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# FUTURE OF FREEDOM

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*It is not because things are difficult that we do not dare; it is because we do not dare that they are difficult.*

— Seneca

# FUTURE OF FREEDOM

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# Dalton Trumbo and the Hollywood Blacklist

by Jacob G. Hornberger



I wish every American would see the movie *Trumbo*, starring Bryan Cranston, which was released last November. The movie is based on a true story. It depicts how the U.S. anti-communist crusade during the Cold War damaged or ruined the lives of many innocent people, including Hollywood screenwriter Dalton Trumbo and nine others, who became known as the Hollywood Ten.

Up until the 1950s, Trumbo had been one of Hollywood's most successful screenwriters. Films that he worked on included *Thirty Seconds over Tokyo* (1944) and *Kitty Foyle* (1940), for which he received an Academy Award nomination.

Like many other leftists during the 1930s, Trumbo had become at-

tracted to communism. One reason is the obvious one: Like many Americans today, he believed that government should play a paternalistic role in society, by taking care of people, regulating economic activity, and managing the economy. Another reason is that Trumbo viewed communism as a counterweight to fascism and Nazism, which were rising in prominence in Italy and Germany.

Trumbo joined the U.S. Communist Party in 1943, when the United States and the Communist Soviet Union were in partnership to defeat the Nazis in World War II. He remained a member of the party until 1948.

After the war ended, Trumbo questioned the premise that U.S. officials were using to justify the Cold War and the rise of the U.S. national-security establishment. From Wikipedia:

In a 1946 article ... Trumbo writes from the perspective of a post-World War II Russian citizen. He argued that Russians were likely fearful of the mass of US military power that surrounded them on all sides at a time when any sympathetic view towards communist countries was viewed

with suspicion. He ended the articles [sic] by stating, “If I were a Russian ... I would be alarmed, and I would petition my government to take measures at once against what would seem an almost certain blow aimed at my existence. This is how it must appear in Russia today.” His argument that the US was a “menace” to Russia, rather than the more popular American view of Russia as the “red menace....”

As Wikipedia points out, that article “did little to help Trumbo eleven months later when he would be called to explain himself to the House Un-American Activities Committee.”

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**U.S. officials convinced the American people that they were in grave danger of being attacked and conquered by the Soviet Union.**

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By that time, the fear of communism had gripped the hearts and minds of the American people. Although the United States and the Soviet Union had worked together during the war, the U.S. government furnishing vast amounts of armaments to the Soviets, as soon as the war was over, U.S. officials

switched gears and began exhorting Americans to view the Soviet Union and international communism as a grave threat to the United States.

Never mind that the Soviets had suffered an estimated 20 million deaths during the war while U.S. deaths numbered in the hundreds of thousands ... or that the Soviet industrial base was effectively destroyed as a result of the Nazi invasion of the Soviet Union while the United States had suffered no war damage to its industrial base ... or that the U.S. government had embarked on a rebuilding campaign for Germany, the nation that had gone to war against the Soviet Union in both World War I and World War II. And perhaps most important, never mind that the U.S. government possessed nuclear weapons and had shown no reluctance to use them against major cities, while the Soviet Union had none.

Despite all that, U.S. officials convinced the American people that they were in grave danger of being attacked and conquered by the Soviet Union, America’s World War II partner and ally.

That was the start of what became known as the Cold War, which became the most dangerous era in U.S. history.

### The national-security state

The most notable aspect of the Cold War was the conversion of the U.S. government to a national-security state, a type of government that is inherent to totalitarian regimes. In fact, both Nazi Germany and the Soviet Union provided perfect models for a national-security state: a vast permanent military establishment and super-secret intelligence agencies with omnipotent powers, such as the Gestapo and the KGB.

Central to national-security establishments is the concept of fear. In order to maintain their hold on power, it is essential that the citizenry be subjected to an ongoing series of threats and crises, so that people will remain perpetually in fear and always eager rally to the state, which presents itself as the defender and savior of the nation, especially in time of crisis.

In previous wars, U.S. troops had been brought home and discharged, a policy based on America's antipathy toward standing armies, a tradition that stretched back to the founding of the government.

That tradition was abandoned after World War II. Harry Truman and many others believed that it was necessary to graft the national-

security state totalitarian apparatus onto America's federal governmental structure in order to combat the Soviet national-security state totalitarian regime. To garner the support of the American people for this fundamental structural change in the federal government, one that was done without a constitutional amendment, Truman knew that he had to do what Sen. Arthur Vandenberg exhorted him to do: "scare the hell out of the American people."

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Central to national-security establishments is the concept of fear.

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And that's precisely what national-security state officials did and continued to do for the next 45 years. Iran. Guatemala. Berlin. Cuba. The Congo. Korea. Vietnam. Chile. The list of countries where the communists were threatening U.S. national security was endless. There were crises everywhere because supposedly there were communists everywhere, which officials claimed necessitated a vast national-security establishment and foreign interventionism.

In 1947, the CIA joined the Pentagon as another central feature of the national-security state. While Truman intended the CIA to be a

strictly intelligence-gathering agency, someone slipped some nebulous phraseology into the law that the CIA construed as giving it virtually omnipotent powers in foreign countries, as part of its mission to protect “national security,” the two-word term that became the most important phrase in the lexicon of the American people, even though no one has ever been able to define what it means.

## HUAC

The anti-communist crusade became a central element in the rise of the U.S. national-security state. As part of the crusade, U.S. officials embarked on a vicious witch-hunt, one in which U.S. officials, together with the American right wing, embarked on a campaign to ferret out communists in American society and do their best to destroy or ruin them.

That’s what they did to Dalton Trumbo and the Hollywood Ten.

Keep in mind that it wasn’t a crime to believe in communism or to join the Communist Party. In fact, that’s one of the bedrock principles of a free society, one that our American ancestors enshrined in the First Amendment — the right to believe in whatever you want to believe in, even if it goes against ev-

eryone else’s beliefs, and to join any organization you would like to join.

That’s what all too many Americans forgot in the Cold War anti-communist hysteria that enveloped the nation. In the name of protecting the freedom of the American people from communism, the U.S. national-security state ended up doing some of the same things to Communists here in the United States that the Soviets were doing to anti-communists within the Soviet Union. One of the best examples of that phenomenon was Dalton Trumbo and the Hollywood Ten.

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### U.S. officials embarked on a campaign to ferret out communists in American society.

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Trumbo was subpoenaed to testify before the House Un-American Activities Committee, an Orwellian name if there ever was one. The purpose of the hearings was to determine the extent of communist propaganda within the U.S. motion picture industry, with the aim of ferreting out communist subversives who were supposedly using Hollywood-produced movies to influence Americans into siding with the Soviet Union and against the United States during the Cold War. The committee’s investigation, which

specifically targeted people who were or had been members of the U.S. Communist Party (which, again, was legal), wasn't exactly a vote of confidence in the millions of public-schooled-educated Americans who had the choice of attending movies or not and accepting or rejecting whatever message the movies contained.

Trumbo complied with the subpoena and was asked the now-famous question: Are you now or have you ever been a member of the Communist Party?

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**The committee brought criminal charges against Trumbo and the Hollywood Ten for "contempt of Congress."**

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Trumbo refused to answer the question. And he had every right to refuse to answer, not because of the Fifth Amendment but because it was none of Congress's business what people believed in and didn't believe in. Congress had no legitimate authority to be conducting hearings into what was influencing Hollywood and what wasn't.

Trumbo's testimony is worth reading for the entertainment value alone. (See the full text of the proceedings, which includes Trumbo's testimony, here: <https://archive.org/>

stream/hearingsregardin1947aunit/hearingsregardin1947aunit\_djvu.txt) Among the most amusing exchanges, which was depicted in the film, was the following:

Mr. Stripling: Mr. Trumbo, I shall ask various questions, all of which can be answered "Yes" or "No." If you want to give an explanation after you have made that answer, I feel sure that the committee will agree to that. However, in order to conduct this hearing in an orderly fashion, it is necessary that you be responsive to the question, without making a speech in response to each question.

