

The Volokh Conspiracy

[Randy Barnett](#) • January 21, 2012 7:32 pm

Trevor Burris responds to my exchange with Orin on applying the state noncommandeering doctrine to mandates that “the people” enter into contractual relations with private companies in [Commandeering the People to Avoid Taxation: A Reply to Barnett and Kerr](#). Here is an excerpt:

I believe Professor Barnett has the right of it, but I do acknowledge Professor Kerr’s concerns. I would like to add something to Professor Barnett’s argument: The individual mandate was passed to avoid the political liability that a taxation-driven scheme would have brought (if you doubt this, read Michael Cannon’s post [here](#)). This is constitutionally significant to the anti-commandeering argument.

[snip]

If the federal government is properly understood as resting on dual representative pillars—the people and the states—then either can be commandeered. Although our case law only discusses the impropriety of commandeering state governments, it is fully within a proper understanding of the Constitution that people are equally susceptible to unconstitutional commandeering. It is of no matter that they are commandeered at other times—e.g., jury duty, the draft, etc.—because states are likewise commandeered by the Constitution—e.g., rules on choosing senators, members of Congress, and electors, as well as the prohibitions in Article 1, Section 10. But since, at some fundamental level, commandeering is so repugnant to a limited government empowered by a free people, there has to be some way to determine unconstitutional commandeering.

In order to determine this, I propose that, because we are talking about the people and not the states, we must look to the ways in which commandeering is constitutionally allowed and see if those protections have been avoided in passing the individual mandate. Taxation is a dangerous power, but the Constitution requires that it be above the board so citizens are aware when forced wealth transfers are occurring. For similar reasons, Article 1, Section 9 requires that “a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.” As Michael Cannon’s post linked above shows, this type of accounting was intentionally avoided by Congress in passing PPACA.

So, I offer to Professor Kerr this principle of decision in the case: THIS IS NOT OKAY. Specifically, when looking to whether or not the people have been commandeered, we look to whether the protections in the Constitution that prevent commandeering have been avoided. One instance in which this would nearly always be the case: the forced purchase of a product from a private entity.

You can read the whole thing [here](#).

A few clarifications of my position.

- In my view, “commandeering” has a much narrower and more specific meaning in the existing doctrine than “commanding.” It means taking over a power properly exercised by another sovereign. In *New York*, the power is that of a State legislature to enact legislation (and the correlative power to decline to exercise this power). With the mandate it the power of “the people” to consent to enter into contractual relations with a private party (and the correlative power to decline to exercise this power). Just as state legislatures have their own reserved power to enact statutes, so too do individuals have the reserved power to alter their legal relations with others via contract. Indeed, as Lon Fuller observed, these powers are very similar. “Commandeering” is the coercing of states (or by extension individuals) to exercise their distinct powers in ways desired by Congress.
- For this reason, making you live with a soldier in your home, convicting yourself by your own words, or performing personal services for another, best exemplify the noncommandeering concept. The power to “take” property for public use, an example I also used in my earlier post, is closer to the power to tax.
- Now, Congress has expressly delegated powers to coerce individuals that it lacks against the States, most importantly the power to tax. But the (dangerous) power to confiscate property in the form of taxes or by

eminent domain is not the same as the power to make someone alter their legal relations with another person, which is what contracts do.

- Congress also has many powers at its disposal to create *incentives* for states and individuals to exercise their reserved powers in ways that Congress desires, and providing such incentives is not “commandeering” (unless, as per *Dole*, they cross the line into “coercion”).
- Likewise, as the term appears to be used by the Court, States (and by extension private persons) are not “commandeered” when they are forcibly *prevented* from exercising their powers, or when they are *regulated* in the *manner* of their exercise. Prohibitions on race and sex discrimination by individuals regulate the manner by which certain activities like operating a restaurant or hotel are to be conducted; these measures do not command that persons enter into the restaurant or hotel business. The very same line has implicitly been drawn by the Court in applying the noncommandeering doctrine to States, while upholding the power of Congress to regulate the manner by which States engage in economic activity.
- This is all a question of delegated *power*, not the side constraints of *rights*. Congress is claiming an *implied* power to force people to enter into contracts with private companies. Is its claim of implied power warranted or not? The fact that, as Justice Kennedy explained in *Bond*, the enumeration of delegated Congressional power is a means of protecting liberty does not render it the same type of endeavor as the doctrinal protection of certain “fundamental” rights under the Due Process Clause. Indeed, the Federalists originally contended that the protection of express rights would be unnecessary *at the federal level* because of the limited and enumerated delegation of powers in the Constitution.

I think the “commandeering” concept best explains why so many people instinctively find the individual insurance mandate peculiarly offensive, just as it explains why *some* justices found the State mandates in *New York* and *Printz* to be objectionable. Conversely, those who take a fundamentally different view of the relationship of the individual to the government — or of the States to the federal government — simply do not understand what the fuss is all about. In this regard, if no other, the debate over the mandate is revealing.

You can read a fuller treatment of the approach in my 2010 law review article, [Commandeering the People: Why the Individual Health Insurance Mandate is Unconstitutional](#). But since I published that piece, I have had considerable time to give the matter fuller thought, so I might not explain the position precisely the same way today.