



Case Western Reserve Law Review

Volume 18 | Issue 1

1966

Federalism as a Limitation on the Treaty Power of the United States, West Germany, and India

F. L. Hartman

Follow this and additional works at: <https://scholarlycommons.law.case.edu/caselrev>



Part of the [Law Commons](#)

Recommended Citation

F. L. Hartman, *Federalism as a Limitation on the Treaty Power of the United States, West Germany, and India*, 18 W. Res. L. Rev. 134 (1966)

Available at: <https://scholarlycommons.law.case.edu/caselrev/vol18/iss1/10>

This Article is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Law Review by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

Federalism as a Limitation on the Treaty Power of the United States, West Germany, and India

F. L. Hartman

The complexity of the world political situation and the concomitant need for effective treaty-making powers have created problems for governments based on the federal system, one of the most perplexing of which is how to strike a balance between the importance of a unified front in external affairs and the desire to preserve the sovereign rights of constituent states. Mr. Hartman examines the constitutions of three federal governments, the United States, India, and West Germany, and compares their approach to the problem. Although the author feels that the organic law of the federation can provide a partial solution, he concludes that an examination of case law and internal agreement or legislation demonstrates that the most workable solution lies in self-restraint and cooperation between the central government and its component states.

THE PROBLEMS which a federal system often creates for a national government in its conduct of foreign affairs continues to concern jurists and students of government. An especially perplexing question is that of how best to strike a satisfactory balance between

the increasing need for unified federal action in external affairs on the one hand and the desire to maintain a dual system of internal government on the other. The proposed Bricker Amendment of 1952 in the United States¹ and the

THE AUTHOR (B.A., University of Iowa, LL.B., University of Michigan) is a member of the Michigan Bar Association and was a 1964-1965 Michigan Law School fellow at the Max-Planck-Institute for Foreign Public Law and International Law, Heidelberg, Germany.

Lindauer Agreement of 1957 in the Federal Republic of Germany² are but two differing examples of possible accommodation. Indeed, it remains to be seen whether a federation can effectively participate in modern international affairs and at the same time maintain its internal federal character.

The primary legal question which will be explored here is the extent to which a division of authority between central government and component states limits the power of a federation to conclude and domestically execute international agreements. Greatest emphasis will be given to the problem as it arises in American law, and

¹ S.J. Res. 130, 82d Cong., 2d Sess. §§ 2-3 (1952).

² See material quoted note 83 *infra*.

comparisons will be made, where appropriate, to the federations of West Germany and India.

I. THE TREATY POWER AS CONSTITUTIONALLY DEFINED

Although 176 years have elapsed since the ratification of the United States Constitution and hundreds of cases involving treaties have been litigated before the Supreme Court as well as before lower courts, the exact scope and limits of the national treaty power remain something of a mystery. The Constitution contains three articles and one amendment which are of foremost importance in defining the treaty power.

Article II, section 2 provides that, "He [the President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur" The President is thereby empowered to enter into treaties with foreign nations, contingent upon the prescribed ratification by the Senate. The House of Representatives is altogether excluded from the treaty-making process, and the entire Congress is excluded from the process of negotiation.

Article VI provides that "This Constitution, and the laws of the United States which shall be made in Pursuance thereof: and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." The significance of this article is twofold: treaties are to have the status of national law *if* made under the authority of the United States, and state organic and statutory law must give way to federal treaties with which they conflict.

The two remaining applicable constitutional provisions further define the relationship between the states and the treaty-making power, first, by denying any power to the states to enter into treaties with foreign governments and, secondly, by placing powers not delegated to the national government beyond its reach. Article I, section 10 provides that "No State shall enter into any Treaty, Alliance, or Confederation . . . or . . . shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power." Finally, amendment X specifies that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The meaning of the former provi-

sion is apparent, but the effect of the tenth amendment as a limitation on the federal treaty power remains in doubt. Nevertheless, it is clear that no aspect of the treaty-making power is reserved to the states.

The Grundgesetz of West Germany³ likewise has established a central government of delegated powers, with the residue being reserved to the constituent states (Länder). In this respect, article 30, GG,⁴ serves the same function as the tenth amendment to the American Constitution. Although no supremacy clause for treaties comparable to article VI of the United States Constitution is contained in the Grundgesetz, article 31 (supremacy of federal law over Land law) together with article 59 (requiring the transformation by legislation of most treaties into federal law) produce the same effect. The only striking contrast between the American Constitution and the Grundgesetz in relation to the treaty power is that the latter, in article 32, reserves a limited treaty-making power to the Länder and requires the central government to consult particular Länder regarding proposed treaties affecting their special interests.

As a practical matter, it is questionable whether the treaty-making power of the Länder is a significant one. In the first place, the Länder may not conclude treaties except with the permission of the central government and then only in those areas in which the Länder are competent to legislate, either concurrently or exclusively.⁵ The Länder are further limited by the fact that they may neither establish consulates or diplomatic offices in foreign countries nor receive on an established basis diplomatic representatives from foreign nations.⁶ In order to deal with foreign countries at all, a Land would either have to work through the federal Foreign Ministry or establish an *ad hoc* committee to negotiate such treaties.

The requirement that Länder whose special interests will be affected by a treaty be consulted by the federal government likewise does not appear to be a significant limitation upon the treaty power

³ The Grundgesetz, translated as "Basic Law," currently serves as the German constitution. It is not called a constitution because it was written and accepted by the German states (in German, states are Länder and are referred to in the singular as Land) as a temporary organic law of West Germany to be replaced by a constitution at such time as East and West Germany were reunified. The term Grundgesetz is often abbreviated as GG, as it will be in this article.

⁴ Article 30 reads as follows: "The exercise of the powers of the state and the discharge of state functions is the concern of the Länder, insofar as this Basic Law does not otherwise prescribe or permit."

⁵ GG art. 32(3).