Mr. Trumbo: I understand, Mr. Stripling. However, your job is to ask questions and mine is to answer them. I shall answer "Yes" or "No," if I please to answer. I shall answer in my own words. Very many questions can be answered "Yes" or "No" only by a moron or a slave.

I only wish that during his testimony, Trumbo had addressed the following question to the committee: Were you then and are you now a supporter of the U.S. government's



partnership with the Soviet Union from 1941 to 1945?

After Trumbo was released from the committee hearings, the committee introduced into evidence an extensive account of his communist activities and affiliations.

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### Trumbo and the others in the Hollywood Ten were blacklisted.

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But even that wasn't good enough for the committee. It brought criminal charges against Trumbo and the Hollywood Ten, not for communism, because that wasn't against the law, but rather for "contempt of Congress" for refusing to answer the committee's questions.

Dalton and others of the Hollywood Ten were convicted. When the case reached the U.S. Supreme Court, it was not surprising that the Court, in what would become a permanent policy of deference to the rising power and influence of the national-security branch of the government, upheld the convictions. Trumbo served 11 months in jail, during which time his family was having an extremely difficult time making ends meet.

Under severe pressure from the anti-communist segment of American society, Trumbo and the others

in the Hollywood Ten were blacklisted, meaning that no Hollywood studio would hire them for fear of being accused of being communist sympathizers.

To avoid the blacklist, however, Trumbo organized an effort by which he and other blacklisted writers would write movie scripts under false names. That's how they were able to continue putting food on their families' tables.

One of the funniest aspects to this sordid story came when the Academy Award was awarded to Hollywood screenwriter Robert Rich, which was a totally fake name for Dalton Trumbo. The film captures the awkwardness at Oscar night when it came to awarding that particular Oscar.

In 1960 two courageous people broke the back of the blacklist. The noted director Otto Preminger publicly announced that Trumbo had written the screenplay for *Exodus* and the noted actor Kirk Douglas did the same with respect to his new movie, *Spartacus*.

A fascinating side note to *Spartacus* involved John Kennedy. According to Wikipedia, two weeks after he was inaugurated, the president walked into a Washington, D.C., movie theater to watch the movie. The reason that was so no-

table was that he intentionally crossed American Legion picket lines, where U.S. military veterans were exhorting people to boycott the film.

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**Kennedy vowed to tear the CIA into a thousand pieces and scatter them to the winds and to bring an end to the Cold War.**

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Another reason that episode is so fascinating is that Kennedy ultimately became one of only three presidents in the post-World War II era who came to question and challenge the dominant role that the national-security establishment had come to play in America's federal governmental structure.

The first was Dwight Eisenhower, who had served as Supreme Allied Commander in Europe during World War II. In what is without a doubt the most shocking Farewell Address in U.S. history, Eisenhower pointed out that the national-security state — or what he termed the “military-industrial complex” — was alien to America's way of life and constituted a grave threat to the liberties and democratic processes of the American people.

The second was former President Truman, who observed in an op-ed published in the *Washington*

*Post* thirty days after the assassination of Kennedy that the CIA had become a sinister force in American life and that Truman's original intention had been to limit the CIA to intelligence-gathering only.

By the time Kennedy had experienced the CIA's disaster at the Bay of Pigs, the ongoing crisis over Berlin, the Pentagon's plans for a first-strike nuclear attack on the Soviet Union, the infamous plan proposed by the Joint Chiefs of Staff known as Operation Northwoods, and then the Cuban Missile Crisis, he had clearly achieved the same breakthrough as Eisenhower and Truman. After the Bay of Pigs disaster, Kennedy vowed to tear the CIA into a thousand pieces and scatter them to the winds and, more important, to bring an end to the Cold War, which obviously would have posed a grave threat to the continued existence and never-ending growth of the national-security establishment.

### Chile

Some 25 years after Trumbo's incarceration, an estimated 30,000 Chileans were rounded up, brutally tortured or raped, and incarcerated in military concentration camps, all without judicially issued warrants, due process of law, and trial. Some 3,000 of them were executed or

“disappeared.”

There are several important things to note about the 1973 coup by which the democratically elected president of Chile, Salvador Allende, was ejected from office in a violent coup and replaced with a brutal military general, Augusto Pinochet, who would serve as Chile’s unelected dictator for the next 17 years.

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**If a person isn’t free to believe in unpopular ideas, how can he truly be considered free?**

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First, it is a virtual certainty that the coup would never have happened if it hadn’t been for the U.S. government, especially the U.S. national-security branch of the government — i.e., the military and the CIA. It was the national-security establishment that began orchestrating the coup three years before it occurred, constantly cajoling Chilean military officials into believing that it is the solemn duty of a national-security establishment to violently remove a president from office if his policies are threatening national security. It was the CIA that intentionally aggravated the economic situation in Chile with the aim of bringing greater chaos and crisis to the country, thereby ensuring wider support for the

coup from the citizenry. And it was the CIA that orchestrated the violent kidnapping (and resulting murder) of the commander of the Chilean armed forces, Gen. Rene Schneider, who was an insurmountable obstacle to the coup, given his steadfast allegiance to the Chilean constitution.

Second, what was done to 30,000 Chileans by the Chilean national-security establishment was driven by the same anti-communist mindset that motivated the persecution of Dalton Trumbo, the Hollywood Ten, and other Americans who believed in communism or who had had communist affiliations in their past or present.

Keep in mind, after all, that the 30,000 victims of Pinochet’s brutality were in the same intellectual or political position as Trumbo and other victims of the U.S. anti-communist crusade. Like Trumbo, all that the Chileans had done was believe in communism, affiliate with people who believed in communism, or support communists, including Allende, for public office.

That is, they hadn’t murdered anyone, raped anyone, or robbed anyone. They had simply exercised what Thomas Jefferson called the fundamental rights of freedom of speech, freedom of belief, and free-

dom of association. At the risk of belaboring the obvious, if a person isn't free to believe in unpopular ideas or to associate with unpopular people or organizations, how can he truly be considered free?

Third, the U.S. military, which had been training Chilean officials at the School of the Americas, and the CIA had to know what was going to happen when they conspired to oust Allende from power and replace him with a brutal military dictator.

In fact, during the coup U.S. officials in Vina del Mar, near where the coup began, expressed tremendous excitement and glee over what the coup leaders were doing. They expressed those sentiments to a young American citizen named Charles Horman, as recounted in the book *Missing*, on which the movie of that same title, starring Jack Lemmon and Sissy Spacek, was based. We also know that U.S. officials began flooding the Pinochet regime with U.S. taxpayer money to enable him to cleanse Chile of communists, socialists, and leftists.

The Horman story is instructive because it reflects what U.S. officials would have done to Trumbo and other believers in communism had the right crisis presented itself here

in the United States. In fact, it turns out that Horman himself, along with another young American Frank Teruggi, were executed after U.S. officials gave the nod to Chilean officials to kill them. The reason? Horman and Teruggi were leftists who supported Allende and also opposed the U.S. national-security state's war against the communists in Vietnam. To make matters worse for Horman, he had discovered U.S. complicity in the coup at Vina del Mar, something that U.S. officials wanted to be kept secret. By acquiring that information, Horman, who was a journalist, became a threat to national security. (See my article "The U.S. Executions of Charles Horman and Frank Teruggi," which is posted on The Future of Freedom Foundation's website: [www.fff.org/explore-freedom/article/u-s-executions-charles-horman-frank-teruggi-part-1/](http://www.fff.org/explore-freedom/article/u-s-executions-charles-horman-frank-teruggi-part-1/).)

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**We still do not know the full extent of U.S. involvement in the Chilean coup.**

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Fourth, for the past several years the Chilean people have been facing their dark and sordid history with extensive investigations and criminal prosecutions of members

of the Chilean national-security establishment. Unfortunately, however, the American people have chosen not to go down that road, obviously believing that it's better to let sleeping dogs lie. We still do not know the full extent of U.S. involvement in the Chilean coup, the details on the Horman and Teruggi murders, the role that U.S. officials might have played in the torture sessions of 30,000 Chileans, and the precise role that the military and the CIA played in Operation Condor, the international assassination operation that killed tens of thousands of people who were suspected of nothing more than holding leftist beliefs, including former Allende official Orlando Letelier, who was assassinated on the streets of Washington, D.C.

