



AMERICAN CONSTITUTIONALISM
 VOLUME I: STRUCTURES OF GOVERNMENT
 Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

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Chapter 6: The Civil War/Reconstruction Era – Powers of the National Government

*Sidney George Fisher, The Trial of the Constitution (1862)*¹

Secession and civil war shook the faith of many Americans in their constitutional and political institutions. Constitutional commentators in the United States and abroad suggested that disunion exposed deep flaws in the American constitutional system. Many Republicans thought that the departure of the South, the traditional home of Jeffersonian and Jacksonian constitutional theory, created an opportunity for reconsidering some constitutional fundamentals and perhaps for shaking off inherited constitutional orthodoxies. Sidney George Fisher and other constitutional critics argued that the Constitution was inadequate to the needs of the nation and should no longer be regarded as binding. "A Government that cannot supply the wants, satisfy the intelligence, or accomplish the objects of a people so eager, so impulsive, so educated as ours," Fisher wrote, "cannot be permanent." Other Republicans stood by the constitution. Timothy Farrar in "The Adequacy of the Constitution" maintained that the Constitution remained the proper source of government authority, if correctly interpreted and constitutional powers properly employed. Farrar declared, "The provisions of the Constitution are the measure of the powers of the Government, and adequate to all the purposes for which it was made."

Sidney George Fisher (1809–1871) was a prominent Philadelphia lawyer and nationalist Whig. Abraham Lincoln's bold assertion of presidential and federal authority in the aftermath of secession inspired Fisher to push his own constitutional ideas even further. His "The Trial of the Constitution" argued that the time had come to recognize that the Constitution designed in 1787 did not work. A written constitution that relied on checks-and-balances and careful limitations on government power had failed the test of practice. Fisher claimed the Constitution had become a "prison house," when what was needed was "unlimited" power controlled only by the ballot box. Government officials, he concluded, should claim the authority to simply act in the name of the public good. Where exactly would Alexander Hamilton or John Marshall think that Fisher had gone wrong in his reasoning? Fisher was concerned that Article V would not be effectively used to make the constitutional changes that might be "rendered necessary by the war," but he had no doubt that such changes "will be made." How well did Article V accommodate and regulate the constitutional transformations of the Civil War and Reconstruction? How do we know when the Constitution is not working and in need of reengineering? When is better management all that is required?

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 Why . . . was not the machinery provided by the Constitution to amend it, to declare its true meaning, and thus to avoid civil war, used for that purpose? The reserved powers of the people were ready, indeed eager, to act on the question. They were, it is true, fastened up in their prison house, but there was a key provided which could unlock the door and let them out. How did it happen that no one thought of using that key? The reason is evident. Each party was afraid of the reserved powers, not knowing which they might attack. Indeed, neither party could get control of the key, so carefully was it guarded. Neither North nor South could have secured a vote of two-thirds of Congress or of two-thirds of the States, to propose an amendment to the Constitution, or to call a convention for that purpose. . . .

For these reasons the means provided by law for making important alterations in the Constitution are not likely to be employed with success, or indeed at all. Yet changes may be rendered necessary by the war. If so, they will be made. A Government that cannot supply the wants, satisfy the intelligence, or accomplish the objects of a people so eager, so impulsive, so educated as ours, cannot be

¹ Excerpt taken from Sidney George Fisher, *The Trial of the Constitution* (Philadelphia: J.B. Lippincott, 1862), 38–41, 198–201.



permanent. Whatever power is essential for these purposes, the Government must possess; whatever part of its machinery cannot perform its functions, must be altered. A fixed, unchanging Government, for a changeable, advancing people, is impossible, and were it not so, would be a sad spectacle. Scarcely less so, however, is a Government so contrived that neither the "reserved powers" nor the knowledge and intelligence of the people can be brought to bear upon it, for want of a proper apparatus, and no resource is left but an appeal to arms.

Is such the nature of our Constitution? The question is forced upon us by the present condition of the country. Our career of peaceful prosperity has been interrupted by a fearful civil war. Why did not the Government prevent that war? Whatever the remote or immediate causes of it, there can be no doubt that the vast majority of people preferred peace and Union. The Government, therefore, failed to represent and execute the wishes of the people. . . . Therefore, under the Constitution and because of its machinery, politicians and demagogues can rule the country in defiance of the people, and endanger or destroy the Government. . . .

The received theory of our Constitution is, that it is alterable, not by the Government, but by the people. . . . But suppose Congress made an alteration, which was approved and sustained by the people; that a sudden emergency should arise, when the Government must either exert unconstitutional power or be destroyed. Should the people acquiesce, what power has the Constitution to protect itself? . . . [W]e get at last to the English doctrine, that Parliament is omnipotent, that is to say, it cannot be legally restrained. . . . The reserved power of the people cannot be exercised, and therefore does not exist. The alleged legal restraint on the power of Congress cannot be enforced, and therefore there is no restraint on it. The whole power of the people, within the sphere of the General Government, does and must, in the nature of things, reside in Congress, and the security of the people consists in their control over Congress by the ballot box.

. . . .
These afford a better security than the weak protest of a Court which does not represent the people, and the only possible security. Should it happen that all branches of the Government united in harmonious action, and that the great majority of the people sustained them, these facts would be evidence that the measure, however novel it might be, was wise and necessary, and such as ought to be adopted; and that word *ought* commands men and nations and constitutions. In such a case what *ought* a Judiciary to do? Set itself in opposition to the combined power of the people and of the Government? Would not its decree, with whatever strength is possessed, tend to the destruction of the Constitution it professed to support . . . ?

The powers of Congress must therefore be unlimited, if they are to be "adequate to the exigencies of the Union." They must be unlimited to carry us through the consequences of this war, because these can neither be foreseen or defined. They must be unlimited over the Union and the Constitution, because the war may make it necessary to alter both. They must be unlimited, because in the perils by which we are surrounded and the greater perils that await us, nothing short of the whole power of the people, exercised without opposition or dispute, can save us from ruin. . . . This power is nothing more than the latent and reserved, but absolute and despotic authority, which every Government must possess, to use in case of need. If it be not granted by the Constitution, it must be employed nonetheless. . . . If the Union and the Government cannot be saved out of this terrible shock of war constitutionally, a Union and a Government must be saved unconstitutionally.

We the people of 1862 are not to be commanded to our destruction, by even the best and wisest of the people of 1787, whose bodies are now resting in their graves. . . . A Union, a Government and a Constitution that suits us we must have. . . .

. . . . These imaginary reserved powers of the States and the people gave color and support to the monstrous claims and pretensions which caused the rebellion, and unless they are disavowed and rejected by the good sense of the country, will forever prevent our becoming a nation, for there can be no such thing in nature as a nation without a National Government.