



## Stifle This, Mr. President

*Just the sort of speech the IRS would target.*

By: Ray V. Hartwell, III – May 16, 2013

---

*In April of last year I was invited by the Alabama Policy Institute to give a talk on the Founders' concept of rights as embodied in the Declaration of Independence. An abridged version of the paper from which I spoke is set forth below.*

*This week's headlines make clear that what follows is the sort of speech the Obama administration has systematically sought to stifle through IRS intimidation and other means.*

*The administration's actions make it all the more important, in my view, for Americans to revisit our republic's founding documents and doctrines. To that end, I offer here an introduction to topics that are as at least as important today as they were at the time of the American Revolution.*

### Introduction

Over the years my appreciation for our system of limited government has grown — right along with my concern that our attachment to limited government as a nation has been shrinking. In my view, it's most unfortunate that there is a growing “dependency” constituency pandered to by politicians in Washington, who have long since lost sight of the virtues of limited government.

In our current political environment, in order to defend our rights and the Constitutional system created for their protection, it is essential that we understand them. It is vital that we understand not only what sorts of rights we should cherish and defend, but also what other so-called “rights” we should greet with great skepticism.

Let's recall James Madison's teaching that “[k]nowledge will forever govern ignorance; and a people who mean to be their own governors must arm themselves with the power which knowledge gives.” We should recall where we started, and with that in mind consider the current fashion of disdain for the Constitution and the rights recognized in our Declaration of Independence.

### The Vision of the Founders

In Colonial times Americans were viewed by the British in London as provincials living on the periphery of the Empire, as simply another set of people to be ruled. The Americans sensed an increasing arrogance on the part of the English. The Colonists resented their treatment at the hands of what they considered an imperious and distant government.

Their complaints were particularized in the indictment of London embodied in the Declaration of Independence, which noted — among other charges — that the King had “obstructed the administration of justice,” “erected a multitude of new offices, and sent hither swarms of officers to harass our people,” imposed taxes “without our consent,” and “excited domestic insurrections among us.”

In contrast to our modern day ruling elites, our Founders did not see themselves as standing apart from their fellow colonists. As Gordon Wood noted in his splendid book *Revolutionary Characters*, “Unlike intellectuals today,” the Founders “had no sense of being in an adversarial relationship to the culture” of their country. Rather, they were very much a part of it, excited by its promise, and dedicated to its success.

They were also willing to take risks. They had the audacity to propose something genuinely new, and to proclaim the independence of their states from England even as they were being hunted by British troops. And so, they all signed the Declaration of Independence, pledging to one another their “lives,” their “fortunes,” and their “sacred honor.”

#### The Declaration of Independence

The Declaration of Independence starts with an invocation of universal principles — principles that are not limited to a particular time or place. Thus, “When in the course of human events,” does not limit the Declaration to the time or place of its writing, but to any occasion when “it becomes necessary for one people to dissolve the political bands which have connected them with another.”

Invoking a higher authority, “the laws of nature and of nature’s God,” the Declaration proclaimed “that all men are created equal, that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty and the pursuit of happiness.”

In the Colonies, those who favored independence were almost unanimous in the view that “the proper ends of government were to protect people in their lives, liberty, and property and that these ends could best be obtained through a republican form” of government. Accordingly, the Founders established a *republic*, in which a majority could never legally vote to violate the natural rights of the minority.

#### What Are “Unalienable Rights”?

The Founders understood that rights belong to individuals, not to groups, and that their purpose is to fence off the freedom of individuals from the power of the state. Accordingly, as the Constitution later specified, the government cannot deny you the right to free speech, to freedom of religion, to freedom to assemble in public or private to preach or protest, to freedom from involuntary servitude, to be secure in your home and person, and even — as the Supreme Court has recently confirmed — to keep and bear arms for self-defense.

These and similar rights acknowledged by the Founders as natural, or endowments from our Creator, are “negative” rights. Such rights are not granted by government; they exist independent of it. The duty of government is to protect them, and if government fails in that duty the people are entitled to abolish it and start afresh.

