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Treaties and Federal Constitutions (Book Review)

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namely, democracy. Their *act of election* does, but the government so established may take any form.[1]

With respect to the "designation" theory, the author concludes that it is perfectly compatible with the principles of St. Thomas and many of his commentators, like Cajetan, Vitoria, and Bellarmine, who have hitherto been classified under the "translation" theory. He adds,

> Whether we call it the translation theory or the designation theory the fact remains that the only fundamentally legitimate title to civil authority is the consent of the people.[2]

Noting that not until the nineteenth century, following the excesses of the French and subsequent revolutions on one side and of the Sillonistes on the other, was the derivation of authority from the consent of the people questioned, Father Bowe points out that the pronouncements of Popes Leo XIII and Pius X on the problem did not constitute a repudiation of the derivation of authority from the consent of the people, since they were not dealing with that particular point. The author's final word is that "democracy as a form of government is *permissible,* just as is any other form. It is not *imperative.*" [3]

The book provides a very good introduction to the subject. Coming from a citizen of the Republic of Eire, which has its own enlightened Constitution, the approach is particularly interesting to Americans with comparable constitutional experiences. If its suggested bibliography be pursued methodically, and supplemented by dissertations on allied topics published at The Catholic University of America, a deeper understanding of the derivation of political authority can be obtained, which should prove useful in helping to solve the problems posed by contemporary political and legal philosophers generally in their turning toward natural law as a replacement for the unsatisfying principles of positivism.

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TREATIES AND FEDERAL CONSTITUTIONS. By James McLeod Hendry. Washington, D. C.: Public Affairs Press, 1955. Pp. V, 186. $4.50.

The defeat in 1954 of Senate Joint Resolution 1, commonly known as the Bricker Amendment, brought into focus the serious

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[1] P. 95.
[2] *Ibid.*
[3] P. 97.
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constitutional problems inherent in a federal state with respect to its international dealings. The fact that the proposed amendment was defeated by one vote in the Senate of the 83rd Congress indicates the existence of a precarious balance between those in favor of upholding the exclusive right of the central government in the field of foreign affairs and those who maintain that the several states should have some voice in the treaty-making process. This contest is by no means over and the delicate balance may be tipped one way or the other depending upon future developments in international situations and domestic politics. The publication of Professor Hendry's book is therefore a timely contribution toward a better understanding of a pressing constitutional problem in the United States.

Professor Hendry's book is a scholarly treatment of the fundamental problems peculiar to federal states with respect to the treaty-making power of their central governments, and will certainly help to place the arguments both for and against the Bricker Amendment in their proper perspectives. The selection of the United States, Canada, Australia, and Switzerland for a comparative study is particularly appropriate. Canada and Australia, in their inter-imperial relations, possessed additional problems with regard to their treaty-making process which never existed in the case of the United States or Switzerland; while the Cantons in the Swiss Federation play a role in the treaty-making process somewhat different from that of the several states under the United States constitutional practice. The distinction between "treaty capacity" and "treaty performance" as adopted by Professor Hendry throughout his book is in line with the traditional classification of "external" and "internal" effects of international agreements.

The book contains a comprehensive survey of the possible limitations on the treaty-making power of federal states on the basis of constitutional practices and judicial decisions. The author's analysis of the pertinent cases is systematic and penetrating, although one may at times find it difficult to accept some of his assumptions and conclusions. For example, Professor Hendry says: "The President's authority to terminate treaties is questionable."[1] This view is in direct conflict with the opinion of the Solicitor for the Department of State which states: ". . . A third method of terminating a treaty is by notice given by the President upon his own initiative without either a resolution of the Senate or the joint resolution of the Congress. . . ."[2] Again, Professor Hendry states: ". . . the United States has ceded territory under the treaty-making power and apparently considers itself to have the power to do so without the consent of the state concerned. . . ."[3] In support of this statement, the

[1] P. 43.
[2] 5 HACKWORTH, DIGEST OF INTERNATIONAL LAW 319 (1943).
[3] P. 97.

author cites the cession of part of Maine to Canada under the Webster-Ashburton Treaty of 1842.[4] This seems to be misleading, for it is well known that in the Maine case, the consent of the State of Maine was first obtained before the conclusion of the treaty and there does not seem to be any case thus far in which the federal government of the United States has, by virtue of its treaty-making power, ceded any part of state territories to a foreign nation without the consent of the state concerned.

Professor Hendry's book not only deals with the question of division of power between the central government and the component parts of a federal state in the field of international relations, but also discusses the different roles of the three branches of government under the constitutional regimes of the United States, Canada, Australia, and Switzerland with respect to international agreements. This comparison enables us to know how the problem is being handled by other federal states so that we may be benefited by their experience.

The tempo of present day international relations demands a strong central executive capable of representing the nation in its international dealings without fear that its commitments may be overruled by the component parts of the nation, or by other branches of the government. However, certain limitations must be placed on the treaty-making power of the chief executive to insure that this power will not be utilized to circumvent the constitutional provisions aimed at the protection of state rights and civil rights in domestic affairs. What the possible limitations are and to what extent they should be allowed to curtail the treaty-making power of the central government are questions which remain to be answered. The cases do not clearly define these possible limitations and their qualifications, nor does Professor Hendry's book provide the answer; but the book does point to certain legal postulates which may be used as a starting point in our endeavor to find a satisfactory solution to the problem. This problem is a challenge to the imagination and ingenuity of the legal profession, especially those in the fields of constitutional and international law, and Professor Hendry has certainly done his share in meeting the challenge by the publication of his book.

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[4] P. 105 n.62.

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