-presidents. It was the *Ministerpräsidenten* of the states who since 1949 had benefited the most from the increase in power of the Federal Council and the concomitant “co-governance” of the *Land* chief executives on the federal level. The proposed reduction of bills requiring consent in the *Bundesrat* together with the regaining of legislative competences at the state level would have benefited the state parliaments and not the minister presidents. Thus such a redistribution of power was not attractive for the state executives, especially since the importance of a *Ministerpräsident* is largely dependent on his or her influence at the federal level. Based solely on their positions as leaders of state governments, minister-presidents would just be regional powers. It is precisely their role in the Federal Council that makes them national players (Lhotta, Höffken, and Ketelhut in Hrbek and Eppler, 2005, p. 22).

After almost a year of work, the deliberations of the Federalism Commission seemed to have reached an impasse in November 2004, when the German federal government offered a new proposal that would widely separate the legislative competences of the federation and the states. In a nine-page paper, the federal government “took the offensive in the matter of reforming the federal system” (Spiegel Online, Nov. 10, 2004). The federation was trying for a clear separation in numerous policy areas, among them the university system. The *Länder* would receive broad legislative powers regarding the legal foundations and reform of universities, as well as in terms of deciding over membership and participation in university governance, curricular reform, postgraduate programs, distance education and multimedia instruction, curricular advising, early graduation, publication of research findings, and external funding. According to the Spiegel, “[o]nly regulations governing university entry, quality control, higher education degrees and special civil service law would be transferred to exclusive federal authority” (Spiegel Online, Nov. 10, 2004).

The federal white paper also proposed to shift all decisions concerning the compensation and coverage of *Länder* civil servants to the states. In addition, commercial law with regional implications, e.g. rules for restaurants, gambling halls, and business opening hours, would be handed to the *Länder*, as

well as the penal system. In the area of taxation, the *Länder* would gain legislative authority over wealth taxes, inheritance and gift taxes, so-called “Verkehrssteuern” or transaction taxes, including businesses involving fire protection, real estate sales, gambling, lottery, and insurance taxes. Further proposals included the revenue-neutral combination of certain administrative and fiscal competences and the reduction of the tax bureaucracy, especially the elimination of duplicate federal and state tax agencies. These tasks should be entirely shifted to the federation. In exchange, the federal government would forego to pass any laws that would burden the states with new expenditures.

New or stronger competences would be created for the federal government in the fields of emergency management and criminal investigations. In those areas where the federation and the *Länder* principally share legislative competences (see table 3), federal regulations would take precedence in the future.

Table 3: Legislative Competences of the Federation and States before Sept. 1, 2006

Regarding so-called framework laws, which are to be eliminated as a separate category, the federal government claimed exclusive powers in regards to the registration and identification of individuals, environmental regulations, and the protection of cultural treasures. The federal government would hand to the states legislative authority in the following areas: media law, urban and regional planning, and hunting. Finally, the federal government demanded a strengthening of its position in representing Germany in the European Union and therefore proposes amending Article 23 of the “*Grundgesetz*” (Spiegel Online, Nov. 1, 2004).

Most policy areas in Germany are governed jointly and in close cooperation by the federal and the state governments, and the German model of cooperative federalism delineates a clear separation of competences only in a very few areas, among them education and police. In Germany’s cooperative federalism the area of “self-rule” is markedly smaller than the complex of “shared rule”, thus the debate over reform focused primarily on the concurrent powers of the *Bund* and the *Länder*. Due to the threat of international terrorism and in light of the global competition for the ‘best brains’ in a ‘knowledge

society', the issues of domestic security and education had become central topics in the last decade, and they now featured prominently in the discussion whether policies would be allocated "better" to the federal level or to the state level, both from a normative and a practical point of view (Große Hüttmann 2005, p. 151).

However, because both the federal government and the *Länder governments* made plausible arguments to claim education and domestic security exclusively, their differences over the allocation of competences in these two areas seemed irreconcilable. Since the federal ministers attended the deliberations of the Federalism Commission only as "guests", they attempted to exert influence via a public debate over their various reform proposals. Both Otto Schily (SPD) as the Minister of the Interior and Edelgard Bulmahn (SPD) as federal education secretary showed much public presence through numerous statements and tried to influence public debate and thus sway the negotiations in the Commission indirectly (Große Hüttmann 2005, p. 153). According to Martin Große Hüttmann, the federal government ministers through their strategy of "going public" and their dominant role in the public debate were able to overcome their handicap to be only "guest participants" in the Federalism Commission. Their strategy of going public to frame the debate worked especially well in the areas of domestic security and in education and research policy because the public and media were especially receptive following the widespread discussion over the PISA results and the perceived terrorist threat after September 11, 2001 (Große Hüttmann 2005, p. 170).

Federalism Reform and Education Policy

In December 2004, the two chairs of the Federalism Commission, Edmund Stoiber and Franz Müntefering, presented a 20-page preliminary draft (*Vorentwurf*) that prominently listed the crucial issues on which they couldn't reach agreement in the preface. The Commission chairs, the draft says, had discussed the issues of "higher education law and educational planning, environmental framework laws, domestic security and the authority of the federal criminal police in fighting terrorism, competences in

regards to emergencies and civil protection, and the participation of the states in European questions and EU responsibilities”, but had failed to reach agreement to change the status quo in these areas. Although CSU-boss Stoiber and SPD-leader Müntefering could not find consensus in these five important areas, their proposal would have reduced the number of “consent bills” (*zustimmungspflichtige Gesetze*) by at least a third, i.e. from currently almost 60 percent of all federal bills to about 35-40 percent. The federal government would also gain exclusive authority over legislation regarding weapons and explosives, residential registration and identity cards, production and use of nuclear energy, and “protection of German cultural treasures against migration abroad”. As a countermove, the *Länder* were to gain new exclusive decision-making powers without federal participatory rights in the following legislative areas: housing policy; rights of assembly; penal system; laws governing store opening hours, restaurants, gambling halls, trade shows, exhibitions, and fairs; sale and lease of agricultural real estate; rural zoning laws; settlement and homestead affairs; Sports and Recreation; and general press laws (*Spiegel Online*, 13. December 2004).

