

Randy Barnett on the individual mandate and ObamaCare

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Randy Barnett, author of *Restoring the Lost Constitution*, recently talked with James Taranto of the *Wall Street Journal* about the constitutionality of the individual mandate, the centerpiece of ObamaCare, and the legal challenges working through federal court:

So would “any constitutional law professor” be right to scoff at the case against ObamaCare? Not according to this law professor. “The challenges to ObamaCare are serious legal challenges within the existing doctrinal framework,” Mr. Barnett says. “They are not an attempt to restore the lost Constitution.”

That’s why the “individual mandate”—the requirement that all Americans purchase medical insurance or pay a fine—has been the focus of the lawsuits by state attorneys general seeking to overturn ObamaCare. (Mr. Barnett wrote a friend-of-the-court brief with the Cato Institute, a libertarian think tank, in support of the Virginia attorney general’s lawsuit.)

Such a mandate is unprecedented: “This is the first time in American history that Congress has claimed to use its power over interstate commerce to mandate, or require, that every person enter into a commercial relationship with a private company,” Mr. Barnett notes. “As a judicial matter, it’s also unprecedented. There’s never been a court case which said Congress can do this.” That doesn’t establish that Congress can’t do it, but the high court could reach that conclusion without undoing existing law.

[...]

“What is the individual mandate?” Mr. Barnett says. “I’ll tell you what the individual mandate, in reality, is. It is a commandeering of the people. . . . Now, is there a rule of law preventing that? No. Why isn’t there a rule of law preventing that? Because it’s never been done before. What’s bothering people about the mandate? This fact. It’s intuitive to them. People don’t even know how to explain it, but there’s something different about this, because it’s a commandeering of the people as a whole. . . . We commandeer people to serve in the military, to serve on juries, and to file a return and pay their taxes. That’s all we commandeer the people to do. This is a new kind of commandeering, and it’s offensive to a lot of people.”

U.S. District Judge Henry Hudson [will be ruling on the federal government motion to dismiss](#) the case backed by several states’ attorneys general soon, possibly by the end of the week. Whatever he decides, it will not be the end of this case.