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Book Review: Constitutional Federalism in a Nutshell, Second Edition. by David E. Engdahl.

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Penthouse are imagining themselves having intercourse, and not really having intercourse at all.

Despite the many passages I have quoted from *Feminism Unmodified*, I fear I may not have adequately recreated the aura of dementia radiating from this book. I have long suspected that feminism has gotten as far as it has because people simply do not read the *ipsissimae dixent* of feminists themselves. So I will close by leaving the reader with the quintessence of the MacKinnon sensibility:

To be about to be raped is to be gender female in the process of going about life as usual.

[T]he fight over a definition of obscenity is a fight among men over the best means to guarantee male power as a system.

And now my favorite (no easy decision). As the reader ponders it, he might reflect that the book from which it is drawn was lauded in the *New York Times*, and that feminism, unmodified, continues to be embraced by a wide segment of the legal, academic, and intellectual community:

Playboy's articles push their views, including their views of the First Amendment, in an expressly sexualized context, and at the same time those articles serve to legitimize what their pictures do to women. Masturbating over the positions taken by the women's bodies associates male orgasm with the positions expressed in the articles. Ever wonder why men are so passionate about the First Amendment? . . . I must also say that the First Amendment has become a sexual fetish through years of absolutist writing in the melodrama mode in *Playboy* in particular. You know those superheated articles where freedom of speech is extolled and its imminent repression is invoked. Behaviorally, *Playboy's* consumers are reading about the First Amendment, masturbating to the women, reading about the First Amendment, masturbating to the women, reading about the First Amendment, masturbating to the women.

CONSTITUTIONAL FEDERALISM IN A NUTSHELL, SECOND EDITION. By David E. Engdahl.¹ St. Paul, Mn.: West Publishing Co. 1987. Pp. xlv, 411. Paper, \$10.95.

*Daniel O. Conkle*²

On the back cover of this and other books in its "Nutshell" series, West Publishing Company advertises its product as "a succinct exposition of the law to which a student or lawyer can turn for reliable guidance." West might have added that law professors,

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most of whom read Nutshells only surreptitiously, tend to dismiss these books as far too "succinct" to be truly "reliable" and far too "expository" to be worthy of critical attention. I therefore was more than a little surprised when the editors of *Constitutional Commentary* suggested that I not only read this Nutshell, but also review it.

Whatever the merit of other books in this series, however, Professor David Engdahl's book is not a typical Nutshell. At over 400 pages, it is not especially "succinct." More important, its presentation is not especially "expository," at least not in the usual sense. Professor Engdahl discusses a wide range of matters affecting constitutional federalism, including Congress's legislative powers, preemption, and intergovernmental relations. His overriding purpose, however, is to "challenge[] the seemingly prevalent impression that *legal* issues of federalism have little substance (and less importance) today." And he finds "the most recent utterances" of the Supreme Court to be "neither indispensable, nor necessarily useful, in the effort to master this branch of Constitutional Law." As a result, the "reliability" of Engdahl's work depends as much on the strength of his arguments as it does on his descriptions of prevailing judicial doctrines.

Engdahl addresses a broad range of problems, and he offers interesting insights on a variety of constitutional issues.³ The most intriguing part of the book, however, is its central argument that there are—or at least should be—judicially enforceable constitutional limitations on the exercise of congressional power. This argument is too elaborate and complex to describe in detail, but I can sketch a few of its fundamental components.

Unlike the judicial advocates of "states' rights" in the *National League of Cities-Garcia* line of cases, Engdahl does not rely on the tenth amendment, which he concedes to be a truism.⁴ Instead, he attempts to rehabilitate what Chief Justice Rehnquist recently called "one of the greatest 'fictions' of our federal system," the doctrine of enumerated congressional powers.⁵ Engdahl argues that

3. In a lengthy treatment of dormant commerce clause issues, for example, Engdahl is highly critical of the Supreme Court's doctrine, and he asks "whether this entire unhappy enterprise is one which the judiciary properly should engage in at all."

4. Engdahl appears to support the position of the majority in *National League of Cities* and the dissenters in *Garcia*, but not on the basis of the tenth amendment. Instead, he suggests that at least when Congress adopts regulations that require reliance on the necessary and proper clause, state immunity might be appropriate when an application of those regulations to the states would not be "proper" in light of the states' role in our constitutional system. See also Engdahl, *Sense and Nonsense About State Immunity*, 2 CONST. COMM. 93 (1985).