While Dalton Trumbo and the other victims of the U.S. anti-communist crusade were made to suffer mightily for their unpopular beliefs, they were the lucky ones. Just ask the family members of Rene Schneider, Orlando Letelier, Charles Horman, Frank Teruggi, and the other victims of the anti-communist crusade.

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*Jacob Hornberger is founder and president of The Future of Freedom Foundation.*

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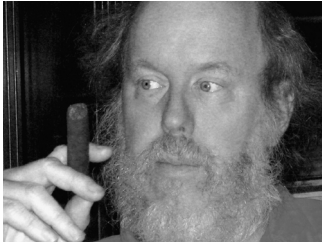
**NEXT MONTH:**  
**“Why I Favor Limited Government, Part 1”**  
*by Jacob G. Hornberger*

*The legitimate powers of government extend to such acts only as are injurious to others.*

— *Thomas Jefferson*

# The Census Bureau's Latest Peril to Freedom

by James Bovard



The Census Bureau is sending its hefty American Community Survey to more than three million households a year. I recently received this 28-page tsunami of questions about everything from my plumbing to my profession to my ethnicity and income. But as a former Census taker who has written about Census controversies for more than 25 years, I distrust this blunderbuss.

In 2005, the American Community Survey replaced the long Census form that was sent to a minority of respondents as part of the once-a-decade population count. Many congressmen are irate that the Census Bureau threatens \$5,000 fines against anyone who refuses to answer all the questions. Rep. Ted Poe

(R-Tex.) denounced it as an “unnecessary and completely unwarranted government intrusion.”

Unfortunately, citizens’ compliance with Census demands does nothing to ensure that the government itself will respect their privacy or obey the law.

The survey demands to know each residence’s previous month’s electric bill. This sounds innocuous, except that the Drug Enforcement Administration uses electric bills to snare search warrants to raid homes suspected of growing marijuana indoors, victimizing innocent homeowners. The *San Diego Union Tribune* reported that when drug agents raided 25 residences, “homes were targeted largely based on unusually high utility bills.”

The survey includes a barrage of housing questions, but the Census Bureau doesn’t warn respondents that such questions have spurred evictions in the past. City governments use Census information to “detect illegal two-family dwellings,” according to the General Accounting Office, and for housing-code enforcement sweeps that often target minorities and immigrants and have more to do with buffering property values than protecting public safety. The housing data, along with questions on ethnicity,

will fuel HUD's fair-housing crack-downs on localities that do not have the "correct" ratio of minorities in affluent neighborhoods. HUD announced a new initiative in 2013 to target racial imbalances in each of the nation's ZIP codes by "affirmatively furthering fair housing." HUD will use Census data to seek to forcibly create more "low-poverty, racially-diverse communities" across the nation.

Census unleashes a blizzard of questions on whether people have a computer, laptop, or smart phone and what type of Internet connection they use. Answering those queries will do nothing to stop the feds' surveillance crime wave. The National Security Agency is vacuuming up Americans' email and phone records in a manner that a federal judge condemned as illegal, unconstitutional, and "almost Orwellian." At least the Census Bureau does not mandate that respondents disclose their email passwords — perhaps because the NSA can easily poach them on its own.

The survey asks whether any member of the household received food stamps in the previous twelve months — information that the Agriculture Department, which runs food stamps, already possesses. But regardless of whether citizens an-

swer this question, the Obama administration refuses to disclose how recipients spend their \$74 billion in food stamps each year. The feds could easily tabulate such information, but doing so would very likely shatter the pretense that food stamps are a nutritional program, as opposed to a blank check bailout for the junk food industry.

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**At least the Census Bureau doesn't yet ask whether people have a home alarm system.**

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The Census Bureau also demands that respondents reveal what time they "usually leave home to go to work." What harm could possibly befall from this question? Actually, the Equal Employment Opportunity Commission is hammering the Census Bureau to end its prohibition on hiring convicted criminals as Census takers. (The EEOC is currently suing private corporations for refusing to disregard job applicants' prison records.) If the Census Bureau capitulates to the EEOC and a class-action lawsuit, almost any disclosure could become more perilous to residents. At least the Census Bureau doesn't yet ask whether people have a home alarm system.

The survey asks whether any resident has "serious difficulty con-

centrating, remembering, or making decisions.” But the Census Bureau relies on profound memory lapses to achieve compliance with its demands.

### Uses of Census information

In the early 1940s, the Census Bureau brazenly violated federal law by providing key information on Japanese-Americans so that the U.S. Army could round them up for concentration camps (later renamed detention facilities). The detentions are widely recognized now as the largest civil-liberties violation in modern American history, and Congress voted to pay compensation to the victims in 1988.

For almost 60 years, the Census Bureau denied any improper role in the internment. In 2000, researchers disclosed a cache of smoking-gun documents that compelled the bureau to finally admit some culpability. But it proudly declared that it had never provided the names and addresses of specific Japanese-Americans to law enforcement or the military.

In 2007, a study by William Seltzer of Fordham University and Margo Anderson of the University of Wisconsin-Milwaukee proved that the Census Bureau gave the Secret Service the names and address-

es of all persons of Japanese ancestry in the Washington, D.C., area during World War II. We do not know how many other Census confidentiality violations have yet to surface.

The Census Bureau acts as if its role in the Japanese-American internment is irrelevant ancient history. But less than a dozen years ago, the Census Bureau provided the Department of Homeland Security with a massive report on how many Arab-Americans lived in each ZIP code.

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**The Census Bureau  
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Donald Trump, the Republican front-runner in the presidential race, has repeatedly promised to forcibly deport 11 million illegal aliens. And the Census Bureau could provide the roadmap for the round-ups.

The American Community Survey asks where each resident of a household was born and whether he is an American citizen. Respondents are obliged to disclose: “When did this person come to live in the United States? If this person came to live in the United States more



than once, print latest year.” If foreigners repeatedly visited the U.S. without proper papers, that could provide grist for their deportation.

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**A National Academy of Sciences panel recently analyzed proposals for surveying Americans’ “subjective well-being.”**

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The Census survey requires disclosure of the details of a respondent’s Hispanic roots — whether he is Mexican, Dominican, Salvadoran, Colombian, et cetera. That could provide sufficient information for government targeting of specific neighborhoods where undocumented aliens congregate.

The Census Bureau has long struggled with how to deal with illegal aliens. When I worked as a Census taker in Illinois in 1980, the guidance repeatedly changed on whether we should count or ignore non-U.S. citizens. The flip-flops by Census management made a mockery of getting an accurate population head count.

The Census Bureau’s vow that survey responses will be kept confidential is as reliable as a political campaign promise. Congress can change the law at any point, regardless of how many Census takers assure respondents to the contrary.

And if the Census Bureau violates the law in a way that pleases the administration in power, there is zilch chance that Census officials will be prosecuted by the Justice Department. There is no reason to presume that the feds will treat Census replies with any more sanctity than they have shown for Americans’ emails and phone records.

### **How happy are you?**

If the government can demand that citizens fill out a 28-page form, why not send out a hundred-page interrogatory? Some Obama administration officials have been gung-ho on devising a new statistical gauge for Americans’ happiness. Alan Krueger, who was chairman of Obama’s Council of Economic Advisers, advocates devising a government statistic to gauge Americans’ “flow of emotional experience during daily activities.” A National Academy of Sciences panel, with help from the Census Bureau, recently analyzed proposals for surveying Americans’ “subjective well-being.” Future versions of the American Community Survey could demand information on the Monday blahs, PMS, and excessive cynicism.

The Census Bureau insists that the survey’s responses are vital to

ensure a benevolent distribution of hundreds of billions of dollars of federal funding per year. Census Director Kenneth Prewitt declared in 2000 that people's Census answers affect "power, money, group interests, civil rights; in short, who gets how much of what." But the federal government has no right to dictate "who gets how much of what." The Census, by providing reams of information, allows politicians to further manipulate people's lives. The more information government collects, the more control it can exert.