⁶ 1 MAUNZ-DÜRIG, GRUNDGESETZ KOMMENTAR art. 32, at 23-24 (1964) (Comment by Maunz).

of the federation. This constitutional requirement is presumed to mean only that the Land affected is to be given an opportunity to formally express its views on the proposed treaty prior to its ratification. It does not appear to imply that the Land must give its formal consent to the ratification or that the federation may not conclude the treaty in the event the Land concerned opposes it.⁷

The Indian Constitution, in contrast to the Grundgesetz and the United States Constitution, provides for a delegation of powers to both the central government and the states, with the residue vested exclusively in the former.⁸ Furthermore, article 253 gives the Indian Parliament the power to make any law implementing any treaty, agreement, or any decision made at any international conference, convention, association or other body, notwithstanding the exclusive grant of some powers to the states. The Indian Constitution leaves no doubt that the central government has plenary power to implement treaties, as well as non-obligatory recommendations of international groups without consideration for exclusive state powers. Similar to the Grundgesetz, Indian treaties are not automatically the supreme law of the land until they have been transformed into federal law, and the distinction between self-executing and non-self-executing treaties is of little practical importance in contrast to the situation in the United States.⁹

The Union government of India is granted the constitutional power to enter into all types of treaties and to pass implementing legislation which may encroach upon exclusive state powers, and the states are thereby denied any right or power to enter into treaties with foreign states. The constitution does not state the prohibition in affirmative terms but simply grants all such power to the central government with no residuum for the states. One Indian writer

⁷ *Id.* art. 30, at 8.

⁸ INDIAN CONST. entry 97, list 1, 7th schedule. See also art. 248.

⁹ There are some exceptions, however. As to some matters, India has simply followed the precedents of British law in declaring that some types of treaties are domestically enforceable even without implementing legislation. Acquisition of territories, for example, is considered to be an act of state, and a treaty incorporating new territory into the Union would be internally enforceable without the legislative aid of Parliament. See *Union of India v. Manmull Jain*, All India Rep., 1954 Calcutta 615. The same is true of treaties by which foreign sovereigns waive their immunities. See *Kunwar Bishwanath Singh v. Commissioner of Income-Tax*, 10 I.T.R. 332 (1942). On the other hand, treaties which diminish or alter boundaries of any of the component states would presumably, under articles 3 and 4, require implementing legislation. It should be noted in this connection that the right and powers of the states are not limitations upon the federal treaty-making power. The constitution, article 3, provides only that the views of the states concerned must be first ascertained before the federal government may alter or diminish state boundaries by treaty.

compares this lack of state power to participate in the treaty-making process with the United States system and concludes:

This [Indian denial of treaty-making power to the states] is not, however, exactly the position under other federal constitutions. For instance, in the United States of America, the Constitution recognizes the right of the States to conclude treaties with foreign Powers, but this right can only be exercised with the consent of the Federal Congress.¹⁰

This comparative observation is, of course, incorrect. The American states are absolutely prohibited by article I, section 10, from entering into any treaty, alliance, or confederation. Since the prohibition is absolute, it may not be avoided by congressional consent. The third clause of article I, section 10, forbids the states to enter into *agreements* or *compacts* with other states or foreign powers, except with the permission of Congress. The Supreme Court in *Holmes v. Jennison*¹¹ reasoned that "as these words [agreement or compact] could not have been idly or superfluously used by the framers of the constitution, they cannot be construed to mean the same thing with the word treaty."¹² Thus, the only difference in this regard between the American and Indian systems is that although the latter's constitution does not expressly prohibit states from entering into treaties, both effectively foreclose the exercise of the treaty-making power by the states.

II. TREATY INTRUSION UPON POWERS TRADITIONALLY EXERCISED BY THE COMPONENT STATES

Although the government of the United States is one of delegated powers, such a generalization does not tell the whole story. The Congress, for example, may enact legislation which is "necessary and proper" for the execution of its enumerated powers.¹³ Thus, it often occurs that subject matter formerly regulated only by the states may come under federal regulation even though no express grant of power to Congress to regulate the matter is to be found in the Constitution. More notable federal invasions upon areas normally or originally regulated by the states are the following activities: punishment of crimes,¹⁴ chartering of banks¹⁵ and corpora-

¹⁰ SEN, A COMPARATIVE STUDY OF THE INDIAN CONSTITUTION 318 (1960).

¹¹ 39 U.S. (14 Pet.) 540 (1840).

¹² *Id.* at 571-72.

¹³ U.S. CONST. art. 1, § 8.

¹⁴ The most recently created crime, formerly punishable by state law only, is murder of the President. 18 U.S.C. § 1751 (Supp. I, 1965).

¹⁵ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

tions,¹⁶ regulation of intrastate commerce,¹⁷ and, most recently, the regulation of public accommodations such as restaurants, hotels, and movie houses in order to prevent racial discrimination.¹⁸

It has been further recognized by the Supreme Court that in relation to the conduct of foreign affairs, the central government is likewise not limited to the exercise of delegated powers. Such was the purport of Mr. Justice Sutherland's statement in *United States v. Curtiss-Wright Export Corp.*¹⁹ to the following effect:

It will contribute to the elucidation of the question if we first consider the differences between the powers of the federal government in respect of foreign or external affairs and those in respect of domestic or internal affairs

The two classes of powers are different, both in respect of their origin and their nature. The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs. . . .²⁰

It results that the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution.²¹

Thus, the broad proposition consistently asserted by the Supreme Court has been that federal treaties may extend into areas of regulation and control traditionally left to the states. As stated by Mr. Chief Justice Hughes in *Santovincenzo v. Egan*,²² "The treaty-making power is broad enough to cover all subjects that properly pertain to our foreign relations, and agreement with respect to the rights and privileges of citizens of the United States in foreign countries, and of the nationals of such countries within the United States . . . is within the scope of that power . . ." ²³ In *United States v. Belmont*,²⁴ the Court asserted that "in respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear."²⁵ In *United States v. Pink*,²⁶ Mr. Justice

¹⁶ *Clallam County v. United States*, 263 U.S. 341 (1923).

¹⁷ *United States v. Wrightwood Dairy Co.*, 315 U.S. 110 (1942).

¹⁸ Civil Rights Act of 1964, §§ 201-1106, 78 Stat. 243, as amended, 42 U.S.C. §§ 2000 a-h (1964).

¹⁹ 299 U.S. 304 (1936).

²⁰ *Id.* at 315-16.

²¹ *Id.* at 318.

²² 284 U.S. 30 (1931).

²³ *Id.* at 40.

²⁴ 301 U.S. 324 (1937).

²⁵ *Id.* at 331.

²⁶ 315 U.S. 203 (1942).