Despite the publicly displayed optimism of the Commission chairs Stoiber and Müntefering that their compromise proposal would be adopted at the decisive meeting on Friday, December 17, 2004, the Federalism commission failed to bring about “the mother of all reforms” (Stoiber) because it could not reach agreement in the education policy area. If “[a]ccording to the original expectations, ... reforms ought to result in significantly reduced veto powers of the *Bundesrat* exchanged for significantly enlarged legislative competences of the *Länder*”, Fritz Scharpf (2005) argued, then “[i]n a nutshell, reform failed because both of these expectations were largely disappointed” (p.10).

Specifically it was the conflict between the federation and the states over educational policy competences that overrode all other compromises already agreed upon. The *Länder* had agreed to leave the federal government in charge of university admissions as well as graduation certification, but prohibited the federation from making decisions regarding tuition or curricula. Müntefering called the narrow window that the *Länder* left open for the federation “too small”, whereas Stoiber countered that

the federal proposal would have “made conditions worse for the states” (Spiegel Online, Dec. 17, 2004). It was especially the prime minister of Hesse and aspiring opposition candidate for the chancellorship, Roland Koch of the CDU, who was unyielding in the negotiations. Leaders of both major parties, the Social Democrats and the Christian Democrats, called the failure “harmful to German politics” or even spoke of a “catastrophe for the entire political class”, but blamed their opponents for the breakdown. Commission chair Müntefering commented that the fiasco was of “a huge political scale” and he hoped that all sides would be sufficiently shocked by that to continue working on the reform. But co-chair Edmund Stoiber summed up by saying that “the great chance to achieve a renovation of the Basic Law has been squandered for the coming years.” (Spiegel Online, Dec. 17, 2004)

According to Scharpf, “education ... became the crucial issue *vis-à-vis* the federal government only because it was one on which all *Länder* could be made to agree, and on which no responsible federal government could or should accept total surrender.” (p. 14). “[After] ... the disappointing results of the [2001] PISA study for Germany⁹, politicians had discovered the public’s interest in education. Social Democrats and Greens as well as conservatives started to compete not only regarding the question whether all-day schools might be a remedy [for the poor performance of German students,] but also how to achieve internationally outstanding results in scientific research. On the other hand two Federal Framework Acts for Higher Education introducing “junior professorships” and establishing a ban on tuition fees for first-degree studies were declared unconstitutional by the Federal Constitutional Court. These decisions supported the position of the *Länder* in the committee: being interested in strengthening the influence of the *Länder* in their main field of competence, they were not willing to accept the proposals of the *Bundestag* and Federal Government, claiming that today’s and tomorrow’s challenges increased the need for federal initiatives in this field” (Münch 2005, p. 150).

Most *Länder* prime ministers, especially those from the CDU, blamed the intransigence of the SPD-led federal government for the failure of the Commission. Saxony’s Georg Milbradt accused the

federal negotiators for abandoning the basis of good-faith-talks and not valuing the reform enough to be willing to pay a significant price. Erwin Teufel of Baden-Württemberg charged that the federal government refused to compensate the states for their concessions. The leader of the CDU, Angela Merkel, pointed the finger at the SPD for trying to instrumentalize the conflict over education policy for election campaign purposes. But, she added, Chancellor Schröder had overestimated this opportunity; she argued that since the CDU-governed *Länder* had bested the SPD-led states in the results of the PISA-educational study, the Christian Democrats would have “set the fox to guard the henhouse” if they would have granted the SPD-Green party-led federal government more competences in the educational area (Spiegel Online, Dec. 18, 2004). From the point of view of the red-green coalition government, the situation presents itself exactly reversed, because blame for the failure lays squarely with the Christian Democrats. Federal Minister of Justice Brigitte Zypries of the SPD declared that negotiations with the CDU would never yield reforms. The sharpest attacks by red-green politicians were directed at Roland Koch, the prime minister of Hesse, who was said to bear the greatest responsibility for the reform debacle. The leader of the Green party caucus in parliament, Krista Sager, said that Koch “had prevented an agreement with his irresponsible maximum demands and ultimatums in the educational policy area.” The Hessian prime minister, she added, had once again played his preferred role of reform “blocker” (Spiegel Online, Dec. 18, 2004).

Table 4: The German Länder Governments (2006)

In the issue area that became the crucial bone of contention, education policy, and seemingly led to the initial failure of the Commission in December 2004, the federal government initially had offered few compromises but later was willing to make far-reaching concessions, perhaps inducing the states’ representatives to overdo it by demanding even greater concessions. In addition, the Federal Constitutional Court’s rulings that increasingly seemed to favor states’ rights, especially the decision regarding the unconstitutionality of the “Junior professorships”, encouraged further hopes for a

⁹ The OECD’s “Programme for International Student Assessment” ranked German students only 21st in reading

strengthening of the *Länder* negotiating position, while the efforts of the federal government to gain greater influence in educational matters via new proposals for financing “elite universities” and subsidizing all-day schools (*Ganztagsschulen*) raised resistance among the CDU-led states. This then prepared the ground for sabotaging the deal that formed the crux of any reform compromise through continued strategic demands that would overstretch of the Federal government’s willingness to compromise. It was therefore not a surprise, that in the end the two minister-presidents with the strongest national ambitions, Christian Wulff of Lower-Saxony and Roland Koch of Hesse, would thwart a consensus. Even an increase in the formative powers of their states would not have compensated them for their loss in federal political influence (Mathias Geis, “Jeder für sich, keiner für alle”, in: *Die Zeit* 53, Dec. 22, 2004, p.4).

It was no coincidence that the attempted reform of the relations between the federation and the states, after more than a year of negotiations, in the end failed over the conflict regarding competences in education policy. The publication in fall 2004 of the results of the Programme for International Student Assessment (PISA) by the Organization for Economic Co-operation and Development (OECD) launched, as had the first PISA-study in 2001, a renewed discussion of the structure of the German education system. In an interview on December 7, 2004, then Federal Education Minister Edelgard Bulmahn (SPD) called for the abolition of the three-track school system, especially the elimination of the so-called “main school”, or *Hauptschule* (*Die Welt*, Dec. 8, 2004). A few months later, in a similar vain, the general secretary of the small opposition Free Democratic Party, Cornelia Pieper, called for more federal competences in education policy, kicking of a controversial debate in her own party and provoking calls for her resignation by other leading members of the FDP (*Die Welt*, Jan. 5 2005).