Besides, politicians use statistics the way a circus sideshow shyster finagles a shell-game ball. It is inconceivable that Washington would use Census data to admit that any federal program is unnecessary, redundant, or a public nuisance.

Americans rarely find out about a government abuse until long after the deed is done. If politicians decide to order another mass round-up of unpopular minorities, the Census Bureau will very likely again serve up the names and addresses on a silver platter. That is why, de-

spite the daily hectoring phone calls from the Census Bureau, I refuse to answer the American Community Survey.

The Constitution mandates that a Census head count be taken once a decade to apportion the seats in the House of Representatives. I am happy to do my part. To put it in the terms of a country music song, the only ones at this address are me and Jack Daniels. Actually, I'm a beer drinker, not a whiskey guy. So let me correct the record: nobody lives here except me and Raging Bitch (brewed by Maryland's Flying Dog).

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*James Bovard serves as policy advisor to The Future of Freedom Foundation and is the author of a new ebook memoir, Public Policy Hooligan, as well as Attention Deficit Democracy and eight other books.*

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**NEXT MONTH:**  
**"Presidential Fear-Mongering  
versus Freedom"**  
*by James Bovard*

# The Fatal Flaw

by *Laurence M. Vance*



The presidential primary season is in full swing. Current and former Democratic and Republican candidates alike have put forward various tax-reform proposals. Some of their proposals were officially unveiled at a press conference; others were unofficially presented in campaign speeches or during one of the debates. Some rehash old proposals, others recommend something entirely new. But whether Democratic, Republican, official, unofficial, old, or new — all suffer from the same fatal flaw.

## The tax code

The income-tax system in America began in 1913 after the adoption of the Sixteenth Amendment. It was initially quite modest, with a 1 percent tax on income greater than \$3,000 (\$4,000 for married

couples). A series of surcharges up to 6 percent were applied to higher incomes, with the maximum rate being 7 percent on taxable income more than \$500,000. Thanks to U.S. involvement in World War I, the tax rate in the highest bracket increased to 77 percent by 1918. The highest rate reached a whopping 94 percent in 1944. After dropping briefly, the highest rate stayed near or above 90 percent between 1950 and 1963. Although all tax rates eventually came down, and dramatically so in the 1980s, the size and complexity of the tax code has steadily increased. The tax code is now a maze of arcane rules and computations concerning income, brackets, deductions, credits, exclusions, and phase-outs that Americans spend more than six billion hours a year complying with at a cost to the economy of more than \$150 billion. The tax code and tax regulations in Title 26 of the Federal Code of Regulations together amount to more than 10 million words.

For individuals, there are currently seven tax brackets for ordinary income with tax rates of 10, 15, 25, 28, 33, 35, and 39.6 percent. The brackets are narrower for married persons filing separate returns, wider for heads of households, and wider still for married persons fil-

ing jointly. Income from capital gains and dividends is taxed at lower rates, with a top rate of 23.8 percent. However, there is also a net investment income surtax of 3.8 percent for taxpayers who earn more than \$100,000 (\$250,000 for married filing jointly). Many tax exemptions and deductions are available to lower one's taxable income. The personal exemption for tax year 2015 is \$4,000. The standard deduction is \$6,300 for singles and \$12,600 for married filing jointly. There are deductions available for home mortgage interest, charitable contributions, student-loan interest, and medical expenses. Tax credits are dollar-for-dollar reductions of the amount of income tax owed. They include the Earned Income Tax Credit, the Child and Dependent Care Credit, the Additional Child Tax Credit, the American Opportunity Tax Credit, and the Hope Scholarship Credit. Some tax credits — most notably the Earned Income Tax Credit — are refundable; that is, you can still take the credit even if you don't have any tax liability. That means that some Americans not only get back all of the money that was withheld from their paychecks, but also receive additional funds from the government that are taken from other Americans who do have

tax liabilities. The Alternative Minimum Tax ensures that those who earn more than \$53,600 (\$83,400 for married filing jointly) and take a lot of deductions and credits still pay their “fair share.”

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**The United States is one of the few countries where businesses have to pay taxes on income earned overseas.**

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For corporations, the top rate is 35 percent. Although the maze of deductions, credits, and exemptions ensures that many companies don't pay the maximum rate, the U.S. corporate tax rates are still the highest in the industrial world. The United States is one of the few countries where businesses have to pay taxes on income earned overseas (a “worldwide” versus a “territorial” tax system). However, taxes are deferred on international income until the income is returned to the United States. The profits of “pass-through” businesses such as partnerships, sole proprietorships, and S corporations — which now employ more than half of the private sector workforce — are passed directly to the businesses' owners to be taxed on their individual income-tax returns. All corporations and businesses must also pay 6 percent

unemployment tax on the first \$7,000 of each employee's income.

In addition to income taxes, there are two payroll taxes. The Social Security tax rate is 12.4 percent (split between employers and employees) on the first \$118,500 of wages. The Medicare tax rate is 2.9 percent (split between employers and employees) on wages of any amount. The employee share increases to 2.35 percent on that portion of income that is more than \$200,000 (\$250,000 for married filing jointly).

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### Even death will not spare Americans from taxes.

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Even death will not spare Americans from taxes. An estate tax is levied on the net value of property owned by deceased persons on the date of their death. Currently, estates are taxed at a rate of 40 percent on assets greater than \$5.430 million.

### The proposals

Many Republican candidates have said that they want to eliminate the estate tax. Jeb Bush specifically mentioned eliminating the estate tax and ending the step-up basis in capital gains for estates. On the other side of the aisle, Democrat Bernie Sanders wants to increase

the top estate tax rate to 65 percent and lower the estate tax exclusion to \$3.5 million.

Some Republican candidates have said that they want to eliminate the corporate income tax. Most have talked about lowering the maximum rate from 35 percent to 25, 24, 20, or 15 percent. Two Republican candidates want to lower the top rate on manufacturers even further. Two others suggested replacing the corporate income tax with a 14.5 or 16 percent business transfer tax, which applies to all capital income and labor payments. Several Republican candidates have proposed a special tax on "pass-through" business income of 10, 14.5, 15, or 25 percent. Several others have called for shifting to a territorial tax system and enacting a deemed repatriation of foreign income at a 6, 8, 8.75, or 10 percent rate.

Sanders wants to raise payroll taxes by applying the Social Security tax to earnings greater than \$250,000 and creating a new tax of 0.2 percent to fund paid family leave. Two Republican candidates want to eliminate payroll taxes for workers older than 62 or 67. Two others just want to eliminate the additional .09 percent Medicare tax on incomes greater than \$200,000. Ted Cruz has said that he wants to eliminate the payroll tax altogether.

Although many Republicans have called for the elimination of the Alternative Minimum Tax, Clinton has said that she wants to create a new minimum 30 percent tax rate on individuals earning more than \$1 million.

Instead of the current seven tax brackets, some Republican candidates want a system of three brackets with the lowest rate ranging from 2 to 15 percent and the highest rate ranging from 20 to 35 percent. Others prefer a flat tax of 10, 14.5, or 15 percent.

Many Republican candidates have proposed eliminating all itemized deductions except for the charitable deduction and the mortgage-interest deduction. Some want a cap on the amount of the mortgage-interest deduction and other deductions. A few have called for increasing the standard deduction or personal exemption. Clinton wants to cap the tax benefit of itemized deductions at 28 percent of the deduction.

Republican candidates are creative when it comes to tax credits. Many would like to expand the Earned Income Tax Credit. Some want to eliminate all credits except for the Earned Income Tax Credit and the Child and Dependent Care Credit. One wants to establish a

family tax credit of \$4,300 for all households living in poverty. Another wants to replace the personal exemption with a nonrefundable credit for dependents and transfer the Earned Income Tax Credit to the payroll tax. One wants to replace the standard deduction, personal exemption, and Earned Income Tax Credit with a refundable personal credit of \$2,750. Another wants to establish an additional child credit of \$2,500 and replace the standard deduction, personal exemption, and 10 percent tax bracket with a refundable personal credit.

Clinton wants to make the American Opportunity Tax Credit permanent.