Douglas, speaking for the Court, pointed out that "power over external affairs is not shared by the States; it is vested in the national government exclusively. It need not be so exercised as to conform to state laws or state policies, whether they be expressed in constitutions, statutes, or judicial decrees."²⁷ And finally, in the famous case of *Geofroy v. Riggs*,²⁸ Mr. Justice Field described the treaty power as not extending

so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent. . . . But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country.²⁹

The rule suggested by these cases can perhaps best be understood in terms of the theory of concurrent powers. The treaty power may extend to matters not specifically reserved to the states but which otherwise have been left to the states as "local" matters, and when such treaty power is exercised, contrary state laws must give way. An interesting example of the operation of this rule is *Asakura v. City of Seattle*.³⁰ In that case, the city of Seattle had passed an ordinance in 1921 requiring all pawnbrokers to obtain a license which was available to citizens of the United States only. The plaintiff, a subject of Japan, argued that the 1911 treaty between the United States and Japan guaranteed that citizens of either nation should be at liberty in the territory of the other to engage in all classes of trade and that this treaty took precedence over the Seattle ordinance. In accepting the plaintiff's argument, the United States Supreme Court observed:

In this country, the practice of pledging personal property for loans dates back to early colonial times, and pawnshops have been regulated by state laws for more than a century. We have found no state legislation abolishing or forbidding the business. Most, if not all, of the States provide for licensing pawnbrokers and authorize regulation by municipalities. While regulation has been found necessary in the public interest, the business is not on that account to be excluded from the trade and commerce referred to in the treaty.³¹

²⁷ *Id.* at 233.

²⁸ 133 U.S. 258 (1890).

²⁹ *Id.* at 267.

³⁰ 265 U.S. 332 (1924).

³¹ *Id.* at 343.

Thus, by exercise of the treaty power, the federal government may regulate alien land holdings within any of the states,³² employment of aliens,³³ protection of migratory birds,³⁴ as well as inheritance taxes upon aliens,³⁵ and the rights of alien creditors against United States citizens.³⁶ These are matters which one might say were always possible subjects of treaties and which were regulated locally until international considerations necessitated regulation on an international level. As suggested by Professor Henkin, if, before the conclusion of a treaty, this type of subject matter is left to the states to regulate, it is only a "defeasible" power, "subject at any time to the assertion of the federal interest by treaty, just as in some other areas of federal power the States may act in the absence of federal regulation."³⁷

In American federalism, as in perhaps most federal systems, there is a tendency on the part of the constituent states to jealously guard their presumed rights and powers against federal encroachment, particularly whenever ambiguity exists as to where federal power ends and state power begins. Ambiguity has arisen in American law as the result of two factors: first, the constitutional doctrine that the central government may regulate otherwise local matters when necessary to carry out its clearly defined powers and, second, the difficulty of distinguishing between the powers reserved to the states by the Constitution and the powers actually exercised by the states in the absence of federal legislation. The latter powers were, of course, originally much broader than the constitutionally reserved powers. And from the point of view of the states, all the powers which they have actually exercised at one time or another ought to be recognized as constitutionally reserved powers. Obviously, such is not the case.

The Indian Constitution presents no significant problems along this line, since the constituent states possess no powers other than those enumerated in the constitution, and those so enumerated may unquestionably be invaded by the central government for purposes of concluding and implementing treaties and non-obligatory international recommendations.

³² *Geofroy v. Riggs*, 133 U.S. 258 (1890).

³³ *In re Parrot*, 1 Fed. 481 (C.C. Cal. 1880).

³⁴ *Missouri v. Holland*, 252 U.S. 416 (1920).

³⁵ *Nielsen v. Johnson*, 279 U.S. 47 (1929).

³⁶ *Ware v. Hylton*, 3 U.S. (3 Dal.) 199 (1796).

³⁷ Henkin, *The Treaty Makers and the Law Makers: The Law of the Land and Foreign Relations*, 107 U. PA. L. REV. 903, 909 (1959).

The Grundgesetz would likewise appear to present no serious problems of this kind. The Federal Parliament has not been recognized as possessing any implied powers capable of invading the competence of the Länder other than the very limited and still doubtful powers arising from the concepts of *Sachzusammenhang* and *Natur der Sache*.³⁸ Theoretically, it is perhaps possible that in the future these two notions might be utilized by the German Constitutional Court to recognize implied powers of Parliament to implement treaties by invading some of the lesser or questionably reserved legislative powers of the Länder, but the seventeen years of German experience with the Grundgesetz does not yet afford an adequate basis for prediction.

III. RESERVED POWERS OF THE STATES AS A LIMITATION ON THE FEDERAL TREATY POWER

Although it appears settled in America that the treaty power may invade areas normally controlled by the constituent states, the question remains as to which, if any, of the constitutional limitations upon the central government are also applicable to the treaty power. If any are applicable, is the tenth amendment among them?

The problem may be approached from two directions. One might ask whether the treaty power is limited only to matters which the central government may expressly or impliedly regulate. Or one might question whether there are any reserved state powers which may not be encroached upon either by Congress or by the treaty power. In either approach the basic problem for determination is what relationship the Constitution bears to the treaty power. The difficulty arises from article VI of the Constitution which indicates what shall be the "supreme law of the land." The article lists three categories of supreme law — the Constitution itself, laws of the United States made in pursuance of the Constitution, and treaties made under the authority of the United States. Article VI suggests that whereas the laws of the United States must be "constitutional" in order to be supreme, treaties need only be made by authority of the United States and, by implication, are not subject to the constitutional limitations applicable to the laws of the United States. It is generally recognized, however, that the Constitution stands at the

³⁸ For a discussion of these concepts, see Judgment of June 16, 1954, Bundesverfassungsgericht, 3 Entscheidungen des Bundesverfassungsgerichts 407 (Ger. Fed. Rep.); 1 MAUNZ-DÜRIG, *op. cit. supra* note 6, art. 30, at 8-9. For a discussion in English, see Kauper, *The Constitutions of West Germany and the United States: A Comparative Study*, 58 MICH. L. REV. 1091, 1143 (1960).

pinnacle of the legal system and that no other form of domestic or international law is accorded a higher or even an equal municipal status. Accordingly, there is no question of whether the treaty power may override the Constitution. Rather, the question is whether the treaty power is exempted from any of the constitutional limitations otherwise imposed upon the central government, and if so, which ones.