In order to revive the debate over the reform of federalism, in February 2005 interior minister Otto Schily proposed, with the support of Chancellor Schröder, that the federal government should be in charge of a few top universities, while the states would control all the remaining universities. Schily

competence and 20th in both math and science capabilities (OECD PISA 2001).

likened his proposal to the division of labor between the federation and the states in the field of sports policy, where the federal minister for sport is responsible for top sports, and the *Länder* govern mass sports. According to Schily, “this works entirely in an outstanding way – and to the advantage of both sides.” (*Spiegel Online*, Feb. 1, 2005). The essence of Schily’s plan was that the states would retain their general sovereignty in the education field, while at the same time the federal government would be able to set clear priorities. The reaction to the Schily plan by the CDU and CSU was taciturn. CSU boss Stoiber, who continued to negotiate behind the scene with his co-chairman, Franz Müntefering, to salvage the failed reform effort, declared that this “was not a fully developed proposal. But at least it is positive that the federal government is contemplating to end the blockage of the federalism reform it has caused.” (*Spiegel Online*, Feb. 1, 2005).

According to Stoiber, the CDU/CSU position was confirmed by the recent decision by the Federal Constitutional Court to invalidate the federal government’s ban of university tuition and to underscore the states’ authority in education policy. The constitutional judges’ ruling explicitly clarified, in Stoiber’s view, that “education policy was fundamentally a states’ issue.” (*Spiegel Online*, Feb. 1, 2005).

Germany’s highest court ruled on January 26, 2005 that the ban on tuition, imposed by the federal government in 2002, was unconstitutional. The eight-judge panel of the Federal Constitutional Court, in Karlsruhe, decided in favor of the six states of Baden-Württemberg, Bavaria, Hamburg, Saarland, Saxony and Saxony-Anhalt, which had sued to overturn the ban, saying it violated Germany’s postwar Constitution, which makes education the preserve of the 16 states, or *Länder*, rather than the federal government (*The Chronicle of Higher Education*, Jan. 27, 2005). Although presiding judge Winfried Hassemer declared at the beginning of the session that “the Constitutional Court doesn’t make education policy”, the decision in effect will alter Germany’s system of higher education.

In 1998, Baden-Württemberg had become the first federal state to impose tuition on long-term students when it began charging students who had been pursuing their degrees for more than twelve

semesters 1,000 German marks, or about US \$ 550, a semester. That practice was stopped by the federal government's 2002 reform of the Higher Education Framework law, which stated that "study leading to the first qualifying degree is tuition free." This, so the six CDU-governed states argued, violates the educational prerogative of the *Länder*. The Constitutional Court judges largely agreed with this argument defending states' rights, as they had done a few months earlier in July 2004 when they had struck down the federal government's introduction of the "*Juniorprofessorship*" as unconstitutional after an appeal by CDU-governed states such as Bavaria, Saxony and Thuringia.

The first states to introduce general tuition fees in the amount of 500 Euros (about US \$ 650) per semester were North-Rhine Westphalia in 2006 and Baden-Württemberg, Hamburg, and Hessen in 2007. Supporters of tuition argue that the money raised will go to the universities to support teaching and thus directly benefit the about 2 million students in Germany by improving their learning environment. Critics charge that tuition will deter students, particularly those from lower-income families, and point to neighboring Austria, where fees in the amount of 360 Euros per semester led to an initial decline in university enrollment (Spiegel Online, Jan. 26, 2005).¹⁰

How can we explain the initial failure of this "mother of all reforms" (Edmund Stoiber) in the fall of 2004? Fritz Scharpf, who himself had been one of the experts participating in the work of the Commission, writes that "the failure must be explained from the perspective of the blocking minority of big, prosperous and politically ambitious West German *Länder*, especially those governed by the opposition parties." He continues that education "became the crucial issue *vis-à-vis* the federal government only because it was one on which all *Länder* could be made to agree, and on which no responsible federal government could or should accept total surrender. What really stood in the way of successful reform were the underlying conflicts of interest between strong and weak *Länder*. They had always existed, but after German unification their political salience had greatly increased." (p. 14)

¹⁰ The number of enrolled students in Austria declined from 280,000 to 200,000 in 2001. The Austrian Federal Ministry of Education viewed this as a result of updating registration records, and indeed subsequent freshman

According to Scharpf (2005), “party politics had played almost no role in the failure of the Commission. What mattered were differences of institutional self-interest between the federal government and the *Länder* and, above all, the asymmetry of conditions shaping the institutional preferences of the strong and the weak *Länder*.” Scharpf argues that “conditional and controlled opt-outs are probably the only way in which the demand for significantly greater legislative autonomy of the strong *Länder* could have been realized within the constellation of veto players involved in attempts at constitutional reforms in Germany. He concludes that “Germany must move to a more asymmetric constitutional form if its federalism should have a chance to regain the flexibility and resilience which had facilitated the success of the post-war German model (p. 19).

Despite the fact that the Federalism Commission failed over the issue of reassigning the competences in education policy, the Commission’s proposal provided the basis for further negotiations. Thus, on March 17, 2005, at a so-called “jobs summit, Chancellor Gerhard Schröder of the SPD, Foreign Minister and Green party leader Joschka Fischer, CDU chairwoman Angela Merkel, and CSU boss Edmund Stoiber agreed to restart the work on the reform. But Chancellor Schröder’s call for early elections after his party’s loss in the state elections in North-Rhine Westphalia and the subsequent campaigns for the September 20, 2005 federal vote made the resumption impossible.¹¹

The Grand Coalition and the Revival of the Commission’s Work

When, after the federal elections of September 20, 2005, the leaders of the two largest German parties decided to form a grand coalition government and negotiated their coalition contract, they agreed to attempt to revive the Federalism Commission’s reform proposal as part of the grand coalition’s governing program and actually included the Stoiber-Müntefering compromise into the formal document. In contrast to the old red-green federal government that barely attempted to disguise its disinterest in the

enrollments seemed to support that view. In 2004, the total number of students has once again reached the level of 2000 (Spiegel Online, Feb. 24, 2005).

¹¹ It was the loss of the SPD majority in the Mediation Committee of the Federal Council because of the SPD-Green defeat in North-Rhine Westphalia that most likely prompted Schröder to call for early national elections.

reform project, the new grand coalition declared federalism reform to be its prestige project (Scharpf 2006), the first major reform the new government would pass and thus prove its willingness and ability to act. On the side of the *Länder* there were calls to maintain a united front against the federation after the change in coalition governments.