#### Concerns About Tyranny

Concerned as they were with the threat of tyranny, the Founders saw the standard for

assessing the legitimacy of a government as whether it rests on the consent of the governed. They distinguished, by the way, between the “will of the majority” and the “consent of the governed.” The Founders feared a pure democracy, in which the “will of the majority” could mean that “all decisions are ultimately political and are routed through the government.”

To the Founders, the rights to life, liberty, and the pursuit of happiness (or the fruit of one’s labor) were not meant to be up for grabs by a greedy or intolerant majority. They were clear in this view, which is a central reason why the Constitution grants our central government only specifically enumerated — and checked and balanced — powers, with all others reserved to the states or to the people.

#### More Contemporary Declarations and “Positive” Rights

Of course, the Declaration of Independence and the Constitution are now more than 200 years old. Today our ruling elites chafe under the constraints these founding documents impose on our central government.

About a decade back our President, then a state senator and adjunct law professor, gave an interview in which he said that the Supreme Court had failed to “*break free* from the *essential constraints* ... placed by the founding fathers in the Constitution.” He lamented that “*generally the Constitution is a charter of negative liberties*. Says what the states can’t do to you. Says what the Federal government can’t do to you, but doesn’t say what the Federal government or State government must do on your behalf.” He called for action “on the ground” to “bring about *redistributive* change.”

Our President has been consistent in his call for expansion of the government’s powers either under or despite the Constitution, to “break free” from the Constitution’s “constraints” in order to achieve “fairness” through, among other things, the redistribution of wealth. If accepted by the Congress and the courts, the “liberation” of our federal government from the limits imposed by the Constitution would indeed be transformative.

In a similar vein, in February 2012, when Supreme Court Justice Ruth Bader Ginsburg was asked what document emerging democracies should look to in drafting a constitution, she pointed not to our own Constitution but to the 1997 constitution of South Africa. That document, in contrast to the U.S. Constitution, includes positive rights, for example stipulating that citizens have the right to adequate housing.

And Cass Sunstein, a law professor who was President Obama’s chief regulatory “czar,” says that South Africa has “the most admirable constitution in the history of the world.” Presumably he ranks it above the U.S. Constitution, probably along with Justice Ginsburg and our President. In addition, Sunstein has opined that the President, and not the Supreme Court, should be empowered to interpret the Constitution and its application to federal legislation. (Of course, he’s also opined that the rights to private property and freedom of speech are, like “Medicare and food stamps,” nothing more than “taxpayer-funded and government-managed social services designed to improve collective and individual well-being.”)

In short, from these and other examples widely reported, we have more than a few judges, presidentially appointed “czars,” and elected officials who seem disdainful of the

United States Constitution, which they have sworn to uphold. Naturally these views also find support in academia and the mainstream media.

To underscore the point, in February 2012 no less an authority than the *New York Times* published an article proclaiming that the U.S. Constitution “is terse and old, and it guarantees relatively few rights.” Continuing, the article lamented that “[t]he commitment of some members of the Supreme Court to interpreting the Constitution according to its original meaning in the 18th century may send the signal that it is of little current use to, say, a new African nation.”

A law professor quoted in the article traces the “waning influence” of our Constitution to “the availability of newer, sexier and more powerful operating systems in the constitutional marketplace.”

Note to James Madison: Don’t phone home; if you can’t Skype, forget it.

#### The Boom in “New” Rights

All these pontifications did not come out of the blue. In fact, most came out of law schools, and out of public officials influenced by legal academia.

As Walter Olson described the phenomenon in his excellent book *Schools for Misrule*, in recent decades legal academia — like the political left — has had a penchant for “couching... demands and preferences in terms of purportedly fundamental rights, asserted as if timeless and universal but in fact proliferating and evolving on a restless, unending, ad hoc basis.”

So from assorted conferences sponsored by legal academia, to treaties and conventions spawned by a variety of international organizations, we are taught that “[t]he old ‘negative’ rights to be left alone... must give way to assertions of new ‘positive’ rights to government action.”