Of the hundreds of treaties subjected to judicial review by the Supreme Court, none has ever been found unconstitutional. Whether this indicates the great breadth of the treaty-making power or simply the past cautiousness of the President and Senate in ratifying only those treaties free of constitutional defects is impossible to determine. Yet because the high Court has not declared a treaty unconstitutional, no one can be certain exactly what such a treaty looks like. The American jurist has only dicta to rely upon in estimating the bounds of the treaty power, for the Supreme Court has thus far only broadly and hypothetically stated what the limits are. The only limit suggested in the cases is that treaties must observe constitutional prohibitions: "The prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or by the Executive and the Senate combined."³⁹ Is the tenth amendment one of these prohibitions, and, if so, what powers does the tenth amendment reserve exclusively to the states and thereby place beyond the reach of the treaty power?

Mr. Justice Roberts, speaking for the Court in *United States v. Sprague*,⁴⁰ suggests that the tenth amendment taken alone has no constitutional significance: "The Tenth Amendment was intended to confirm the understanding of the people at the time the Constitution was adopted, that powers not granted to the United States were reserved to the States or to the people. It added nothing to the instrument as originally ratified . . ."⁴¹ Professor Corwin reaches a similar conclusion:

That this provision was not conceived to be a yardstick for measuring the powers granted to the Federal Government or reserved to the States was clearly indicated by its sponsor, James Madison, in the course of the debate which took place while the amendment was pending concerning Hamilton's proposal to establish a national bank. He declared that: "Interference with the

³⁹ Reid v. Covert, 354 U.S. 1, 17 (1957).

⁴⁰ 282 U.S. 716 (1931).

⁴¹ *Id.* at 733.

power of the States was no constitutional criterion of the power of Congress. If the power was not given, Congress could not exercise it; if given, they might exercise it, although it should interfere with the laws, or even the Constitutions of the States."⁴²

The Supreme Court's view of the tenth amendment has been slow in evolving and has been greatly influenced by the exigencies of national life. Beginning in 1871, the Court first utilized the amendment as an independent limitation upon the federal government to nullify otherwise constitutional acts of Congress.⁴³ Beginning in 1918 and for two decades thereafter, the Court found in the amendment prohibitions with respect to the federal government's regulation of economic activities.⁴⁴ It was not until the depression of the 1930's proved the necessity for national action that the Court began to take a new and less sympathetic look at the tenth amendment. By 1941, the Court had fully reversed itself so that Mr. Chief Justice Stone, supported by a unanimous Court, was able with one stroke to snuff out most if not all of the earlier vitality of the tenth amendment by describing it as "a truism that all is retained which has not been surrendered."⁴⁵

This constitutional development, of course, involved only the struggle between the powers of the states and those of the Congress and not the conflict between states and the treaty power. However, since the treaty-making power is no less broad than the powers of Congress, what was said by the Court of the tenth amendment in relation to congressional powers is equally applicable to the treaty power.

Further, the much-discussed case of *Missouri v. Holland*⁴⁶ at

⁴² CONSTITUTION OF THE UNITED STATES OF AMERICA, 1035 (Small ed. 1964).

⁴³ *Collector v. Day*, 17 U.S. (11 Wall.) 113 (1871).

⁴⁴ *Hammer v. Dagenhart*, 247 U.S. 251 (1918); *Hill v. Wallace*, 259 U.S. 44 (1922); *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *United States v. Butler*, 297 U.S. 1 (1936).

⁴⁵ *United States v. Darby*, 312 U.S. 100, 124 (1941).

⁴⁶ 252 U.S. 416 (1920). The facts of the case are, summarily, as follows: In 1913, Congress passed the first Migratory Birds Act, 37 Stat. 847 (1913), to give national protection to certain wild game birds which, because of their semiannual migration from state to state, could not be protected by the laws of any one state. The act provided that "migratory game . . . which . . . do not remain permanently the entire year within the borders of any State or Territory, shall hereafter be deemed to be within the custody and protection of the government of the United States, and shall not be destroyed or taken contrary to regulations" to be made by the Department of Agriculture. *Ibid.* The act was held invalid in two lower federal courts on the ground that the power sought to be exercised had never been delegated by the states or people and therefore remained a tenth amendment reserved power. *United States v. Shauver*, 214 Fed. 154 (E.D. Ark. 1914); *United States v. McCullagh*, 221 Fed. 288 (D. Kan. 1915). In 1916, a treaty between the United States and Great Britain, acting on behalf of Can-

least implied that the treaty power is even broader than the powers of Congress and that although the tenth amendment may stand generally as a limitation upon the implied powers of Congress to enact purely domestic legislation, it is not a limitation on the implied powers of Congress to implement treaties. As Mr. Justice Holmes indicated in the opinion, "It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could . . ."⁴⁷ It is significant to note that this opinion was premised upon two assumptions. First, Holmes assumed without deciding that because of the tenth amendment, Congress did not have the power to regulate migratory birds in the absence of a treaty on this subject. Secondly, Holmes hypothesized that a matter of national gravity could arise with which Congress would be powerless to deal, other than in pursuance of a ratified treaty. In view of the subsequent development of constitutional law, it is highly doubtful that either assumption would be warranted today. As has been pointed out earlier, beginning in the late 1930's, the Supreme Court has steadily liberalized its view of the implied powers of Congress, particularly when faced with "national exigencies," and at the same time has become increasingly cautious in giving any substantive meaning to the tenth amendment as a general limitation upon the central government. Indeed, there are jurists today who assert that the powers of Congress are every bit as broad as the treaty-making powers of the President and Senate.⁴⁸

One should not conclude, however, that the foregoing indicates that the states are totally unprotected from intrusion upon their powers by treaties. There are cases suggesting specific limitations upon the right of the treaty power to invade the jurisdiction of the states. In *Patsone v. Commissioner of Pa.*,⁴⁹ state law denied an Italian citizen residing in Pennsylvania the right to carry firearms despite his argument that he was a farmer who needed to have a gun and that the statute violated a treaty provision permitting Italians

ada, was ratified in order to provide international protection of migratory birds. The Migratory Birds Act was again enacted by Congress in 1918 with a few incidental changes, this time as legislation implementing a treaty, Migratory Bird Treaty Act, 40 Stat. 755 (1918), as amended, 16 U.S.C. §§ 703-11 (1964). The state of Missouri brought a bill in equity against the United States game warden to prevent enforcement of the act.