5. Rehnquist was an Associate Justice at the time he made this comment. *Hodel v.*

the Constitution's listing of congressional "powers" in fact enumerates permissible "objects" or "subject matters" of regulation. Within these areas, Engdahl agrees that Congress can regulate in the pursuit of whatever ends it desires, including "police power" objectives. For example, Congress can regulate matters actually "in" interstate commerce, such as the interstate shipment of handguns, even if Congress's only purpose is to further some aspect of the public health, safety, or morals. On the other hand, Engdahl makes a unique argument that congressional legislation of this type, although constitutionally valid, should not preempt state law that conflicts only with Congress's "police power" objectives, and likewise, to the same extent, should not give rise to federal immunity from state regulation or taxation. Under this reasoning, the activities of federal agencies and corporations often could be regulated or taxed by the states.⁶ Moreover, Engdahl defines some of Congress's enumerated powers, such as its power to tax and its power over federally-owned property, much more narrowly than does the modern Supreme Court.⁷

As to matters falling outside of these enumerated areas, Engdahl contends that Congress must rely on the necessary and proper clause. Following Marshall's reasoning in *McCulloch*, Engdahl argues that Congress can reach these "extraneous" matters only if the congressional regulation is a proper "means to effectuate federal policy with respect to some legitimate federal concern," such as interstate commerce. Although he accepts the prevailing view that courts must defer to rational congressional judgments on what he calls the "telic" relationship between means and ends, Engdahl contends that this "rational basis" review is not meaningless, and that it sometimes might lead to judicial invalidation.

More important, Engdahl would increase the potential for invalidation by imposing two requirements, not generally recognized in current doctrine, on congressional regulation pursuant to the necessary and proper clause. First, he would impose a "particularity requirement": each particular aspect of congressional regulation would have to be supported by the requisite "telic relationship." Under this view, Congress could not exercise general control over

Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 307 (1981) (Rehnquist, J., concurring in the judgment).

6. See also Engdahl, *Preemptive Capability of Federal Power*, 45 U. COLO. L. REV. 51 (1973).

7. Engdahl in fact maintains that article IV's property clause (§ 3, cl. 2) should not be read to confer an enumerated *legislative* power at all, but only the power of a proprietor. See generally Engdahl, *State and Federal Power Over Federal Property*, 18 ARIZ. L. REV. 283 (1976).

an "extraneous" subject matter, such as mining, merely because that subject matter substantially affected a "legitimate federal concern," such as interstate commerce. Instead, each particular congressional control of a local activity like mining would be "valid only if *that particular control* effect[ed] Congress' goal for interstate commerce." Engdahl thus criticizes the Supreme Court's companion decisions in *Hodel v. Virginia Surface Mining and Reclamation Association* and *Hodel v. Indiana*, in which the Justices upheld the Surface Mining Control and Reclamation Act of 1977 without engaging in a "telic relationship" inquiry for each of the numerous regulations in the Act.

Second, Engdahl would impose a closely related requirement of "actual" congressional purpose, which would permit the courts to uphold congressional regulation under the necessary and proper clause only if there were "some sufficient indication that Congress *did* have a legitimate objective, *perceived* the telic connection, and acted upon that ground." For example, Congress constitutionally could prohibit the local sale of dangerously flammable illuminating oil in order to make interstate shipping safer for other products, but not to protect consumers. On the other hand, so long as Congress had a permissible purpose in this sense, the presence of other, "police power" objectives—even if those other objectives were the predominant reasons for the legislation—would not make the law invalid. Engdahl even concedes, moreover, that the necessary and proper clause permits what some would regard as a "bootstrap." Thus, Congress would be permitted to regulate an "extraneous" matter as a means to effectuate a regulation falling within the area of enumerated congressional concerns, even if the latter regulation itself were designed to further "police power" objectives. For instance, Congress could prohibit the "manufacture or local sale of . . . handguns . . . as a means to effectuate [a congressional] prohibition of their interstate shipment," even if the prohibition on interstate shipment were "itself targeted at reducing local handgun crimes (an extraneous end)." Relying on this theory, Engdahl supports the Supreme Court's arguably "bootstrap" reasoning in *United States v. Darby*.