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**Republican candidates are creative when it comes to tax credits.**

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Some Republican candidates have proposed lowering the tax rate on capital gains and dividends. Others are content to tax capital gains and dividends as ordinary income. Clinton wants to raise the rate on medium-term capital gains. And although many Republicans have expressed their desire to eliminate the net investment-income surtax, Sanders aims to increase it to 10 percent.

Republican candidate Mike Huckabee has called for the elimination of all taxes (personal income, corporate income, capital gains, estate, and payroll) and replacing them with a national sales tax rate of 23 percent on all goods and services (the FairTax) with monthly rebates (cash payments from the government) for low-income households.

### The fatal flaw

It is safe for Republicans to call for the elimination of the estate tax or the lowering of the corporate income tax. Corporate taxes are a relatively small share of federal revenue, about \$328 billion in 2015. The estate tax provides the government with even less revenue than the corporate income tax. No candidate would ever call for abolishing in its entirety the personal income tax, replacing it with nothing. Not when they support just minuscule cuts in federal programs, saving Social Security and Medicare for future generations, and increasing the defense budget. That is why they always talk about tax reform rather than complete tax elimination.

And herein lies the candidates' fatal flaw. Their tax-reform proposals all presuppose that the government has a claim to a certain per-

centage of every American's income. They may disagree on what percentage that is, whether higher-income Americans should give the government an even higher percent, and how the government should collect the money, but they all agree that the state says to its subjects, as Frank Chodorov made clear in his book *The Income Tax: Root of All Evil* (1954), "Your earnings are not exclusively your own; we have a claim on them, and our claim precedes yours; we will allow you to keep some of it, because we recognize your need, not your right; but whatever we grant you for yourself is for us to decide.... The amount of your earnings that you may retain for yourself is determined by the needs of government, and you have nothing to say about it." That means that there can be no such thing as a fair tax.

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**The candidates' tax-reform proposals all presuppose that the government has a claim to a certain percentage of every American's income.**

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Republicans are always patting themselves on the back for inaugurating and extending for several years the so-called Bush tax cuts — until the new top rate of 39.6 per-

cent was instituted in the “American Tax Relief Act of 2012” passed by the lame-duck Congress to avert the “fiscal cliff.” But what was the top rate before their bipartisan tax increase? It was 35 percent! That some Americans had to turn over 35 percent of their income to the government is something that Republicans should be ashamed of, not proud of.

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**Acquiring someone’s property by force is morally wrong — even when it is done by government.**

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Acquiring someone’s property by force is morally wrong — even when it is done by government. This means that all taxation is theft, and theft on a grand scale, as the late Austrian economist Murray Rothbard explained:

*All other persons and groups in society (except for acknowledged and sporadic criminals such as thieves and bank robbers) obtain their income voluntarily: either by selling goods and services to the consuming public, or by voluntary gift (e.g., membership in a club or association, bequest, or inheritance). Only the State obtains its revenue by coercion,*

by threatening dire penalties should the income not be forthcoming. That coercion is known as “taxation,” although in less regularized epochs it was often known as “tribute.” Taxation is theft, purely and simply, even though it is theft on a grand and colossal scale which no acknowledged criminals could hope to match. It is a compulsory seizure of the property of the State’s inhabitants, or subjects.

It would be an instructive exercise for the skeptical reader to try to frame a definition of taxation which does not also include theft. Like the robber, the State demands money at the equivalent of gunpoint; if the taxpayer refuses to pay his assets are seized by force, and if he should resist such depredation, he will be arrested or shot if he should continue to resist.

So, if taxation is theft, then why do libertarians pay taxes? Libertarians pay taxes for the same reason that they hand over their wallet to someone who points a gun in their face and says, “Give me your money or I will shoot you.”



## The libertarian alternative

The libertarian alternative is a simple one. Instead of debating how the tax code should be reformed — whether the focus should be on simplifying it or making it fairer, whether the number of tax brackets should be expanded or reduced, whether there should be a flat tax rate, whether tax rates should be made more or less progressive, whether certain tax credits and deductions should be eliminated, whether tax credits and deductions should be phased out for those with high incomes, whether tax credits and deductions should be indexed to inflation, whether tax loopholes should be closed, whether families making below a certain amount should be exempt from paying income tax, whether “the rich” are paying their “fair share,” whether the tax burden should be shifted to businesses, or whether the income tax should be replaced with or supplemented by a sales tax or VAT — libertarians say that the whole tax code should be eliminated.

Not reformed, not rewritten, not simplified, not shortened, not revised, not amended, not rephrased, not reworded, not altered, not reworked, not made more efficient, not modified, not changed, not improved, not enhanced, not

made more equitable, not adjusted, and not replaced, but eliminated. Completely eliminated — every title, section, paragraph, and word.

No tax code, no IRS, no tax courts, no tax rates, no tax brackets, no deductions, no credits, no exemptions, no loopholes, no shelters, no personal income tax, no corporate income tax, no payroll taxes, no capital gains tax, no estate tax, no Alternative Minimum Tax, no depreciation schedules, no tax burden, no tax base, no filing requirements, and no tax forms — not even one that fits on a postcard.

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**Not reformed, not rewritten, not simplified, but eliminated.**

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Although it may seem unnecessary and redundant that the elimination of the tax code has to be spelled out in such terms, such is certainly not the case. Not when conservative tax-reform proponents are so disingenuous. Not when conservative tax-reform proponents talk about repealing the Sixteenth Amendment and eliminating the IRS at the same time as they propose to institute a national sales tax or give the specifics of some income-tax plan. Do they really expect us to believe that the government would have a tax code of some kind, to

collect taxes on consumption or income (or both), and just expect businesses and individuals to voluntarily collect and pay taxes?

But, it is objected, without a tax code and an IRS, the federal government wouldn't have any way to fund Social Security, Head Start, food stamps, scientific and medical research, farm subsidies, space exploration, school breakfast and lunch programs, SSI, arts and culture, education, student loans, Medicare and Medicaid, TANF, foreign wars, overseas military bases, WIC, airport security, the drug war, foreign aid, disaster relief, Planned Parenthood, housing subsidies, home heating assistance, and the Corporation for Public Broadcasting.

Exactly. That is the point. The government shouldn't be funding any of those things.

All constitutional functions of the government could be funded by donations, bequests, user fees, land sales, and lotteries. In a free society, the government wouldn't levy taxes on individuals or businesses. In a free society, the government would know neither the incomes of individual Americans nor the profits of American businesses. In a free society, all Americans would keep the fruits of their labor. In a free society, there would be no such thing as

public assistance. In a free society, all charity, assistance, aid, relief, benevolence, philanthropy, and welfare for food, medical care, housing, mental health, the handicapped, and foreign countries would be private. In a free society, funding for scientific and medical studies, arts and culture, and exploration and research — from the depths of the sea, to the lab, to outer space — would be voluntary. In a free society, the government wouldn't forcibly take money out of the paychecks and pockets of Americans and redistribute it after funneling it through layers and layers of federal bureaucracy.

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**In a free society, the government would know neither the incomes of individual Americans nor the profits of American businesses.**

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But, it is then objected, with all the statists in Congress, the tax code and the IRS don't look like they are going away any time soon. What should be done in the meantime? The answer is to work toward keeping as much money as possible in the hands of Americans and as much money as possible out of the hands of Uncle Sam. Therefore, any decrease in taxes or tax rates or increase in tax credits or deductions

is always a good thing. From the libertarian point of view, the “goal” of tax policy should not be reform, simplicity, fairness, efficiency, economic growth, revenue maximization, revenue neutrality, tax base broadening, tax shifting, or tax replacement, but freedom. Freedom to keep as much of the fruits of one’s labor as possible.

The tax plans of all of the presidential candidates — Democratic and Republican — are flawed, fatally flawed. As Chodorov reminds us, “There cannot be a good tax nor a just one; every tax rests its case on compulsion.”