On February 16, 2006, representatives of the federal government and the states finally announced in Berlin that they had resolved the remaining open questions regarding education and environmental law and that the constitutional reform bill would be debated by both the Federal Diet and the Federal Council on March 10, 2006. Although the reform packet did not entail a restructuring of the financial relations between the two sides, it was hailed as the “the most important constitutional reform of the Federal Republic”, which would give both the federation and the *Länder* more creative opportunities to shape policy and enable both sides to act more efficiently (Spiegel Online, Feb. 16, 2006).

What had changed since December 2004 that explains the (albeit belated) agreement? A major cause for consensus was the forming of a “grand coalition” government of CDU and SPD after the federal elections of September 2005. Now both major parties had an interest in passing the reform bill to prove that their coalition government was effective and more than just a care-taker administration whose imminent demise would soon necessitate new elections. The reorganization of federal-state relations had quickly been identified as one of the central reform projects of the new government under Chancellor Angela Merkel (CDU) and Vice-Chancellor Franz Müntefering (SPD). The core of the agreement remained that the *Länder* would relinquish some of their veto powers regarding national legislation in the Federal Council and would receive more legislative authority at the state level in return. In some policy areas governed by federal authority, states would for the first time gain the right to deviate from federal regulations, for instance in environmental and higher education law, in addition to opting out of certain federally mandated administrative procedures and substituting their own implementation measures.¹²

¹² The most extensive constitutional changes affect the so-called concurrent or joint legislative authority of the federation and the states. Federal framework laws as a type of law disappear entirely and are replaced by three new types of concurrent or shared legislation: core legislation (*Kerngesetzgebung*) applying to 18 issue areas ranging

Table 5: Legislative Competences of the Federation and States after Sept. 1, 2006

But soon after this newest breakthrough had been announced, opposition to the consensus agreement arose, especially among the education policy experts in the parliamentary factions of both governing parties. The critics focused particularly on the plan of the negotiation leaders to take away the prerogative of the federal government to independently provide financial support for educational programs. The compromise bill would strengthen *Länder* authority in education policy and prohibit future co-operation between the federation and states. The federal government would only retain its authority to regulate uniform university degrees and college entrance requirements, but it would for instance no longer be able to launch initiatives like its four billion Euro program to create all-day schools. Another point of critique relates to construction of higher education institutions, which the federal government has been massively subsidizing since 1969. No longer would the federal authorities have influence on how their subsidies would be spent. This, feared Edelgard Bulmahn, the former federal minister of education from the SPD, would lead to growing inequality between rich and poor states, and would cement the advantage of prosperous southern states like Bavaria and Baden-Württemberg (*Spiegel Online*, Feb. 17, 2006). If Social Democrats painted the scenario of a regionalization of educational opportunities, even the Christian democratic education experts like the ranking member of the *Bundestag's* education policy committee announced that she would not push hard for passage of the bill or support it enthusiastically, although she also was concerned that changing any aspect of the reform bill would lead to the collapse of the whole bundle (*Spiegel Online*, Feb. 17, 2006). Criticism was also voiced by the opposition parties of Free Democrats, Greens, and the Left Party/PDS, as well as from parents and teachers' association. They also worried about a relapse into parochialism and state particularism

from civil law over labor law to environmental protection; need-based legislation (*Bedarfsgesetzgebung*) involving 10 issue areas ranging from residency over welfare law to human genetics; and opt-out legislation (*Abweichungsgesetzgebung*) covering six areas, among them university admissions and graduation requirements, allowing the *Länder* to pass their own laws when the federal government has not invoked its legislative competences or when it has done so but the state governments pass legislation that deviates from federal rules (see Table 4).

(*Kleinstaaterei*) in the educational system, leading to inequality of educational opportunities between individual federal states (*Spiegel Online*, Feb. 17, 2006).

Despite the support of the federal grand coalition government and almost all of the *Länder* minister presidents, federalism reform continued to encounter opposition. Some commentators supported the need for the reform of German federalism but rejected the particular scheme that had been proposed by the government; experts doubted that the plan would actually accomplish the objective of disentangling the responsibilities of the federation and the states; officials from poorer states insisted that the new system would benefit the richer states at their expense; and interest groups denounced the program when they concluded that the interests of their constituents were negatively impacted (Lehne 2006, p. 18).¹³ Michael Naumann, a former secretary of state for cultural affairs under the Schröder government and prominent editor of the left-liberal weekly *Die Zeit*, attacked the reform in his paper as “a cold revolution”, driven by “the hunger for power of the rich federal states”, the “typical fruit of a committee of scholars and unveiled state egotism,” that amounted to a power grab by the *Länder* and would lead to a “federation of poor and rich particularistic states” (*Die Zeit*, 03/02/2006 Nr. 10). He charged that the gridlock of the 1990s was not the result of outdated constitutional arrangements, but rather the outcome of “Machiavellian strategies” of opposition state minister-presidents in the Federal Council, who, by blocking federal legislation were trying to capture the Federal Chancellery.¹⁴

These various complaints came together mainly in the SPD parliamentary caucus to produce what was characterized as “massive pressure” against the federalism reform proposal, with the

¹³ For instance, the German Culture Council (*Deutscher Kulturrat*), an umbrella organization of German artistic and cultural associations, feared that the reform would harm cultural education in particular. Projects to promote innovation in this area would become virtually impossible with this reform. The Executive Director of the *Kulturrat*, Olaf Zimmermann, said that calling the federalism reform “the mother of all reforms ... suggests that the reform will solve the structural problems in Germany. In reality, this is just horse trading between the federal government and the states” in which the federal government made a deal with the states: in the future, the federation will be able to decide more without having to ask the states, in exchange giving up much federal authority in education and cultural matters to the *Länder* (*Deutscher Kulturrat*, Pressemitteilung 17. Feb. 2006, retrieved from <http://www.kulturrat.de>).

¹⁴ Naumann points out that it was exactly the loss of the majority in the mediation committee of the *Bundesrat* after the SPD defeat in the North Rhine-Westphalia state election in May 2005 that prompted Gerhard Schröder “to throw in the towel” and call for new federal elections that led to his defeat and change in the national government (*Die Zeit*, 03/02/2006).

Parlamentarische Linke and the *Gruppe Netzwerk* inside the SPD faction both demanding substantial changes (Lehne 2006, p. 18).

