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January 31, 2015: How to Think About Constitutional Government

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Title: How to Think About Constitutional Government

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1/31/2015—I am reading the manuscript of a new book by Randy Barnett, Georgetown Law School professor and the author of *Restoring the Lost Constitution*. It is great and Barnett is the most profound and provocative legal writer in America today.

Barnett's approach is to try to return us all to what might be called "first principles": what is constitutional government all about? And the basic answer is that the purpose of government under the Constitution is just what it was thought to be in the Declaration of Independence. Government is instituted to secure our fundamental rights and the consent of the governed is presumed to be just that. No one would consent to a government that did less or more than that.

The Constitution is not a first principle in this sense. The constitutional system is just one way to structure a government that could reasonably be expected to accomplish the goal of securing our fundamental rights.

The framers thus might be wrong about the best structure. The structure of government must be strong enough to defend the nation and prevent interference by others with individuals pursuing their own happiness. But, of course, the framers might also be wrong about what fundamental rights are.

They might even be wrong about the reality of fundamental rights. If they are, Barnett's premises become a kind of Rawlsian experiment—Rawls' original position—of asking what a hypothetical group of people would consent to concerning government.

Now, in this context, the structures of the Constitution should be thought of as experimental, not fundamental. And I think they should be tested by history. That is, if some government action that needed to be taken to secure our fundamental rights, would not have been taken if the constitutional structure were strictly construed, then the structure is defective. (This is like asking how well a current climate model would have predicted past climate change—if it was inaccurate then, we should not trust it now).

So think about Martin Luther King's call to J. Edgar Hoover in 1964 for the FBI to do a better job investigating the murder of civil rights workers and church bombings. There is no obvious constitutional authority for such federal investigations. These crimes were carried out by individuals whom the local authorities sometimes refused to indict, but sometimes just did not try very hard to investigate.

So I believe that congressional power should be thought of as available whenever the states prove incompetent to act to secure our fundamental rights. (there was a moment at the constitutional convention when something like was passed).

This view makes the litigation over Obamacare—*National Federation of Independent Business v. Sebelius*—questionable but trivial. The question should never have been whether Congress could force Americans to buy broccoli. As a matter of regulating commerce, the answer to that should have been, why not? Such a requirement would have increased the flow of commerce.

The question should have been whether any government can force Americans to buy a product. The NFIB case was always a fundamental rights case masquerading as a commerce case for reasons of legal strategy.