⁴⁷ 252 U.S. at 433.

⁴⁸ For an interesting development of this thesis, see Henkin, *The Treaty Makers and the Law Makers: The Law of the Land and Foreign Relations*, 107 U. PA. L. REV. 903 (1959).

⁴⁹ 232 U.S. 138 (1914).

the freedom to carry on trade on the same terms as American citizens. The state law was upheld on the basis that a state has the right to protect its wild game for its own citizens if it wishes and that there was nothing in the treaty contrary to the right of the state to make such regulations.⁵⁰

Further, according to Professor Hendry, in *Lubetich v. Pollack*⁵¹ and *Leong Mow v. Board of Comm'rs*,⁵² "there is support for the proposition that the regulation of this type of state property [commercial fishing] is within the control of the state, and may not be touched by the treaty process."⁵³

In *Magnani v. Harnett*,⁵⁴ the question arose as to whether or not a New York statute limiting issuance of chauffeurs' licenses to citizens and those who have officially declared an intention to become citizens was in conflict with the reciprocal "trade and occupation" treaty with Great Britain. The Supreme Court of Albany County held:

There does not seem, however, in the case at hand, to be the question of "occupation" or "trade" involved. Rather the question is one of the granting of a "privilege" to operate motor vehicles upon the public thoroughfares of New York State. This is clearly an exercise of the police power, the proper enforcement of which cannot be abrogated by an international treaty, it being purely a question within the province of the several States.⁵⁵

The Albany court's holding was reversed by the appellate division,⁵⁶ and the New York Court of Appeals affirmed on the ground that the statute was in violation of the fourteenth amendment.⁵⁷

The federal circuit court case of *In re Wong Yung Quy*,⁵⁸ offers the following dicta: "[I]t may well be questioned whether the treaty-making power would extend to the protection of practices, under the guise of religious sentiment, deleterious to the public

⁵⁰ *Id.* at 145-46.

⁵¹ 6 F.2d 237 (W.D. Wash. 1925).

⁵² 185 Fed. 223 (C.C.E.D. Ia. 1911).

⁵³ HENDREY, TREATIES AND FEDERAL CONSTITUTIONS 113 (1955).

⁵⁴ 169 Misc. 697, 8 N.Y.S.2d 447 (Sup. Ct. 1938), *rev'd per curiam*, 257 App. Div. 487, 14 N.Y.S.2d 107 (1939), *aff'd*, 282 N.Y. 619, 25 N.E.2d 395, *cert. denied*, 310 U.S. 642 (1940).

⁵⁵ *Id.* at 698, 8 N.Y.S.2d at 448.

⁵⁶ *Magnani v. Harnett*, 257 App. Div. 487, 14 N.Y.S.2d 107 (1939), *aff'd*, 282 N.Y. 619, 25 N.E.2d 395, *cert. denied*, 310 U.S. 642 (1940).

⁵⁷ *Magnani v. Harnett*, 282 N.Y. 619, 25 N.E.2d 395, *cert. denied*, 310 U.S. 642 (1940).

⁵⁸ 2 Fed. 624 (C.C. Cal. 1880).

health or morals, or to a subject-matter within the acknowledged police power of the state."⁵⁹

All of these cases, however, are of dubious validity. First, with the exception of *Patson* and *Magnani*, they are lower federal court opinions. Second, much of their significance is lost in the fact that each of the cases upheld state statutes based on the police powers by holding the statutes not to be in conflict with the treaties asserted against them. Finally, in each case, the court found that the treaty in question did not, in its language or intent, attempt to establish a rule of law in opposition to the state statute. Some scholars, particularly Professor Hendry, argue that such interpretations have tended to do violence to the intent of the treaties and that "such restrictive interpretations represent a circuitous reasoning encouraged by poor or indefinite treaty-drafting rather than any illustration of the reserve power in the states."⁶⁰

It remains interesting speculation, however, as to what the Supreme Court might do with a factual situation similar to that of *Magnani* if the treaty had specifically stated that subjects of Great Britain living in the United States were to be granted motor vehicle licenses on the same basis as citizens of the American state in which the British subject resided. Or suppose the treaty provided that an international driver's license held by a British subject residing in the United States would be honored for a period of six months after the subject entered the country. Speculation would favor the upholding of the treaty provision as against contrary state laws on the basis that this was a proper subject of international negotiation, that the treaty provision did not violate a specific constitutional prohibition, and that the power to license persons to operate vehicles on public streets was not reserved exclusively to the states. However, the question would be a difficult one since the states to date have exercised this power almost exclusively and are considered to be the proprietary owners of the state highways within their boundaries.

A judicial device for the protection of state powers in relationship to treaties is the policy of the Supreme Court to construe treaties, whenever reasonably possible, so that they do not come into conflict with state laws, although the Court has been less than consistent in the application of this policy.⁶¹ In *United States v.*

⁵⁹ *Id.* at 632.

⁶⁰ HENDREY, *op. cit. supra* note 53, at 112.

⁶¹ In *Guaranty Trust Co. v. United States*, 304 U.S. 126 (1938), the Court indicated that "even the language of a treaty wherever reasonably possible will be con-

Pink,⁶² Mr. Justice Douglas noted that "it is, of course, true that even treaties with foreign nations will be carefully construed so as not to derogate from the authority and jurisdiction of the States of this nation unless clearly necessary to effectuate the national policy."⁶³ On the other hand, some years prior to these two cases, the Court asserted that treaties will be liberally interpreted and that "as the treaty-making power is independent of and superior to the legislative power of the states, the meaning of treaty provisions so construed is not restricted by any necessity of avoiding possible conflict with state legislation . . ."⁶⁴ These statements can perhaps be reconciled by paraphrasing them as follows: the judiciary is not obligated to construe treaties so as to avoid conflict with state statutes, but it will do so whenever it seems appropriate and reasonable.