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**NEXT MONTH:**  
“The Libertarian Sticking Point”  
by Laurence M. Vance

*Congress shall have the power to lay and collect taxes, duties, imposts and excises for revenue necessary to pay the debts, provide for the common defense and carry on the government of the Confederate States; but no bounties shall be granted from the treasury, nor shall any duties or taxes on importations from foreign nations be laid to promote or foster any branch of industry.*

— *Constitution of the Confederate States*  
*Article I [1861]*

*The immature conscience is one that bases its judgments partly, or even entirely, on the way other people seem disposed toward its decisions. The good is what is admired or accepted by the people it lives with. The evil is what irritates or upsets them. Even when the immature conscience is not entirely dominated by people outside itself, it nevertheless acts only as a representative of some other conscience. The immature conscience is not its own master. It is merely the delegate of the conscience of another person, or of a group, or of a party, or of a social class, or of a nation, or of a race. Therefore, it does not make real moral decisions of its own, it simply parrots the decisions of others. It does not make judgments of its own, it merely “conforms” to the party line. It does not really have motives or intentions of its own. Or if it does, it wrecks them by twisting and rationalizing them to fit the intentions of another. That is not moral freedom.*

— Thomas Merton

# The Right to Keep and Bear Arms as a Check on Tyrants

by Scott McPherson



*Whatever makes kings can unmake them.*

— Isabel Paterson  
*The God of the Machine*

Service in the militia, for purposes of national defense, suppression of rebellion, and answering the “hue and cry,” was widely understood as an ancient right and duty of the free citizen. By securing to individual citizens “their private arms,” the Framers of the Constitution were also ensuring the right of Americans, like Englishmen of old and their own colonial forebears, to defend hearth and home against tyrannical elements within their own government.

With the exception of those conscientiously opposed to any

form of violence, Americans of the Founding generation would have agreed that arms, in the hands of the people, were a legitimate tool of last resort against tyrants. They had seen that principle borne out in dramatic practice; the American militiamen lining the road back from Concord in April 1775 were firing at their own government’s troops. The fierce fighting that marked that day was relentless, and at times bloodthirsty. Snipers shot soldiers from concealment, and Minutemen ambushed en masse, wreaking havoc on the British ranks.

For more than a year after, a militia army held Boston — a valuable strategic and commercial port in North America — under siege, until British policy moved the war elsewhere. From April 19, 1775, until British ships lifted anchor and sailed out of Boston Harbor on March 17, 1776, the militia of New England, supplemented by a steady stream of militia units pouring in to join the cause from as far away as Virginia, was a band of rebels, acting in defiance of their lawful king and parliament. The Revolution’s leaders were well aware of that fact; at the signing of the Declaration of Independence that summer in Philadelphia, Ben Franklin quipped,

“Gentlemen: we must all hang together, or assuredly we shall all hang separately.”

### A right to revolt

The Declaration of Independence holds among our “unalienable rights,” the right to “alter or abolish” government, should it become “destructive” to personal liberty. And that was precisely the action taken in the American Revolution. Men (and women) were no less enamored of this spirit of revolution a decade later, when a new Constitution was proposed. Alexander Hamilton and James Madison, possibly the two most influential political theorists of the time, certainly acknowledged the right to revolution. “If the representatives of the people betray their constituents, there is then no recourse left but in the exertion of that original right of self-defence,” Hamilton wrote, in *Federalist* 28. Madison downplayed fears that an American army would be employed against the people, but only because it would face “a militia amounting to near half a million of citizens with arms in their hands.”

Following the Whiskey Rebellion, Thomas Jefferson wrote to Madison from Paris, that revolutions should not only be frequent, but possibly even encouraged:

I hold it that a little rebellion now and then is a good thing, and as necessary in the political world as storms in the physical. Unsuccessful rebellions indeed generally establish the incroachments on the rights of the people which have produced them. An observation of this truth should render honest republican governors so mild in their punishment of rebellions, as not to discourage them too much. It is a medicine necessary for the sound health of government.

This “right to revolt” was also sanctioned in official documents. For example, Article 10 of the New Hampshire Constitution, adopted on June 2, 1784, states,

Government being instituted for the common benefit, protection, and security, of the whole community, and not for the private interest or emolument of any one man, family, or class of men; therefore, whenever the ends of government are perverted, and public liberty manifestly endangered, all other means of redress are ineffectual, the people may, and of right ought

to reform the old, or establish a new government. The doctrine of nonresistance against arbitrary power, and oppression, is absurd, slavish, and destructive of the good and happiness of mankind.

Joseph Story, the great American jurist and Supreme Court justice, wrote in his influential *Commentaries on the Constitution of the United States*, first published in 1833,

The right of the citizens to keep and bear arms has justly been considered as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them.

Of particular note here is further articulation of the theme, running right back to the beginning of the American Republic, and well before, that resistance to tyranny is not only just, but a moral imperative, and an important responsibility of the free citizen. The idea might

cause a shudder among some of the more “refined” members of American society today, but for those who shaped political thought in this new country, the right to keep and bear arms was widely considered as a check on the ambitions of power-mad public officials.

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**“The right of the citizens to keep and bear arms has justly been considered as the palladium of the liberties of a republic.”**

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In the 1960s, an ultra-left-wing writer named Edward Abbey drew up a list of eight steps necessary for anyone “planning to impose a dictatorial regime upon the American people,” warning that step three would be restriction of gun-ownership “to the police and the regular military organizations.” Sanford Levinson, another “liberal” of the late twentieth century, was also awake to the Second Amendment’s role as a fail-safe for preserving healthy government. In “The Embarrassing Second Amendment,” he hints at both the need and possibility of armed revolution, even in the present day:

One would, of course, like to believe that the state, whether at the local or national level,

presents no threat to important political values, including liberty. But our propensity to believe that this is the case may be little more than a sign of how truly different we are from our radical forebears. I do not want to argue that the state is necessarily tyrannical; I am not an anarchist. But it seems foolhardy to assume that the armed state will necessarily be benevolent. The American political tradition is, for good or ill, based in large measure on a healthy mistrust of the state.

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**“It seems foolhardy to assume that the armed state will necessarily be benevolent.”**

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The right to revolt deserves at all times our most thoughtful consideration. The idea was more than academic to those who established this republic. It occupies the pages of historical texts precisely because they wanted future generations to understand the proper relationship between citizen and government, and the role of government itself. The cancerous nature of tyranny, once firmly rooted, will weaken the character of a people, and by extension their ultimate means of rebuke.

As we attempt to understand the morality of defensive violence, the possibility of removing and replacing government by force is problematic at best. Important questions demand to be addressed: To whom, and under what circumstances exactly, does this right pertain? If government is established on a popular foundation, with regular elections, separation of powers, and judicial review, what “right” can exist to overturn lawfully constituted government? Isn’t the “right of revolution” just a prescription for civil discord, lawlessness, and ruin?...

### What about the minority?

Addressing a crowded Senate chamber in the nation’s new capitol, President Thomas Jefferson called on his fellow citizens to “bear in mind this sacred principle,”

that though the will of the majority is in all cases to prevail, that will, to be rightful, must be reasonable; that the minority possess their equal rights, which equal laws must protect, and to violate which would be oppression.

The American constitutional order rests in part on widespread



firearm ownership, and an attachment to personal freedom over democracy. Democracy unbridled can run counter to individual rights and threaten the stability of a society. Levinson writes, “The development of widespread suffrage and greater majoritarianism in our polity is itself no sure protection” against a tyrannical state. Majorities can be as oppressive as a single dictator. Yet, if the right of revolution is enjoyed only by a majority, what recourse is available to an oppressed minority?

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**Democracy unbridled can run counter to individual rights and threaten the stability of a society.**

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Here again we may turn to Carson, though briefly. First, he says, a minority has access to the podium and the printing press, to persuade their fellow citizens, and possibly “become the majority.” Failing that, “the ultimate recourse of an oppressed minority is migration. The right to migrate for a minority is the corollary of the right to revolution for a majority.” The Framers had created the largest free-movement zone since the Roman Empire, and those unhappy in their present circumstances could, in theory, “vote with their feet.” An example of that

is the Great Migration, when more than six million people of African descent left the South in the twentieth century, moving north and west.

But the reality for those who stayed was untenable. Anyone in immediate or imminent physical danger cannot simply pack up his family and moveable property and go elsewhere, and government officials most assuredly can (and have) acted against citizens before they might avail themselves of that option, or even contemplate its possibility. Moreover, there is no guarantee that even a change of one’s location will mean an end to legal (and lethal) persecution. Finally, regardless of the option to leave, some indignities should never be tolerated, by anyone.

