

## ESSAY #4-A LIVING CONSTITUTION?

This essay will continue the discussion of the impact of the Constitution on our nation as well as look at efforts to lessen or even dismiss its importance as the fundamental document in the governance of the United States. The men who met in Philadelphia in 1787 were not only among our nation's founders, but were the framers of the Constitution. It is the foundation upon which the framework of our republic and system of government rests. The Declaration of Independence and the Constitution are the fundamental legal documents on which the American Experiment is based.

I would like to define six words used in the first paragraph to help the reader better understand previous essays and what will follow in this one. The first word is founder which means a person who establishes. The second is framer(s) which means a person (people) who shape, fashion or form, usually according to a pattern; design (to form a constitution). The third word is framework. It is the basic structure, arrangement in a system. Foundation comes from the Latin word fundatio and means the fundamental principle upon which something is founded; basis. The fifth word is fundamental. It derives from the Latin fundamentum. It means a principle, theory, law, etc. serving as a basis; essential part. One additional word that has been and will be used is fiat which means an order issued by a legal authority; a decree; a sanction; an authorization; any arbitrary order.

Although Article VI of the Constitution states that it and all laws of the United States are the supreme law of the land, there is nothing as specific as the Patriot, Judiciary or Affordable Care Acts mentioned in the document. Rather, the Constitution provides the framework by which laws such as these are made, carried out and interpreted as well as who will perform these functions, and for how long within specified limits placed on their powers and duties. Article V provides the mechanism for making changes and additions to it by amendment. Further, James Madison explained in "Federalist No. 51": "But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. ....In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself". This as well as protection of the rights of all individual Americans is the primary function of the Constitution.

The Constitution has provided stable governance for the nation through its own implementation during George Washington's two administrations; the election of 1800; the War of 1812; the era of slavery and the abolitionist movement; the secession of southern states in 1860-61; the Civil War; Reconstruction; the election of 1876; westward expansion; the American Industrial Revolution, urbanization, the influx of millions of immigrants from Europe and Asia; World Wars I & II; the 1918 Spanish Flu epidemic; the Great Depression; the rise of the U.S. as a superpower; the nuclear age; the Cold War; the civil rights movement and the integration of American society; the Vietnam War; the defeat of communism in Europe; the election of 2000; 9/11 and the subsequent wars on terror; the assassination of four presidents; the death of four while in office and the resignation of another; and more than thirty-five peaceful transitions of power from one president's administration to another.

Unfortunately, there have been times in our nation's history when the Constitution was unable to provide both stable governance and especially protection of individual rights. However, it is not the fault of the Constitution that this has occurred. That fault lies with the men and women who have been charged with carrying out the obligations specified in the Constitution especially when personal liberties are at stake. The passage of the 1798 Alien and Sedition Acts; the continued existence and expansion of slavery in the U.S. before 1865; the confiscation of Cherokee, Choctaw and other tribal lands in the 1800's; Jim Crow laws, Black Codes, the KKK and segregation especially in southern states after the Civil War and into the twentieth century; the Red Scare in 1919; race riots and anti-war demonstrations in the 1960's; the violent, destructive protests, and the shutdown of the American economy in 2020 into 2021 are numerous examples of where most often the individual's unalienable rights have been ignored, restricted or denied.

Many constitutions have been written since 1970. Numerous people and nations have experience writing them but only Americans have the experience of a stable government based on “a living Constitution”. For a number of decades politicians, academics, political theorists, lawyers, and others in the United States have made the contention that a living constitution is not one based on its longevity, on its cumbersome process for passing and changing laws, for determining the propriety of laws, and for adding amendments; but on its flexibility to keep up with the times. They want a constitution whose meaning is not fixed. They want a “living constitution” that can be manipulated to fit the exigencies of government and the politicians’ whims and wants. They have rejected the process of legislation and amendment spelled out in the Constitution in favor of executive, judicial, and bureaucratic fiat; of imposed bureaucratic regulation without recourse; and of rejection of a constitutional structure designed to insure “personal responsibility” (James Madison’s own words); that is, to provide a mechanism to hold officials “justly and effectively answerable” for their actions.

The framers anticipated and prepared for such criticism. They wrote and ratified a living, flexible constitution that is much different than the one advocated by recent critics. John Marshall was one of our nation’s most important and longest serving Supreme Court chief justices. In two of his most famous decisions, *Marbury v. Madison* and *McCulloch v. Maryland*, Marshall reaffirmed the framers’ living constitution when he said that the Constitution should not be adapted to the various crises of human affairs; but the powers of Congress are adaptable to meet these crises. The legislative branch has been granted the power to make laws that will deal with the various crises of human affairs. Both Marshall’s and framers’ concern was not to keep the Constitution in tune with the times, rather, to keep the time, to the extent possible, in tune with the Constitution.

Today’s living constitution advocates contend that the rapid advances in science, technology, attitudes, communication and travel require a framework of government that is not fixed. This is a specious argument since the founders lived in an age when technology and science were already having an impact on people. Every generation since the founding has seen rapid change. Historians Daniel Howe and Wilfred McClay claim that a transportation and communication revolution was occurring in the U.S. in the decades before the Civil War. By 1855, a news article in a New York City paper could be read within hours by people living in St. Louis. An internet of sorts has existed a lot longer than we tech savvy moderns think. Yet why is it now necessary to impose a flexible constitution on the American people? To do so would destroy the Rule of Law and replace it with the Rule of Men where those in power can make changes to the political, economic and social structure of the nation to fit their needs and desire for power.

The framers knew the passage of time would disclose imperfections or inadequacies in their work. But these were to be repaired or remedied by formal amendment rather than by legislative action or judicial construction. The American system of government is based on the supremacy of the Constitution, which means sovereignty resides in the people; and the idea that it can be changed by an act of the legislature, even if allowed by the judiciary, is simply incompatible with the natural right of the people to determine how they will be governed.

This brings us to the campaign and election of Barack Obama to the Presidency in 2008. During his campaign and shortly after his inauguration, he said that his goal as president would be the “fundamental transformation” of the United States. What did he mean by this? Did he ever explain this phrase in explicit, clear terms that we all understood?? Recall the meaning of “fundamental”—a principle, theory, law, serving as a basis. Look at the meaning of transformation, or, in short, transform—to change the condition, nature, or function of; convert. In order to do this, what must first be changed or converted? The only answer to this question is the United States Constitution, one of the two fundamental, legal documents on which our political system, our economy, our very way of life is based. A nation cannot have a fundamental transformation without disregarding its original historical, political, moral, and social structural framework.

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