In both his general framework and his application of that framework to particular constitutional issues, Engdahl presents an analysis that is intellectually sophisticated. He constructs an intricate model with a number of interrelated components, and he applies this model to a variety of different constitutional problems. But one leaves the book doubting whether Engdahl's suggested approach is one that ought to be embraced.

Although Engdahl advocates a renewed emphasis on judicially enforceable limitations on congressional action, he defends most of the Supreme Court's modern decisions upholding the exercise of congressional power. To be sure, his reasoning often differs substantially from the Court's. But this may only suggest that he paints an analytical picture far more complex than is necessary to explain or justify the Court's decisionmaking.

To the extent that Engdahl's approach would make a difference, moreover, his reasoning is far from compelling. In light of his other concessions, Engdahl's related requirements of "particularity" and "actual purpose" under the necessary and proper clause would not appear to impose any meaningful substantive limits on the types of legislative policies that Congress could pursue. Instead, they would impose nothing more than procedural and evidentiary burdens, which Congress could meet by carefully structuring its legislative action to comply with Engdahl's model. Even if Congress could not satisfy Engdahl's necessary and proper clause requirements in furtherance of a given enumerated power, some other enumerated power, either alone or in conjunction with the necessary and proper clause, usually would be available to accomplish the same substantive result. Engdahl nonetheless defends the burdens that he would impose on the theory that "[a]n important function of constitutional doctrine is to make the political process do its work. It erects conceptual hurdles — deliberately artificial obstacles — to impede precipitous majoritarian action by multiplying (and isolating from transient issues) the points on which majority agreement must be reached." Beyond a general suggestion that liberty is enhanced when Congress finds it difficult to operate, however, Engdahl offers no justification for imposing "deliberately artificial obstacles" on the adoption of legislation that Congress determines to be in the national interest.

Some of Engdahl's arguments do call for limitations on the exercise of national law-making power that might not easily be overcome through calculated legislative maneuvering. His novel position concerning the limits of preemption and federal immunity, for example, would have significant doctrinal implications, as would his narrow definitions of Congress's power to tax and its power to control federally-owned property. Through the use of different legislative strategies, Congress could circumvent some of the barriers that these doctrinal changes would erect, but others might be difficult to overcome. In any event, Engdahl makes no meaningful effort to explain why we should accept the restrictive approaches that he advocates.

Engdahl has written an intellectually stimulating book that contains a number of interesting and useful ideas. At the same time, despite its own suggestions to the contrary, the book also fulfills the role of a more conventional Nutshell by providing helpful explanations of the evolution and modern status of various constitutional doctrines.

Engdahl's goal for his book, however, is more ambitious, for he attempts not only to describe, but also to defend, a scheme of judicially enforced limitations on congressional power. Yet in the context of federalism, no less than elsewhere, we need to know why the judiciary should be restricting the operation of the legislative process. If the appeal is to the wisdom of the framers, we need to know whether their judgments are still wise in the 1980s, and, if not, why their intentions should nonetheless continue to control. If the appeal is not so much to the framers as to functional considerations guiding the proper operation of our modern democracy, this functional analysis must be set forth and defended. Engdahl makes no serious effort on either front.⁸ As a result, his attempt to shore up the law of constitutional federalism is incomplete, and therefore unsuccessful, because such an effort cannot succeed without a more persuasive theoretical foundation.

STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS. By David M. O'Brien.¹ New York, N.Y.: W. W. Norton & Company. 1986. Pp. 384. Cloth, \$18.95; Paper, \$9.95.

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Professor David M. O'Brien has brought forth a readable but serious book about the Supreme Court, appropriate for adoption in undergraduate upper division courses, or as collateral reading in law school courses in constitutional law, or simply as an introduction to the Court for intelligent laymen. From the perspective of a

8. Indeed, his argument that the judiciary should enforce significant limitations on the power of Congress seems at least somewhat at odds with his critique of the Supreme Court's dormant commerce clause doctrine. In the course of that critique, he contends that "when debatable choices must be made among competing public interests, or between public and competing private interests, one might well wonder whether they ought not be made through the political rather than the judicial process," and he adds that "interests locally disadvantaged *do* have political representation in Congress."

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