New Light on the Old World and Commandeering

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Jud Campbell, *Commandeering and Constitutional Change*, **122 Yale L. J. --**, (forthcoming 2013) *available at* SSRN.

Some of the best constitutional history papers have a single conceptual move that makes you see the world differently. Once you understand some previously unappreciated legal rule or piece of historical context, everything falls into place. Jud Campbell's forthcoming article in the Yale Law Journal, *Commandeering and Constitutional Change*, is just such a paper.

The topic is "commandeering"—*i.e.,* whether the federal government can force state officers to execute federal law. The Supreme Court has said that it cannot, because commandeering is inconsistent with state sovereignty. Campbell's central insight is this: At the time of the Founding, commandeering was the *Anti-Federalist* position, not the Federalist position. The Anti-Federalists thought that it was much better for state sovereignty to have federal law executed by their own officers. They did not want a corps of officers in the states with federal paychecks and federal allegiance, and they were willing to accept commandeering, as opposed to voluntary cooperation, as the price of state execution.

In Printz, Justice Scalia rejected Alexander Hamilton's arguably pro-commandeering statements by calling them "the most expansive view of federal authority ever expressed, and from the pen of the most expansive expositor of federal power." But Campbell's insight shows us that when Hamilton supported commandeering, he was not putting forth an expansive view of federal power. Rather, he was conceding a point to the Anti-Federalists. Hamilton had opposed state execution of federal law during the impost controversies under the Confederation government, and preferred independent federal enforcement.

Campbell walks through a lot of other Founding-era evidence, and his historical eye is very sharp; he's even unearthed from the Filson Historical Society in Louisville a previously unknown 1802 circuit court opinion on commandeering and the Necessary and Proper Clause. I find his account quite persuasive, from what I understand. But the key to all of it is the conceptual move: Once you understand that at the Founding the politics of commandeering were the opposite of what they are now, everything falls into place.

Plenty has been written about legal history scholarship and the comparative advantages of lawyers and historians in writing it. In my view scholarship like Campbell's illustrates what is best about history by lawyers, when they do it well. Lawyers have an eye for conceptual moves that simplify or refract the existing evidence, and help us see the old world in a different light.

At the same time, Campbell's piece also illustrates what is dangerous about the history work of lawyers when it is done badly. The Justices in *Printz* assumed that commandeering had the same relationship to state sovereignty back then as it does now. Because of that anachronism, they made the wrong assumptions about how to read ambiguous materials and gaps in the record. It is worth noting that Campbell himself is cagey about the implications of his analysis: perhaps if the social meaning of commandeering has flipped since the founding, *Printz* is right as a matter of the living constitution. But *Printz* is trying to be originalist, and Campbell shows that it is does it backward.

Campbell's article is especially impressive since it his first. It follows an excellent and sophisticated student note, which examines historical and legal reasons that would explain an absence of religious accommodation case law in the nineteenth century, even if such exemptions were thought to be constitutionally based. I look forward to seeing what

he does next.

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