To summarize the present status of American law, it is this writer's opinion that the tenth amendment no longer constitutes a restriction upon the treaty-making power. A state may not expect to win its case before the Supreme Court if it opposes a ratified treaty on the ground that it invades powers reserved to the states under the tenth amendment. In relation to state power, the only restrictions upon treaty making by the central government which appear to be commonly recognized are those stated in *Geofroy v. Riggs*,⁶⁵ that the treaty power does not extend so far as to authorize a change in the character of the government "of one of the States, or a cession of any portion of the territory of the latter, without its consent."⁶⁶ It is significant to note, as has Professor Corwin, that "The reserved rights of the States have never received vindication in a single decision of the Supreme Court of the United States pronouncing a treaty of the United States unconstitutional because of its operation within the field of power which ordinarily belongs to the States."⁶⁷

If the tenth amendment may not be used to maintain a tolerable balance between the objective of maintaining a division of power along federal and state lines and the necessity of having a central government powerful enough to deal effectively in external affairs,

strued so as not to override state laws or to impair rights arising under them." *Id.* at 143.

⁶² 315 U.S. 203 (1942).

⁶³ *Id.* at 230.

⁶⁴ *Neilsen v. Johnson*, 279 U.S. 47, 52 (1929).

⁶⁵ 133 U.S. 258 (1890).

⁶⁶ *Id.* at 267.

⁶⁷ CORWIN, NATIONAL SUPREMACY 300 (1913).

then what protection, if any, do the states have? Protection is suggested in *Missouri v. Holland*⁶⁸ where the importance of traditional state powers was weighed against the need for invading these powers by treaty. Professor Quincy Wright has suggested that the maintenance of a modicum of power in the states could be assured by application of the following test to treaties: "The immunity from treaty interference of certain State powers can only be sustained by showing that they cover a subject-matter inherently inappropriate for treaty negotiation."⁶⁹ Thus, by this test, the question is not whether the treaty invades a power reserved to the states, but whether the treaty embraces a matter irrelevant to foreign affairs.

Secretary of State Root had made the same observation in maintaining:

It is, of course, conceivable that, under pretense of exercising the treaty-making power, the president and senate might attempt to make provisions regarding matters which are not proper subjects of international agreement, and which would be only a colorable — not a real — exercise of the treaty-making power; but so far as the real exercise of the power goes, there can be no question of state rights, because the constitution itself, in the most explicit terms, has precluded the existence of any such question.⁷⁰

The view expressed by Arthur K. Kuhn is likewise instructive and went far to anticipate the outcome of *Missouri v. Holland*.⁷¹ "International, not municipal standards of law should determine its scope [the treaty-making power] and the limitations of its use."⁷² Hence, when local matters extend themselves into the affairs of nations so that international cooperation is required, they then become proper subjects of treaties.

Much potential controversy over the reserved powers of the states in relation to the treaty power is usually anticipated and allayed by federal treaty makers either by drafting the treaty so that it is conditional upon applicable state laws or by simply excluding certain subjects from treaties. As pointed out by Bowie and Friedrich:⁷³

⁶⁸ 252 U.S. 416 (1920).

⁶⁹ Wright, *The Constitutionality of Treaties*, 13 AM. J. INT'L L. 242, 258 (1919).

⁷⁰ Root, *The Real Questions Under the Japanese Treaty and the San Francisco School Board Resolution*, 1 AM. J. INT'L L. 273, 279 (1907).

⁷¹ 252 U.S. 416 (1920).

⁷² Kuhn, *The Treaty-making Power and the Reserved Sovereignty of the States*, 7 COLUM. L. REV. 172, 185 (1907).

⁷³ STUDIES IN FEDERALISM (Bowie & Friedrich ed. 1954).

The federal government has proceeded rather cautiously in other fields [than those in which the treaty power has already been upheld]; e.g., despite the broad federal powers in labor matters derived from the commerce clause of the Constitution, it has refused to ratify almost all international labor conventions on the ground that they deal with subjects which belong to an area reserved to States.⁷⁴

Although perhaps politically expedient, it is highly doubtful that such cautiousness is legally necessary. As stated in *United States v. Belmont*,⁷⁵ "in respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear."⁷⁶ It is thus difficult to avoid the conclusion that in its relations with foreign nations, the United States is represented, for all practical purposes, by a unitary rather than a federal government.⁷⁷

The development which has taken place in the Federal Republic of Germany is noteworthy for comparison purposes.⁷⁸ First, the central government has no power to legislate in matters other than those over which the Grundgesetz has given the federation specific

⁷⁴ *Id.* at 253.

⁷⁵ 301 U.S. 324 (1937).

⁷⁶ *Id.* at 331.

⁷⁷ As is well known, Senator Bricker introduced resolutions in the United States Senate in 1952 to amend the Constitution by placing certain limitations upon the treaty-making power. See S.J. Res. 130, 82d Cong., 2d Sess. §§ 2-3 (1952). On the basis of Senator Bricker's efforts, the Senate Judiciary Committee reported out a resolution which provided that treaties in conflict with the Constitution are invalid, that a treaty becomes internal law only through legislation which would be valid without the treaty, and that Congress shall have the power to regulate all executive and other agreements with foreign powers or international organizations. The initial provision would appear to be a statement of the obvious; the second was an attempt to negate the implications or dicta of *Missouri v. Holland*, 252 U.S. 416 (1920), that Congress might pass legislation in aid of a treaty which it had no power to enact in the absence of such a treaty. (See Henkin, *supra* note 48 for the view that the powers of Congress are as large in scope as the treaty-making power.) The third provision was an attempt to bring executive agreements under the watchful eye and within the control of Congress. The entire discussion and movement to restrict the treaty power and particularly the foreign relations powers of the President arose from controversy as to the constitutionality of the United States becoming a party to the draft of the International Covenant on Human Rights prepared by the United Nations Commission on Human Rights. One of the unfortunate aspects of this movement was the fact that the American Bar Association had early in the public debate lent its prestige to a proposed constitutional amendment similar to the Bricker proposal.

The Senate Judiciary Committee resolution was debated during January and February of 1954, was amended to delete the provision granting Congress the power to regulate executive agreements but failed by one vote to receive the necessary two-thirds majority approval of the Senate. See 100 CONG. REC. 2349-58, 2364-75 (1954).