The *Länder* governments opposed any changes in the carefully negotiated package of reforms, and the grand coalition leadership feared that the plan would unravel if revisions were made to accommodate dissatisfied groups. Nevertheless, federalism reform had become a test of leadership for a government whose substantive accomplishments were limited, and lengthy public hearings as part of the legislative process organized by the *Bundestag*'s Law Committee in May 2006 strengthened the groups that were seeking amendments to the program. After the Coalition Committee and the minister-presidents accepted proposals to mollify some opponents, the federalism reform package was finally approved by the two-thirds majorities required in both the *Bundestag* and *Bundesrat* on June 30, 2006, and July 7, 2006, respectively.¹⁵

The federalism reform represents the most extensive constitutional reform in the history of the Federal Republic of Germany since 1949. A total of 25 articles of the Basic Law were changed or amended. As finally enacted, both sides expected the proportion of measures that would require the approval of the *Bundesrat* to be reduced by half. The *Länder* became fully responsible for elementary and secondary schools, and their authority over research and university education was enhanced. Although the federation could define standards for university admission and graduation, the *Länder* were allowed to deviate from these standards. The federal government was also authorized to fund research and student support programs at universities, so long as the *Länder* approved these initiatives. Rather than follow national standards, the *Länder* governments were now permitted to determine salaries and procedures for state employees, despite the assertion of a major employee group that the end of unified public personnel procedures would lead to ruinous competition among the states. The federation received

¹⁵ The *Bundestag* adopted the bill on June 30, 2006 with 428 Yes-votes against 162 No-votes and 3 abstentions, i.e. at least 40 deputies of the government coalition, mainly from the SPD faction, refused to support the constitutional change. On July 7, 2006 the *Bundesrat* decided with 62 out of 69 votes to adopt the reform. Mecklenburg-Vorpommern was the only state to vote against the reform package and Schleswig-Holstein abstained from the vote.

increased authority in the areas of defense against terrorism, weapons control, nuclear energy, and environmental policy while the states were authorized to determine closing hours for shops and restaurants, impose criminal penalties, set standards for welfare institutions, and deviate from some federal environmental standards. In a last minute compromise, the federation retained authority to regulate notary services, when it was argued that regulation by the *Länder* might lead to competition among the states and, thus, lower fees and less income for notaries (Lehne 2006, p. 19).

But its critics charge that it falls short of being the “reform of the century” as its proponents claim, since it does not succeed in separating federal from state functions, i.e. after all was said and done the veto powers of the Federal Council were hardly reduced and the *Länder* didn’t really receive any greater latitude for their own policies. Critics like German federalism expert Fritz W. Scharpf, himself a member of the panel of experts consulted by the Federalism Commission during its earlier hearings, continued to charge that the reform’s mistake was to aim at a clear separation of the competences of the federation and the states, but that this was indeed impossible in Germany’s federal system. Rather, what would have been needed was a “more intelligent division of labor” than the one adopted, i.e. a more flexible interconnection, which would give the state parliaments more scope to decide, but at the same time prevented them from negatively impacting European issues for instance. Scharpf maintained that the reform effort failed because it did not take the time to reach better solutions by deliberation and because “the wrong people” sat in the Commission. Scharpf argued that a group of “elder statesmen”, experts, and administrators who know the practical problems and the relevant interests but have the requisite independence to think about “new solutions, would have produced a better, more comprehensive reform proposal.”¹⁶

The Federalism reform bill was signed by the Federal President on August 28, 2006, promulgated in the Federal Law Register on August 31, 2006, and thus went into effect the next day, i.e. on September 1, 2006.

¹⁶ See the interview with Fritz W. Scharpf in the *Tageszeitung* from May 8, 2006. Scharpf specifically argued that the Commission was composed of leading decision-makers, i.e. all *Land* Minister presidents and the leaders of the party factions in the *Bundestag*, to ensure that its recommendations would find the necessary majority support. Instead of consisting of the ultimate decision makers, who were prone to immediately veto any specific proposal that from a narrow point of view would disadvantage them, without considering solutions that would have amounted to a

Ultimately, in Scharpf's view, the promised comprehensive federalism reform failed to materialize because the smaller, financially weaker states were afraid of increased competition. Thus, together with the federal ministries, they made sure that the reform remained limited (*taz*, 05/08/2006).

Other critics of the current practices of the German federal system, for instance former Federal Chancellor Helmut Schmidt, complain about the increased influence of the *Länder* minister-presidents on federal policymaking (*Die Zeit*, 09/28/2006). The problem seems compounded under the current grand coalition government under Chancellor Angela Merkel, because the Chancellor lacks a *Hausmacht*, a personal stronghold of power, and depends on the support of powerful CDU and CSU state leaders like Roland Koch from Hesse or Edmund Stoiber from Bavaria for her government's policies.

Conclusion

The paper analyzed the work of the "Federalism Commission" in Germany from its inauguration in the fall of 2003 to the final adoption of its reform proposals in May 2006. Integrating historical-institutional, rational, and sociological explanations, the paper concludes that the Commission's reforms mainly represents the -- sometimes unintended -- consequences of the path-dependent evolution of German cooperative federalism, the Commission members' prior normative commitments and the effects of their previous policy decisions at critical junctures after unification in 1990, such as the limited constitutional and fiscal reforms in 1994 and 2001, respectively. They were also the results of deliberate choices and self-interested utility maximization of powerful key actors in German politics and society, especially the Minister-Presidents of the rich southern and western German states and their poorer colleagues from the five new *Länder* of Eastern Germany. Last not least, they are also the non-rational outcomes of political discourse, cognitive framing and recognition heuristics among decision makers with competing ideas and ideologies, primarily the programmatic commitments of the main parties, CDU/CSU and SPD, to

broader and balanced overall solution befitting of the very complex subject matter (*taz* Nr. 7965 vom 8.5. 2006, page

reform and modernize the federal system while at the same time maintaining the principle of the “equivalency of living conditions”, the intent of their leaders, Angela Merkel and Franz Müntefering, to make the adoption of the Commission’s proposals a show of success for the new grand coalition government, and their repeated public pledges to address and overcome the widespread political disenchantment or *Politikverdrossenheit*.