Guidance may be sought in the contributions of John Locke, the seventeenth-century political philosopher whose ideas profoundly influenced the Founding generation, particularly Thomas Jefferson. Locke saw government as an instrument created by men, those who do not trust the uncertainty of a “state of nature,” and seek instead protection for their lives and property in a common set of laws, to be obeyed by all who wish to benefit from this mutual respect and community. However, in his *Second*

*Treatise of Civil Government*, Locke argued that, even under a government, justice still remains with those who use force to repel force:

[The] law, which was made for my preservation, where it cannot interpose to secure my life from present force, which, if lost, is capable of no reparation, permits me my own defence, and the right of war, a liberty to kill the aggressor, because the aggressor allows not time to appeal to our common judge, nor the decision of the law, for remedy in a case where the mischief may be irreparable.

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**Being a right that is inherent to all people, this Right of Resistance, precedes the Second Amendment.**

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A minority, even a minority of one, facing a dangerous aggressor, may have no moral claim to the Right of Revolution ... but the “ultimate recourse” in this scenario is not petition, persuasion, or even flight. It is resistance. In his “Essay on the Trial by Jury,” first published in 1852, Lysander Spooner argued that “the only security against the

tyranny of the government lies in forcible resistance to the execution of the injustice,” noting that if men have the right to defend their “lives and liberties,” then naturally “they have a right to defend them against” government.

Being a right that is inherent to all people, this Right of Resistance, as we can fairly call it, precedes the Second Amendment, and is also anticipated by that guarantee, which prohibits government from disarming individual citizens. A state or local force, acting under the auspices of a governing body, is, according to those who celebrate democracy over individualism, a tool of the majority — and it may in fact be the very means by which an individual’s life is threatened. By protecting each member of society’s right to maintain the personal firepower to defend his life, liberty, and property, it logically follows that this remedy is also available to a minority, to check the dangerous pretensions of belligerent government officers.

For example, on February 28, 1993, a force of approximately seventy-five heavily armed agents from the Bureau of Alcohol, Tobacco, and Firearms (ATF) attacked a group of 120 religious eccentrics, mostly women and children, outside of Waco, Texas. Storming their

church, the ATF agents began firing, first shooting a dog and her puppies, then, turning their attention on two unarmed cult members at the front door. The agents mortally wounded one cult member and sent the other, wounded in the arm, scrambling back inside. A number of Branch Davidians, as they were called, returned fire. After a two-hour gun battle, during which ATF agents fired indiscriminately into the building and possibly through the roof from helicopters, five Davidians and four ATF agents lay dead, with another sixteen agents wounded.

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After a fifty-one day siege, an FBI assault on the Davidian property ended in the deaths of seventy-six people.

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The Davidians considered their actions to be purely defensive. When the ATF agents began firing, Wayne Martin, a lawyer educated at Harvard, immediately called 911, yelling at the police dispatcher, “There are about seventy-five men around our building shooting at us.... Tell them there are children and women in here and to call it off! Call it off!”

Following this botched raid, the FBI took charge. After a fifty-one day siege, an FBI assault on the Da-

vidian property ended in the deaths of seventy-six people. Despite this tragic outcome, the Davidians’ actions may have had a profound impact on federal police policy. As libertarian activist and author Peter McWilliams put it,

If the Branch Davidian compound at Waco had been your ordinary, unarmed weirdo cult, do you think any of us would have heard about what would have been a very uneventful raid? Although it would have made the front page in Waco, the swift roundup and eventual release of a band of odd believers would have been buried in the second section of the Dallas papers and probably never mentioned by *Time*, *Newsweek*, the *Los Angeles Times*, or the *New York Times*. And although the Branch Davidians died in a mystery inferno, they certainly made their point; I doubt very much if a branch of the federal government will be attacking an armed cult again in the near future.

Within a few years, *No More Wacos: What’s Wrong with Federal Law Enforcement and How to Fix It*,

by David Kopel and Paul Blackman, was published. In 1996, an armed standoff with the Montana Freeman, a Christian patriot group who had declared sovereignty from the federal government in a small town in Montana, ended peacefully, after eighty-one days. The attorney general had made it abundantly clear there would be no repeat of Waco. In 2007, two convicted tax protesters, Edward and Elaine Brown, refused to leave their home for almost four months, and supporters were allowed to deliver supplies to the couple. Rather than force a gun battle, U.S. Marshals posed as sympathizers, arresting the couple without incident, peacefully ending the standoff. When Cliven Bundy, a Nevada rancher, refused to comply with federal grazing laws in April 2014, 200 heavily armed federal agents moved in to arrest him. They found themselves opposed by perhaps 1,000 armed citizens. Wisely, the agents chose to de-escalate the crisis.

### Conclusion

Under Adolf Hitler's Nazi regime, Jews and other "enemies of the state" were disarmed years before adoption of the Final Solution; state forces knew exactly whom to visit because they had ready access

to lists of gun-owners made after "crime control" measures required registration of all weapons in the 1930s. Any Jew found with a gun faced twenty years in prison. The American political tradition in general, and the Second Amendment in particular, not only allow for revolution and resistance, but effectively guarantee a certain level of tension between citizens and government, by ensuring that each and every individual has the right to purchase, own, and carry weapons for his own defense. While the right to revolt may pertain only to a majority that finds itself compelled to obey the oppressive edicts of a government grown "alien to the generality of the people," the minority, including a minority of one, still retains the moral authority to resist injustice, even that inflicted by government, and by force of arms if necessary.

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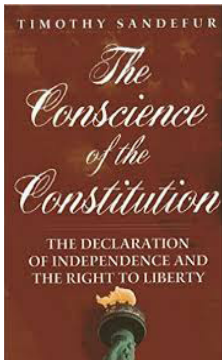
*Scott McPherson is a policy advisor for The Future of Freedom Foundation. This is an excerpt from his ebook, Freedom and Security: The Second Amendment and the Right to Keep and Bear Arms, published in 2015 by FFF.*

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# Securing the Blessings of Liberty

by David S. D'Amato

*The Conscience of the Constitution: The Declaration of Independence and the Right to Liberty* by Timothy Sandefur (Cato Institute, 2014), 200 pages.



In his book *The Conscience of the Constitution: The Declaration of Independence and the Right to Liberty*, Timothy Sandefur, an attorney at the Pacific Legal Foundation and a Cato Institute adjunct scholar, argues that “the primacy of liberty” is the most important principle of America’s constitutional order. The Declaration of Independence, as an expression of that principle, is the Constitution’s lodestar, the guiding light that can help us strike the correct balance be-

tween majoritarian democracy and the sacred rights of the individual. In prosecuting his argument, Sandefur illustrates a largely imagined contest between what he calls “the States’ Rights Party and the Republican Party,” a deep disagreement on the fundamental values of the country that saw the latter group attempt to realign the nation with the spirit of the Declaration by way of the Fourteenth Amendment. Perhaps counterintuitively, in this story, the centralizing, federal government-aggrandizing Republicans are the genuine guardians of the natural-rights tradition that gave rise to the Declaration and the Constitution. Sandefur wants to show that the Republican conception of the “nature and limits” of sovereignty represented a principled departure from that of the British constitution, and that the States’ Rights camp retained the flawed and despotic conception. Civil war was the predictable result of such a momentous breach.