⁷⁸ For excellent discussions of the effects of federalism on the treaty power in Germany, see BERNHARDT, *DER ABSCHLUSS VÖLKERRECHTLICHER VERTRÄGE IM BUNDESSTAAT* (1957) and Mosler, *Kulturabkommen des Bundesstaats*, 16 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 1 (1955).

exclusive or concurrent legislative power.⁷⁹ Further, no implied power is granted by the Grundgesetz which would permit the central government to legislate in areas in which it had neither exclusive nor concurrent legislative powers. If, therefore, the federation concludes a treaty requiring internal legislation which the Länder alone are competent to enact, the federation may not invade these powers and attempt to legislatively implement the treaty itself. In such a case, the federation would have to rely upon the Länder to enact the legislation, but could not force the Länder to do so, even under the doctrine of *Bundestreue*.⁸⁰ As stated by Professor Maunz, "If a concurrent treaty competence in the area of Land legislation were to fall to the federation, these treaties could be legislatively fulfilled only by the Länder."⁸¹

This clear-cut division of legislative power between the federation and the Länder has created problems for the treaty-making power. A somewhat unique solution was devised in 1957, although whether it constitutes a permanent solution remains open to question. Known as the Lindauer Agreement⁸² and concluded between the federation and the Länder, the document provides that the Länder will permit treaty invasion upon their reserved powers under certain specific circumstances.⁸³ The legal status of the agreement presently seems to be unclear.⁸⁴

⁷⁹ GG arts. 70-75.

⁸⁰ 1 MAUNZ-DÜRIG, GRUNDGESETZ KOMMENTAR 13 (1964) (comment by Maunz). The term *Bundestreue* is perhaps best translated as "loyalty to the Federation."

⁸¹ *Ibid.* [translated by the author].

⁸² 20 ZBITTSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT (1960).

⁸³ Because of the uniqueness of this agreement, the author takes the liberty here of giving the text of the agreement as the author has translated from the German in 20 ZBITTSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 116-17 n.102.

1. The Federation and Länder adhere to their proclaimed legal opinions as to the power to conclude and transform international treaties concerning subjects within the exclusive competence of the Länder.

2. The Länder consider cooperation to be possible in respect to the application of Articles 73(1) and (5) and 74(4) of the Grundgesetz:

A competence of the Federation could, on this basis, be recognized, for example, for

A. Consular treaties,

B. Trade and navigation treaties, treaties concerning the right of establishment and treaties concerning traffic in goods and currency.

C. Treaties concerning the entrance into or establishment of international organizations; also insofar as these treaties contain provisions which it is possibly doubtful whether within the framework of an international treaty, they fall within the exclusive legislative competence of the Länder, when these provisions

a) are typical for such treaties and are usually contained in these

It would appear then that, for the most part, there is no constitutional basis in German law by means of which the federation might invade the reserved powers of the Länder as is the case in the United States and that the only effective way to overcome this limitation in specific instances is for the federation to obtain the prior consent of the Länder to specific invasions.

In India, if any problem at all arises as to the relationship between the treaty-making power and the division of authority between the states and the federation, it is one of how to prevent the treaty power from being used in non-treaty matters to reduce the states to mere administrative subdivisions of the central government. The problem arises from the language of article 253 which provides that the Union Parliament has the power to make any law im-

treaties or b) make up a subordinate part of the treaty, the main part of which is free of doubt in the matter of the competence of the Federation.

In this category belong provisions concerning privileges of foreign states and international institutions regarding tax, police, and expropriation law (immunities) as well as the further definition of the rights of foreigners in trade, navigation, and the right of establishment.

3. The conclusion of state treaties which, according to the opinion of the Länder, touch upon their exclusive powers and which are not based upon the power of the Federation according to paragraph 2, and in particular cultural agreements, shall be effected as follows:

"So far as international treaties in the areas of the exclusive power of the Länder shall establish an obligation upon the Federation or the Länder, the consent of the Länder [to the treaty] shall be obtained. This consent shall be submitted prior to the time when the obligation will become binding under international law. In case the Federal Government transmits such a treaty to the Bundesrat according to Article 59 (2), GG, it will, at the latest, simultaneously request the consent of the Länder. For treaties listed in paragraph 1, sentence 1, the Länder shall participate in the preparation of the treaty in good time and in any case prior to the final determination of the treaty text."

4. It is further agreed that for treaties touching upon essential interests of the Länder, whether they concern the exclusive competence of the Länder or not,

1. the Länder will be informed concerning the proposed conclusion of such treaties in good time so that they may promptly make their wishes known,

2. a standing committee consisting of Länder representatives will be established to be at the disposal of the Foreign Office or other competent specialized department of the Federation during the period of the negotiation of international treaties as a discussion participant,

3. the agreement according to paragraph 3 is not to be affected through the information of the committee and the statements given by it.

5. The special case of Article 32 (2), GG, is not covered by paragraph 4.

⁸⁴ Maunz in 1 MAUNZ-DÜRIG, *op. cit. supra* note 80, at 17 suggests only that the agreement "is to be regarded as legally valid." BERNHARDT, *op. cit. supra* note 78, at 180 indicates that where the special position of authority in foreign affairs is concerned, which requires that the federation appear unified, there is no doubt that the federation is to be permitted to conclude treaties concerning subjects reserved to the Länder if the Länder give their consent.

plementing any treaty or "any decision made at any international conference, association or other body." Certainly, no legislature could ask for a broader power than this. One wonders whether an international association or body might make a decision concerning a domestic Indian matter and, by its decision, in effect confer new powers upon the Indian Parliament to infringe upon otherwise purely internal matters, over which power of regulation is expressly given to the states by the constitution. One writer makes an interesting comment as to this possibility:

This last phrase [of article 253] is remarkably vague. It does not specifically refer to conferences, associates and other bodies representing Governments, and on its face it would seem to apply to any international organization representing, let us say, universities or trade unions. Nor would it seem to matter that the organization had merely advisory powers. The word "decision" cannot mean a binding decision, for the assumption is that legislation is needed to implement it. If this is the correct interpretation the Union Parliament can acquire jurisdiction over university education by the simple process of a decision of the Inter-University Board of India, which is an international body because it contains representatives of universities in Burma and Ceylon. This is such a startling invasion of States' rights . . . that one doubts its correctness.⁸⁵

Perhaps for reasons of political expediency, as is sometimes the case with United States treaty-making, the Indian government has in the past shown restraint in treaty matters likely to infringe upon state powers. Professor Rao notes that the Indian government has, on previous occasions, refused to issue decrees implementing treaties when such decrees would conflict with state legislation in an area reserved to state competence. For example, the government refused to decree that French university degrees would have the same recognition in India as degrees from Indian universities in pursuance of article 25 of the Treaty of Cession of the French Territories in India. The Indian universities are autonomous bodies under state laws. Further, contends Professor Rao, the government would not for political reasons compel the states to accept French university degrees as equivalent for purposes of recruitment into the civil services of the states because of article 309 of the constitution which grants power to the states to regulate recruitment and conditions of public service.⁸⁶

⁸⁵ JENNINGS, *SOME CHARACTERISTICS OF THE INDIAN CONSTITUTION* 65 (1953).

