



AMERICAN CONSTITUTIONALISM
 VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

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Chapter 7: The Republican Era – Judicial Power and Constitutional Authority

J. Allen Smith, *The Spirit of American Government* (1907)¹

The early twentieth century was a period of constitutional turmoil. The Thirteenth, Fourteenth, and Fifteenth Amendments had significantly altered the structure and workings of the U.S. Constitution and federal system by ending slavery and giving federal protection to civil rights in the states and to black voting rights. The manner in which they had been adopted during Reconstruction was unusual, to say the least. But no constitutional amendment had been ratified since 1870.

In the early twentieth century, constitutional reform was very much on the agenda. The states were dramatically remaking their political systems and creating innovative new political structures. The national political parties were fragmented, divided, and distrusted. Nonetheless, Congress and the federal executive were hardly standing still. They were instead pushing forward a wide variety of bold new policies and institutional reforms.

Could the Constitution keep up? For Progressives, change was not coming fast enough, and the Constitution seemed to be standing in the way of needed reform. For conservatives, change was coming too fast, and reformers were putting the entire nation at risk in their rush to experiment. A wave of constitutional amendments burst through the ratification process, including the Sixteenth (federal income tax), Seventeenth (direct election of senators), Eighteenth (Prohibition), Nineteenth (female suffrage), and Twentieth (moving inauguration day and the start of the congressional session), with others such as the Child Labor Amendment under consideration. Can the Constitution be changed too much, too fast? Does the Constitution have a conservative bias?

J. Allen Smith was among the most prominent of the Progressive-minded writers in the early twentieth century to question popular “myths” about the origins and value of the U.S. Constitution. Later overshadowed by the historian Charles Beard, who sought to demonstrate that the terms of the Constitution were driven by the specific economic interests of its drafters, Smith was a political scientist at the University of Washington. Writing from the Pacific Northwest, the hotbed of such Progressive constitutional reforms as the referendum and initiative, Smith argued that the federal Constitution was rigid and undemocratic. One admiring fellow traveler, historian Vernon Parrington, later characterized these Progressive scholars as latter-day “Jacksonians” who had made the “discovery of the essentially undemocratic nature of the federal constitution,” who sought to wrest the Constitution from the “hands of lawyers” who encouraged only reverence and obedience to the constitutional law produced by unaccountable judges.² The “real spirit and purpose” of the Constitution was “its inherent opposition to democracy.”³ Smith’s views were embraced by Progressive politicians and reformers who had come to believe that the Constitution itself was an obstacle to needed social and political reform and perhaps the source of the political ills of which they complained.

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 . . . [T]he efforts of the Constitutional Convention were directed to the task of devising a system of government which was just popular enough not to excite general opposition and which at the same time gave to the people as little as possible of the substance of political power.

¹ Excerpt taken from J. Allen Smith, *The Spirit of American Government* (New York: Macmillan, 1907), 27–64, 291–301.

² Vernon Louis Parrington, “Introduction,” in J. Allen Smith, *The Growth and Decline of Constitutional Government* (New York: Henry Holt, 1930), xi, xii.

³ Smith, *Spirit of American Government*, vii.



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In the United States at the present time we are trying to make an undemocratic Constitution the vehicle of democratic rule. Our Constitution embodies the political philosophy of the eighteenth century, not that of to-day. It was framed for one purpose while we are trying to use it for another. Is free government, then, being tried here under the conditions most favorable to its success? . . .

. . . . The Convention desired to establish not only a strong and vigorous central government, but one which would at the same time possess great stability or freedom from change. This last reason is seldom mentioned in our constitutional literature, yet it had a most important bearing on the work of the Convention. This desired stability the government under the Confederation did not possess, since it was, in the opinion of the members of the Convention, dangerously responsive to public opinion; hence their desire to supplant it with an elaborate system of constitutional checks. The adoption of this system was the triumph of a skillfully directed reactionary movement.

. . . . All democratic constitutions are flexible and easy to amend. This follows from the fact that in a government which the people really control, a constitution is merely the means of securing the supremacy of public opinion and not an instrument for thwarting it. Such a constitution can not be regarded as a check upon the people themselves. It is a device for securing to them that necessary control over their agents and representatives, without which popular government exists only in name. A government is democratic just in proportion as it responds to the will of the people; and since one way of defeating the will of the people is to make it difficult to alter the form of government, it necessarily follows that any constitution which is democratic in spirit must yield readily to changes in public opinion.

. . . . The restrictions which [the framers] placed upon the exercise of the amending power were not only not inconsistent with the form of government which they established, but as a matter of fact absolutely necessary to ensure its preservation, since without such a limitation of the power to amend, the majority could easily overcome all other checks upon its authority.

This feature of the Constitution, which nominally provides for amendment, but really makes it an impossibility, is perhaps the best proof we could have that the Constitution as framed and adopted represented the view of a minority who intended by this means to perpetuate their influence. . . .

. . . . The Constitution which restored the old scheme of government in a new garb also revived the old conception of individual liberty. There is, however, one important difference between the eighteenth-century conception of liberty and that which finds expression in our constitutional literature. . . . Formerly the many advocated the limitation of the power of king and aristocracy in the interest of liberty; now the few advocate the limitation of the power of the many for their own protection. With the abolition of monarchy and aristocracy the attitude of the few and the many has been reversed. . . .

. . . . Liberty, as the framers of the Constitution understood the term, had to do primarily with property and property rights. The chief danger which they saw in the Revolutionary state governments was the opportunity afforded to the majority to legislate upon matters which the well-to-do classes wish to place beyond the reach of popular interference. . . . It may be said without exaggeration that the American scheme of government was planned and set up to perpetuate the ascendancy of the property-holding class in a society leavened with democratic ideas. . . .