Many libertarian readers will demur at Sandefur’s lionization of the Constitution and his picture of the Union victory as an abortive attempt to revive the spirit of the Founding. After all, if the Constitution had libertarian elements at all, then arguably they were easily and

completely eclipsed by its apparent sanction of slavery. The outstanding abolitionist and editor of *The Liberator*, William Lloyd Garrison, famously called the Constitution “a covenant with death” and an “agreement with hell,” publicly burning copies and cursing the American Union. Likewise considering it a monument to the institution of slavery, Garrison’s fellow Christian nonresistant and abolitionist Henry C. Wright wrote, “The only cure for such a Constitution is its destruction — the only remedy for the evils of such a Union is its dissolution.” And though he had argued more than twenty years earlier that slavery was unconstitutional, the great libertarian lawyer Lysander Spooner boldly asserted that the Constitution had no binding authority, that the government it created was merely a gang of “robbers and murderers.” While today’s libertarians certainly need not be bound by their opinions, it is worth noting that it is exceedingly difficult to find a nineteenth-century libertarian of any importance or prominence who saw the Constitution of the United States as an even somewhat libertarian document. Almost to a man, the libertarian radicals of Spooner’s and Garrison’s time derided the Constitution as yet another

in a long historical string of oppressive legal instruments, an expression of ruling-class values and interests. Whether the Constitution is a friend or foe of liberty, then, is not self-evident.

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### Prepolitical principles

Sandefur’s plea for the Constitution is most persuasive in its argument that we should treat the Declaration not only as a part of the nation’s political history, but as an important legal document in its own right — indeed, as “the conscience of the Constitution.” The principles immortalized in the Declaration, Sandefur argues, should inform our interpretations of the Constitution, at last resolving the conflict between the “the nation’s founding principles of equality and liberty” and the “wolfish view that government has a basic right to rule.” Sandefur’s book is thus a powerful vindication of the idea that certain knowable and objectively defined values, in particular the Enlightenment philosophical traditional of natural rights, are

essential to a proper understanding of the Constitution.

In a compact work of clear, coherent prose, he explodes the idea, tellingly shared by both conservatives and progressives, that there can be “no objectively ‘correct’ hierarchy” in ethics, that instead “rights are created by the state” through either arbitrary edict or popular vote. Sandefur demonstrates that this positivist way of thinking is essentially authoritarian, a lapse back into a benighted time before widespread acceptance of the vital concepts of natural rights and individual sovereignty. To argue that “rights” are merely privileges, granted by the state according to its discretion and subject to revocation at will, is to fall into a vicious infinite regress. Sandefur shows that in the absence of a presumption of individual liberty, one would be required in practice to prove not only that he has a particular right, but that he has a right to set forth his proof of that right. If we take it seriously, the old idea that rights come only from positive enactments of law requires what Tom G. Palmer called “an infinite hierarchy of power,” layers upon layers of enforcers able to threaten their subordinates.

The libertarian alternative, of course, is the acceptance of certain

“prepolitical principles” as guideposts directing our statecraft. The principles of equality before the law and the natural, inalienable freedom of every individual are such guideposts, shaping our ideas about the proper role of government. In analogizing a just, proper government to a contractual agreement, Sandefur’s political philosophy recalls the ideas of radical thinkers such as Spooner and Benjamin Tucker, who rethought classical social-contract theory by demanding that a governmental entity confine itself to actions compatible with the requirements of justice and the law of equal liberty. Spooner and Tucker believed, however, that if government were so confined, if it were a service provider only, then it would thereby cease to be a government at all — the state being defined by the fact that it exceeds its authority to protect and abuses its discretion.

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It is, in any case, far from clear that the Framers wanted the government created by the Constitution to be a mere “arbitrator” and “security guard,” as Sandefur con-

tends. More likely, the Framers wanted a strong federal government, empowered to do all kinds of things that have nothing to do with resolving disputes or protecting the kinds of negative rights that today's libertarians advocate. As Richard Epstein writes, "[The] Constitution is not a libertarian document." Furthermore, leaving the Framers aside, Sandefur's generous esteem for the Republicans seems incongruous with his treatment of the Progressives, whom we should see as the Republicans' successors. Sandefur sets up a rather baffling false choice between the States' Rights Party, which advocated state sovereignty cynically (that is, only to protect the hideous crime of slavery) and the Republican Party, which represented the obviously absurd notion that "[political] union and protection for individual rights reinforced each other." This is a version of the old Randian argument that a system of objective laws requires a single coercive monopoly, the authority of which must have no rivals. But it is a basic tenet of libertarian thought that political decentralism, exemplified by the Constitution's vertical federalism, is a disincentive to abuses of power, allowing people to vote with their feet and making centers of political

authority less remote and, therefore, more accountable. It is hardly a coincidence that the wholesale rejection of individual rights has attended the growth and centralization of the federal government, overseen by both Progressives and their Republican antecedents. Theodore Roosevelt spoke truly in a speech delivered at a Lincoln Day banquet in 1913: "Lincoln and Lincoln's supporters were emphatically the progressives of their day." Repeatedly vilifying "reactionaries," Roosevelt declared that "the Progressive movement of today and the Republican movement of 1854" are "fundamentally and basically alike." Libertarians need not — and emphatically should not — side with either the Confederate crusaders for states' rights or the Republican champions of the Union.

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### Substantive due process

Nevertheless, *The Conscience of the Constitution* refreshingly dismantles the idea, prevalent among certain liberty-movement contingents, that the states' rights theory



and the secession of the Confederacy were inherently libertarian. Sandefur shows that, quite to the contrary, adherents of the states' rights philosophy tended to embrace a view of state sovereignty fundamentally at odds with the libertarian idea of natural rights, a view that saw government as possessing an illimitable "right to obedience." The book contrasts this view, the state as entitled to unlimited power, with the idea that government is, or at least should be, an agency of the popular will, its powers limited in scope and delegated through the consent of the people. Implicit in this proposition is the understanding that if government goes beyond its narrow mandate to protect the rights of citizens, if it becomes an instrument of oppression and violation, then it dictates no longer demand respect or obedience.

To restore proper respect for individual liberty, Sandefur argues, the judiciary must engage in meaningful judicial review of government actions. Progressives and legal positivists contradict themselves when they claim to reject all prescriptive, normative claims just as they express their commitment to the abstract idea that judges should defer to the will of the majority. Sandefur endorses a robust concep-

tion of judicial review that incorporates a defense of substantive due process, which, he notes, is "today one of the most controversial of all legal theories," condemned by both the Left and Right. Substantive, as opposed to procedural, due process is the idea that the Due Process Clause not only requires certain procedural steps and forms, but also protects certain fundamental individual rights. Libertarian attorneys have lately been among the fiercest defenders of substantive due process as an integral aspect of America's legal inheritance.

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Indeed, Sandefur argues compellingly that the distinction between substantive and procedural due process is itself spurious, that the two are inseparable as a practical matter. "Form and substance," he writes, "cannot be separated here any more than they can be in the realm of physical reality." For a directive to be law in the first place, it must accord with a formula that entails both procedural and substantive requirements, heeding the unspoken limits that are implied in

every law or legal instrument. Certain contractual terms, for example, are invalid as a matter of law — voided automatically even if the parties consent to them. Sandefur maintains that the Constitution is no different, its implied limits and provisions being supplied by the Declaration’s “foundation of equal liberty.” If we accept Sandefur’s argument about the legal, interpretive connection between the Declaration and the Constitution, then substantive due process is plainly not just judges “making it up,” engaging in irresponsible judicial activism to undermine policy objectives they find distasteful. It is rather a legitimate and important aspect of a proper review of constitutionality.

Ironically, *The Conscience of the Constitution* is at its strongest not in its novel legal theories, but in its neat defenses of objective individual rights, immutable and logically inherent in the nature of men as rational, sentient entities. Sandefur accurately shows the Progressive Era as a revival of old-time authoritarianism, under which the state, rather than the individual, is the final reality, the only sacred, inviolable sovereign actor in society. The historically confused attempt to

square the circle, to make the Party of Lincoln a stronghold of limited-government liberalism, detracted from the appealing argument that the Declaration of Independence is genuine law. Righteous hatred of the Confederacy should never tempt libertarians into awkward apologies for the Union — or for political centralism generally. Downplaying the Constitution’s vertical federalism (arguably its defining feature) and looking to the federal judiciary to be the great champion of individual liberty is unlikely to avail libertarians and will almost certainly yield unlooked-for results. As alluring as *The Conscience of the Constitution’s* historical narrative is, the establishment of American politics and government has given today’s libertarians few real heroes. Still, Sandefur’s book undoubtedly offers lawyers and legal scholars food for thought and will, with any luck, help to lure the profession and the judiciary away from the progressivism that has so long dominated.

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