⁸⁶ Rao, *Some Problems of International Law in India*, 6 INDIAN Y. B. INT'L AFFAIRS 3, 36 (1957).

IV. EFFECT OF A TREATY UPON CONFLICTING STATE LAWS

The problem of the possible collision between the laws of the constituent states and a treaty or legislation implementing a treaty, has been provided for and avoided in all three of the federations under consideration. In all three, some form of supremacy clause is contained in the organic law. In German law, a treaty and its implementing legislation nullifies conflicting Land law only when the treaty and implementing acts concern subjects over which the federation has exclusive or concurrent legislative power. In the United States and India, the supremacy of treaty law is not so limited. Some scholars have contended that in American law treaties are not supreme to conflicting state statutes when the latter concern subjects within the reserved powers of the states. Henry Tucker, for example, presented the thesis that the Supreme Court has never invalidated such conflicting state laws but has instead found the treaties dealing with the status of aliens residing in the states, so often judicially reviewed by the Court, not in conflict with the state statutes. He suggested that in *Chirac v. Chirac*⁸⁷ and *Geofroy v. Riggs*,⁸⁸ the treaties merely conferred the status of citizenship upon the aliens involved so that they were no longer subject to the state laws dealing with inheritance by aliens.⁸⁹ Tucker argued that the treaties operated analogously to marriage ceremonies in that the marriage brings the bride within the line of inheritance under state law, whereas prior to that time she could not demand the benefit of such inheritance laws. The difficulty with this analogy is that in the case of the bride, her status is completely changed because of an act performed by a state official under laws recognizing and giving effect to the ceremony. But in the case of the alien, he does not become a citizen of either the nation or the state in which he resides by virtue of the treaty. Instead, the treaty confers a privilege upon him as to the inheritance of property; a privilege which the state laws had denied to him. The view taken by Mr. Chief Justice Marshall in the *Chirac* case seems clear: "The act of Maryland has no particular reference to the case of Chirac, but is a general rule of State policy prescribing the terms on which French subjects may take and hold lands. *This rule is changed by the treaty;*

⁸⁷ 15 U.S. (2 Wheat.) 259 (1817).

⁸⁸ 133 U.S. 258 (1890).

⁸⁹ TUCKER, LIMITATIONS ON THE TREATY-MAKING POWER 188-92 (1913).

and it seems to the court that the new rule applies to all cases"⁹⁰

As early as 1797, in *Ware v. Hylton*,⁹¹ the Supreme Court went to great pains to point out that a treaty may not only repeal conflicting state laws but may nullify them as well so as to destroy the legal effect of acts done under the state law during its existence and before the repeal.

Notwithstanding Professor Tucker's thesis, there has never been any serious doubt about the matter, particularly in this century. The rule was clearly reaffirmed by Mr. Justice Douglas in *United States v. Pink*⁹² in the following terms:

But state law must yield when it is inconsistent with, or impairs the policy or provisions of, a treaty or of an international compact or agreement. . . . Then, the power of a State to refuse enforcement of rights based on foreign law which runs counter to the public policy of the forum . . . must give way before the superior Federal policy evidenced by a treaty or international compact or agreement.⁹³

V. CONCLUSION

The problem of the effect on the treaty-making power of a two-fold distribution of power between component states and central government has received varying treatment. The most effective solution to the problem is evidenced in the Indian Constitution, which, by express language, completely eliminates the division of power. The United States Constitution, the oldest of the three constitutional documents considered, was neither conceived nor written with the modern problems of treaty-making in mind. Nevertheless, because the Constitution established a general framework of government without going into great detail, the judiciary has been able to interpret the document so that many potential "federal" problems of treaty-making have been averted. This generality of the American Constitution is in marked contrast to the constitutional documents of West Germany and India.

The Grundgesetz, although written at a time when its authors had the advantage of being acquainted with present-day treaty problems, reflects what might be called the historical German approach to the problem. In many respects, its treatment of the treaty power is similar to that of the Weimar Constitution of 1919, and repre-

⁹⁰ 15 U.S. (2 Wheat.) 259, 275 (1817). (Emphasis added.)

⁹¹ 3 U.S. (3 Dal.) 199 (1797).

⁹² 315 U.S. 203 (1942).

⁹³ *Id.* at 230-31.

sents a concession to the historically independent spirit of the German states. Furthermore, the Grundgesetz is potentially the most problematic of the three, at least theoretically, in its recognition of the right of the component states to make treaties and carry on relations with foreign states.

But the law governing a federation, particularly its constitutional law, must be considered in light of the prevailing practices which give it its fullest meaning. For example, as a practical matter, the United States government has thus far managed to avoid many of the difficulties of treaty infringement upon state powers by cautiously drafting its treaties with such problems in mind and by tacitly recognizing that the states exercise some powers which should not be encroached upon by treaty. In the Federal Republic, it is doubtful that many of the Länder will encounter situations which require or suggest to them that they enter into formal treaties with foreign states. Likewise, when the conclusion of treaties dealing with subjects reserved to the Länder is necessary at the federal level, the device of formal agreements between Länder and the federation to permit such treaties offers at least a functional solution. And in India, the Union government, despite its broad treaty powers, has exercised restraint in administering treaties internally so as not to bring the legislative competence of the states into question.

Thus, in the final analysis, the problem is only partly one of what the organic law of a federation specifically provides in balancing the treaty power with rights of the states. Of equal importance is the degree to which the federation and constituent states are able to find a basis of cooperation for their mutual benefit.