The federal government wanted to shift certain burdens to the states. The state prime ministers did not want to lose their veto power over federal policies in the Federal Council. Both the Christian-democratic and the Social-democratic members of the Commission had supported shifting more power to the states while in opposition, and now that they formed the government together could not easily go back to opposing reform. Finally, all members of the Commission had committed themselves to “ending the gridlock of federal arrangements” and were locked into their earlier promises to reform federalism through disentangling federal and state competences, strengthening subsidiarity, and increasing *Länder* autonomy.

The reform of German federalism enacted on September 1, 2006 is supposed to make legislation “faster, more efficient and better.” Essentially, the federal government obtained a reduction of the number of laws requiring the consent of the states’ chamber by giving the federal states the right to digress in procedural matters (Burkhart and Manow, 2006, p. 5). Although Fritz Scharpf initially saw the introduction of *Abweichungsrechte* (rights to opt in or out) as a realization of the principle of subsidiarity (KOMBO Dokumentation, Kom-Drs. 87, p 1021), he argues that both the federal government and the southern and western states fell short of their goals and achieved only “Quisquilien” or trifles (Scharpf 2006, p. 10). Burkhart and Manow (2006) come to the conclusion that “the expectation, that [the federalism reform] will lead to an ‘acceleration of decision-making processes’ seems unfounded. A significantly shorter duration of legislative processes should not be expected However, the federalism reform most probably will – in those cases where the consensual veto of the Federal Council no longer

applies – markedly increase the political autonomy to act of the federal government and the parliamentary majority it is based on (p. 18, my translation). This relief effect will not be even. The decrease of obligatory consent will be felt least in fiscal policy, and strongest in social policy, with the caveat that given the current political objective of increased tax funding of the German welfare state, these two policy areas will be increasingly interwoven. Additionally, the relief effect very likely will be much less than has been generally expected up to this point. Overall, the reduction by half of laws requiring consent, as suggested by a study of the Research and Reference Services of the German *Bundestag* seems unrealistic. Especially when it comes to bills that are highly controversial between the federal government and the opposition, the relief effect of the federalism reform will be minimal, because the federal government is unlikely to forfeit its right to specify binding regulations in procedural matters.

To conclude, this paper focused on the work of the “Commission for the Modernization of the Federal System” (“Federalism Commission” for short) in Germany from 2003 to 2004 and the final adoption of its proposals to reform institutional arrangements that had become widely regarded as responsible for the German “*Reformstau*” or “reform gridlock” in May 2006. Integrating historical-institutional, rational, and sociological explanations, the paper assessed whether and to what degree the recent changes of federal arrangements in Germany represent the (un-) intended consequences of actors’ prior normative commitments and subsequent path-dependent development, whether they are the results of deliberate choices and self-interested utility maximization of powerful key actors in German politics and society, or if they are the non-rational outcomes of political discourse, cognitive framing and recognition heuristics among decision makers with competing ideas and ideologies.

The politics of federal reform in Germany were certainly characterized by a mixture of historical constraints, institutional path dependence, normative commitments and rational strategic action by key actors like the Minister-Presidents, members of the federal government, and leaders of the main political parties, who initially opposed each other but then formed a grand coalition government together. But this paper also clearly shows that the perceived pressure to modernize and europeanize German federalism

that had built up since German unification and the creation of the European Union reached a tipping point in the early 1990s. At this critical juncture institutional path dependencies and key actors' preferences opened up enough to provide a window of opportunity to establish the Federalism Commission in November 2003 with the stated goal of ending the reform blockage of the German federal system. It was the failed tit-for-tat deal between the federal government and the state prime ministers, on the one hand, and the asymmetric interests between the *Ministerpräsidenten* of the rich states and those of the poor states that caused the initial failure of the Commissions' work in December 2004. Ultimately, however, it was the pervasive political discourse involving the leaders of both major parties, cognitive framing provided by party programs stressing the necessity of reform, and prior commitments to modernization pervasive across all political parties that opened a new window of opportunity after the federal elections of September 2005 that led to the compromise of the new Grand Coalition government of CDU/CSU and SPD and the eventual adoption of the Commission's proposals in the spring of 2006.

However, many of the major issues of federal reform, such as fiscal equalization and territorial restructuring, remained unresolved and on December 15, 2006, the Federal Diet and the Federal Council decided on the modalities for the formation of a 32-person "Commission for the Modernization of the Federal System-2" to produce a "Federalism Reform II": 16 members from the federal side, among them four ministers of the federal government (the Federal Ministers of Justice, the Interior, Finances, and the Chief of the Chancellor's Office), and the 16 Minister-Presidents. Four members of the Land parliaments will also participate, but without the right to vote, and there will also be representatives of the local and municipal governments' peak associations. The new Commission was officially constituted on January 18, 2007 and is expected to tackle some of the crucial questions that its predecessor failed to resolve or never even addressed.