Now, in an our enlightened era, we see calls for the recognition of a slew of “positive” rights. These include the right of all “peoples [to] self-determination,” the right to “an equitable distribution of food supplies,” and such nascent rights as freedom from hate speech (which of course means the right to silence those who say the “wrong thing”), “freedom from want,” and even the right to gender reassignment surgery.

#### The Problem with Positive Rights

Just thinking about the seemingly endless stream of newly minted positive rights, I’m sure you perceive the problem. Is it possible to preserve individual liberty and at the same time provide for the fulfillment of these various “positive rights”? Can one enforce “equality” without destroying “liberty”?

In the 1970s, Harvard philosophy professor Robert Nozick, in his highly acclaimed book, *Anarchy, State, and Utopia*, sought to explain why any scheme for achieving “distributive justice,” based on the notion that a particular distribution of wealth is necessary to achieve “fairness” (have we heard this term lately?), is destructive of liberty.

Nozick offered a teaching example along these lines. Suppose a distribution of wealth that is “fair” or “just” to all; maybe all share equally, or maybe not, but all agree that the distribution is just. Suppose further that people enjoy watching Wilt Chamberlain play basketball, and that a million people each pay one dollar to watch him. So, Wilt “The Stilt” winds up with one million dollars more than his initial distribution.

Is this unjust? Each person who saw him “chose” to give Wilt Chamberlain a dollar. The “just” distribution has been altered because people voluntarily transferred their resources, in a way of their choosing. Only by forceful transfer of Wilt’s newfound wealth can the original, “fair” distribution be restored.

Nozick explained that “fairness” in distribution can never be “continuously realized without continuous interference with people’s lives.... To maintain a pattern one must either continually interfere to stop people from transferring resources as they wish to, or continually... interfere to take from some persons resources that others for some reason chose to transfer to them.”

Professor Nozick framed the issue cogently. It is very much a live issue today, especially when one considers the views of administration officials, legal academics, and media elites on the Constitution’s guarantees, which they consider — in the words of the *New York Times* — “parsimonious by international standards” and (like some prehistoric insect) “frozen in amber.”

So Where are We?

In my view, in every sense, this discussion takes us back to where we started. In 1776.

Running through all of the positive rights talk, and all of the lamentation over our Constitution’s “parsimonious” limitations, is the notion that rights come from government, that our government’s powers have no limits. That’s not what Thomas Jefferson and the other Founders believed, as they made quite clear in the Declaration of Independence and the Constitution.

Read carefully here, please: Of our Constitutional government, James Madison said, “*In Europe, charters of liberty have been granted by power. America has set the example... of charters of power granted by liberty.*” He called this a “revolution in the practice of the world,” which introduced “the most triumphant epoch of its history.”

Although they led a revolution, the Founders counseled in the Declaration that “governments long established should not be changed for light and transient causes.” In today’s political environment, this advice should be taken to heart by those who favor the exercise of unprecedented and essentially unlimited power on the part of the federal government. For it is they who propose to effect fundamental changes in our government, in furtherance of their own fashionable but transient causes.

Happily, today more than at any time in our lives, Americans are intensely interested in the Declaration and the Constitution — and in the limits the Constitution places on the separate powers of Congress and the President.

The Founders would find this entirely appropriate. After all, they did not live in ivory towers outside the reach of real world politics. Indeed, they wrote the Constitution, in

language their fellow Americans could understand, very deliberately; the public of the time read not only the document but also the Federalist Papers that debated its merits and meaning.

The Constitution, as the Founders well understood, is not the property of politicians and academics, or of some self-proclaimed intellectual elite. It is ours; it belongs to “we the people.” We owe it to ourselves and to our children to understand its terms, and to join in a new and urgent national conversation about how it should empower and constrain our federal government in today’s world.

*Ray V. Hartwell, III, is a Washington lawyer and a Senior Fellow of the Alabama Policy Institute.*