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Tables and Figures

Figure 1: The Federal Republic of Germany



Figure 2: The Basic Model

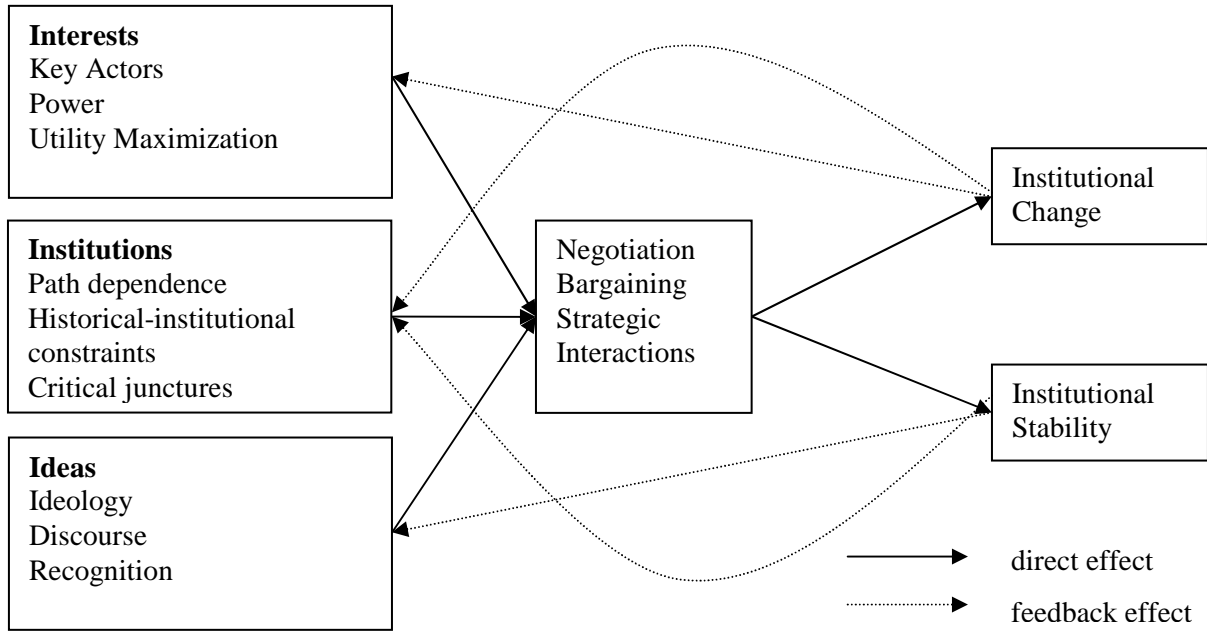


Figure 3: The Model Applied to Germany

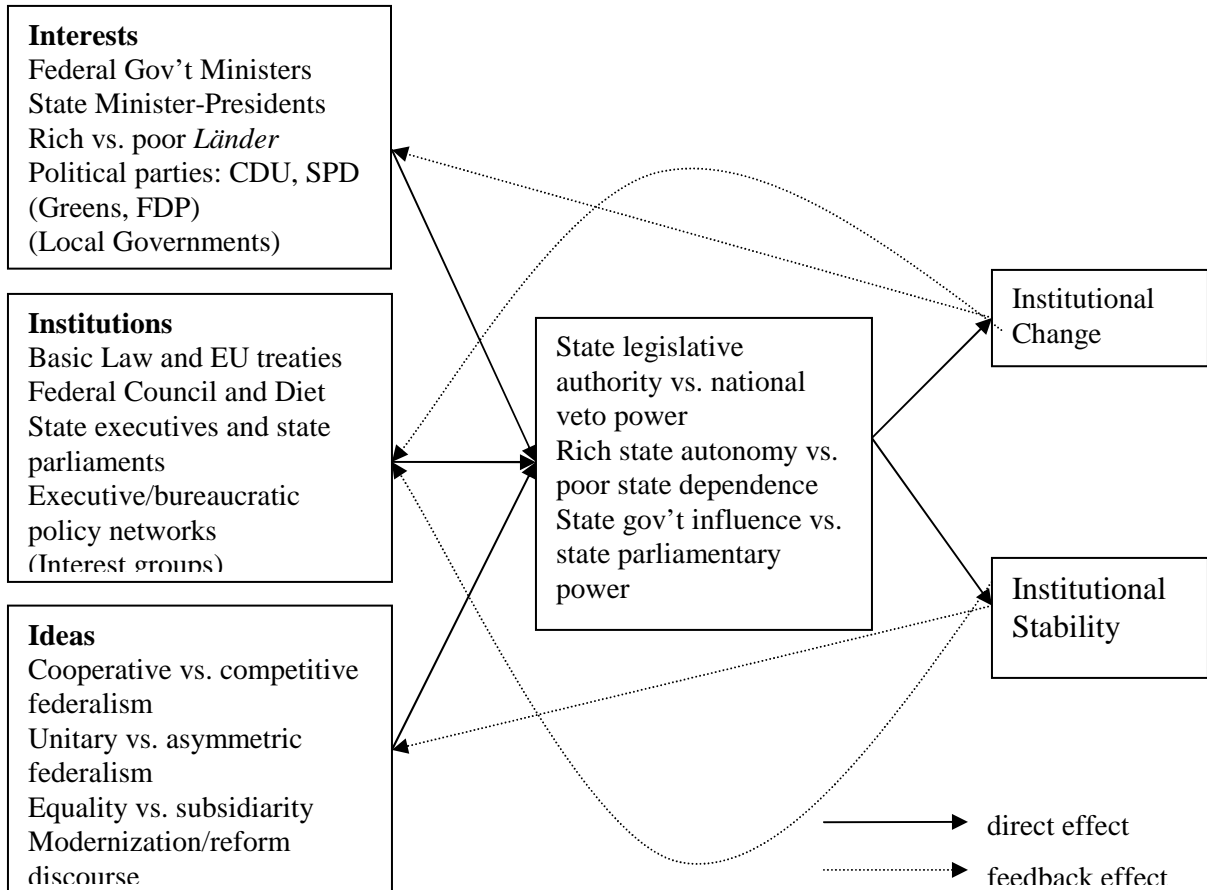


Table 1: Distribution of Seats in the Federal Council (September 2006)

CDU-led B-Länder:		SPD-led A-Länder:	
Baden- Württemberg	6 CDU/FDP	Berlin	4 SPD/PDS
Bayern	6 CSU	Brandenburg	4 SPD/CDU
Hamburg	3 CDU	Bremen	3 SPD/CDU
Hessen	5 CDU	Mecklenburg- Vorpommern	3 SPD/PDS
Nordrhein- Westfalen	6 CDU/FDP	Rheinland- Pfalz	4 SPD/FDP
Niedersachsen	6 CDU/FDP		
Schleswig- Holstein	4 CDU/FDP		
Saarland	3 CDU		
Sachsen	4 CDU		
Sachsen- Anhalt	4 CDU/FDP		
Thüringen	4 CDU		
51 Votes		18 Votes	

35 votes = absolute majority; 46 votes = two-thirds majority; 69 votes = total number of votes

Source: Bundesrat

Table 2: Composition of the Federalism Commission 2004 - 2005

16 Members of the Federal Diet	8 SPD 8 CDU/CSU 1 Alliance 90/The Greens 1 FDP		
16 Members of the Federal Council	16 Minister presidents of Federal States (10 CDU/CSU, 6 SPD)		
4 Non-voting members of the Federal Government	Chief of Staff of the Federal Chancellery (SPD) Federal Minister of Justice (SPD) Federal Minister of Finances (SPD) Federal Minister of Consumer Protection, Food and Agriculture (The Greens)		
6 Non-voting members of the State Diets	2 Presidents of State Diets of SH and SA 4 Party caucus chairs from NRW, BW (2), and H (1 from CDU, SPD, FDP and The Greens each);		
3 Permanent guests	1 Diet of German Cities 1 Diet of German Counties 1 Federation of German Towns and Communities		
12 Academic experts	8 Public/Constitutional Law 2 Economics and Public Finance 2 Political Science		
32 Voting members, 10 Non-voting members, 3 Permanent guests, 12 Academic experts			

Source: KOMBO-Dokumentation

Table 3: Legislative Competences of the Federation and States before Sept. 1, 2006

Federation (<i>Bund</i>)	States (<i>Länder</i>)
Exclusive powers	Exclusive powers
Foreign affairs	Cultural affairs (including broadcasting)
Defense	Education
Citizenship	Health service
Passports, immigration, etc.	Police
Currency matters	
Customs and free movement of goods	
Post and telecommunications	
Framework legislation	
Principles of higher education	
Hunting and conservation	
Press and film industry	
Land distribution and regional planning	
Shared or Concurrent powers	
Civil and criminal law and sentencing	
Registration of births, deaths and marriages	
The law of association and assembly	
Residence and establishment of aliens	
Production and use of nuclear energy	

Source: Smith, in Smith et al. 1992, p. 41

Table 4: The German *Länder* Governments (2006)

Land	Inhabitants in Mio.	Minister- President	Votes in <i>BR</i>	Governing Parties
Baden-Württemberg	10,65	Öttinger	6	CDU/FDP
Bayern	12,38	Stoiber	6	CSU
Berlin	3,39	Wowereit	4	SPD/PDS
Brandenburg	2,58	Platzeck	4	SPD/CDU
Bremen	0,66	Scherf	3	SPD/CDU
Hamburg	1,73	von Beust	3	CDU
Hessen	6,09	Koch	5	CDU
Mecklenburg-Vorpommern	1,75	Ringstorff	3	SPD/PDS
Niedersachsen	7,98	Wulff	6	CDU/FDP
Nordrhein-Westfalen	18,07	Rüttgers	6	CDU/FDP
Rheinland-Pfalz	4,05	Beck	4	SPD/FDP
Saarland	1,07	Müller	3	CDU
Sachsen	4,36	Milbradt	4	CDU
Sachsen-Anhalt	2,56	Böhmer	4	CDU/FDP
Schleswig-Holstein	2,81	Carstens	4	CDU/FDP
Thüringen	2,40	Althaus	4	CDU

Source: Statistisches Bundesamt, Stand: 30.09.2006

Table 5: Legislative Competences of the Federation and States after Sept. 1, 2006

Federation (<i>Bund</i>)	States (<i>Länder</i>)
Exclusive powers	Exclusive powers
Residency and Identity Cards (Art. 73 Abs.1 Nr. 3 GG) Protection of German cultural treasures against export (Art. 73 Abs.1 Nr. 5 a GG) Defense against the threats of international terrorism through the Federal Criminal Police in specific cases (Art. 73 Abs.1 Nr. 9a GG) Statistical data collection for federal purposes- (Art. 73 Abs.1 Nr.11 GG) Weapons and explosives law (Art. 73 Abs.1 Nr. 12 GG) Care for war victims, their dependants, and former prisoners of war (Art 73 Abs.1 Nr. 13 GG) Production and use of nuclear energy for peaceful purposes (Art. 83 Abs.1 Nr.14)	Cultural affairs (including broadcasting) Education Health service Police
Shared or Concurrent powers	
Core legislation	
<ul style="list-style-type: none"> - Civil and criminal law, courts structure and sentencing (Art. 74 Abs.1 Nr. 1 GG) - Registration of marital status (A. 74 Abs.1 Nr. 2 GG) - Law of associations (Art. 74 Abs.1 Nr. 3 GG) - War damages and reparations (Art. 74 Abs.1 Nr. 9 GG) - War graves (Art. 74 Abs.1 Nr. 10 GG) - Labour law (Art. 74 Abs.1 Nr. 12 GG) - Federal Expropriations (Art. 74 Abs.1 Nr. 14 GG) - Law of cartels (Art. 74 Abs.1 Nr. 16 GG) - Agriculture and fisheries (without consolidation of farmland) (Art. 74 Nr.13 GG) - Land distribution and reform (Art. 74 Abs.1 Nr.18 GG) - Health law (Art. 74 Nr. 19 GG) - Maritime shipping (Art. 74 Abs.1 Nr. 21 GG) - Railroads (Art. 74 Abs.1 Nr. 22 GG) - Waste disposal (Art. 74 Abs.1 Nr. 24 GG) - Civil service law (Art. 74 Abs.1 Nr. 27 GG) - Hunting licensing (Art. 72 Abs.3 Nr.1 GG) - General principles of environmental protection, nature conservation, and protection of endangered species or sea life (Art. 72 Abs.3 Nr. 2 GG) - Environmental protection relating to resources and installations (Art. 72 Abs.3 Nr. 5 GG) 	
Need-based legislation	
<ul style="list-style-type: none"> - Residency law (Art. 74 Abs.1 Nr. 4 GG) - Public welfare (Art. 74 Abs.1 Nr. 7 GG) - Commercial Law (without store closing time regulations) (Art. 74 Abs.1 Nr. 11 GG) - Education and training grants (Art. 74 Abs.1 Nr.13 GG) - Social welfare (Art. 74 Abs.1 Nr. 15 GG) - Hospital law (Art. 74 Abs.1 Nr. 19a GG) - Food safety, Animal protection (Art. 74 Nr. 10 GG) - Traffic regulations (Art. 74 Abs.1 Nr. 22 GG) - Government liability (Art. 74 Abs.1 Nr. 25 GG) - Human genetics (Art. 74 Abs.1 Nr. 26 GG) 	

Opt-out legislation

- Hunting (without hunting licensing) (Art. 72 Abs. 3 Nr. 1 GG)
- Environmental protection, nature and land conservation (without the general principles of environmental protection, nature conservation, protection of endangered species or sea life) (Art. 72 Abs. 3 Nr. 2 GG);
- Land distribution (Art. 72 Abs. 3 Nr. 3. Art. 74 Abs.1 Nr. 30 GG);
- Regional planning (Art. 72 Abs.3 Nr. 4 GG; Art. 74 Abs.1 Nr. 31 GG);
- Water resources (without regulations regarding chemicals and installations) (Art. 72 Abs. 3 Nr. 5 GG);
- University admissions and graduation (Art. 72 Abs. 3 Nr.6; Art. 74 Abs.1 Nr. 33 GG)

Source: