1995

Guns, Militias and Oklahoma City

Randy E. Barnett
Georgetown University Law Center, rb325@law.georgetown.edu

Randy E. Barnett, Guns, Militias and Oklahoma City, 62 Tenn. L. Rev. 443 (1995).

FOREWORD: GUNS, MILITIAS, AND OKLAHOMA CITY

RANDY E. BARNETT*

I. INTRODUCTION

While this Symposium on "The Second Amendment and the Right to Keep and Bear Arms" was in final stages of production a massive explosion ripped through a federal office building in Oklahoma City, Oklahoma, killing scores of men, women, and children. As this Foreword is being written the final count of casualties is still unknown. Also unknown at this time are the identities of all who were involved in planning and executing this crime. One man is in custody, but to this point he has chosen to remain silent. Another unknown suspect is still at large.[1]

The lack of knowledge of the identities of the perpetrators or their motives has not stopped many pundits, reporters, and the President of the United States from casting blame for this heinous act upon radio talk show hosts and even House Republicans.[2] They are accused of creating a "climate of hate" that has led embittered citizens to organize themselves into self-styled militia organizations that train with weapons in preparation for a future confrontation with federal authorities. Despite the fact that this crime was apparently committed with a homemade explosive device made from fertilizer and dynamite, there have also been numerous calls for increased restrictions on firearms ownership. Notwithstanding that no evidence to date suggests that a militia group or any other "right-wing" organization planned this attack, establishment figures have called for empowering federal agencies with increased authority to engage in covert surveillance of domestic political groups and congressional hearings on citizen militias have been scheduled.

This discourse of blame is in sharp contrast with that accompanying the widespread violence—which included riots, looting, arson, and bombings—that occurred in the late 1960s and early 1970s and that which followed the 1992 riots in Los Angeles. I am old enough to remember working in my father's launderette on 71st street in Chicago when, after the assassination of Dr. Martin Luther King, the streets were being patrolled by

---

* Austin B. Fletcher Professor of Law, Boston University School of Law.

1. While this Foreword was being edited authorities charged another man as an accomplice to the crime and announced that the unknown suspect initially being sought was not at all involved in the affair.

2. *See, e.g.*, Albert R. Hunt, *Stop Encouraging the Crazies*, WALL ST. J., April 27, 1995, at A15; Robert Wright, *Did Newt Do It?* THE NEW REPUBLIC, May 15, 1995, at 4.

national guard soldiers attempting to stem the rioting and looting that had occurred in other parts of the city.[3]

Both during that era of domestic violence and after the L.A. riots, the reaction of establishment reporters and pundits was consistent: although we "deplore" violence, we must "understand" the motives of those who committed these acts, for they acted out of a deep-seated frustration with the injustice and oppression which they felt powerless to change. To prevent such violence in the future, it was repeatedly argued, we should address the underlying "social problems"—discrimination, poverty, the Vietnam war—that led some people to be so disaffected with the political establishment.

There is a superficial similarity between establishment commentators' reactions to these incidents of violence and their reaction to Oklahoma City. Both involve refocusing responsibility away from those who committed the acts. Yet there is a palpable difference as well. Whereas in the past we have been told that violence was a deplorable product of frustration with the pervasiveness of *genuine* injustice for which many persons had *legitimate* complaints, no such suggestion is made about the complaints of militia groups or other frustrated Americans. These complaints are dismissed as paranoid delusions. Moreover, whereas in the Sixties and Seventies those who sought to "understand" the rage of the disaffected sought also to reduce the power of domestic police agencies to spy on American citizens, now some who seek to shift responsibility to others want to *increase* the government's power to infiltrate citizen groups.[4]

In this Foreword, I do not intend to explain or understand the motivations of the person or persons who built and detonated the bomb in Oklahoma City or in any way to excuse their actions. Instead, I intend to address the concerns of some of the thousands of persons who have violated no laws to organize themselves into citizen militias, and those of the millions of other Americans who have come to distrust the government of the United States—for one gets the distinct impression that the mass murder in Oklahoma City is being used as a vehicle to discredit these concerns. In sum, I shall take seriously the insightful caution of Professor Glenn Harlan Reynolds:

> When large numbers of citizens begin arming against their own government and are ready to believe even the silliest rumors about that government's willingness to evade the Constitution, there is a problem that goes

---

3. It was said then that 71st street was spared the massive destruction that had occurred only blocks away because it was protected, not by the National Guard, but by the Blackstone Rangers, a local street gang who had determined that at least one commercial street was needed to survive intact to service residents of the community.

4. As I write, however, spokespersons for the American Civil Liberties Union are now, as ever, voicing concerns about calls for increasing the powers of government to engage in covert surveillance of domestic political groups.

> beyond gullibility. This country's political establishment should think about what it has done to inspire such distrust—and what it can do to regain the trust and loyalty of many Americans who no longer grant it either.[5]

However, I also include in the category of disaffected Americans millions who have not and would not organize themselves into paramilitary groups.

II. A LIST OF GRIEVANCES

What, then, has the political establishment done to inspire the distrust of so many law abiding, nonviolent citizens? The list of grievances is quite long, and I shall not even attempt to enumerate them all. Rather, this symposium concerns one particular issue that illustrates several categories of complaints. This issue is the longstanding movement to ban (as opposed to "regulate") the sale and possession of some or all firearms in this country and the reaction of the political establishment to the argument that such legislation would violate the Second Amendment to the Constitution. This issue exemplifies a number of grievances that apply far beyond the matter of guns.

A. The federal government has acted far beyond its enumerated powers.

In Article I, section 8, the Constitution lists or enumerates the powers of Congress, and in the Tenth Amendment the Constitution states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[6] Nowhere in the Constitution is Congress empowered to prohibit or even to regulate alcohol, tobacco, or firearms. Indeed, in second decade of this century, when Congress sought to prohibit the manufacture and sale (though not the private possession) of alcohol, it thought it needed a constitutional amendment to do so. For this reason it proposed such an amendment to the states, and in 1919 its proposal became the Eighteenth Amendment.

Similarly, when the Harrison Act, which taxed the interstate sale of narcotics, was claimed by enforcement officials of the executive branch to justify them in prohibiting narcotics, the Supreme Court in United States v. Jin Fuey Moy[7] rejected this interpretation of the statute as one which might exceed the proper scope of Congress' enumerated powers. Writing for the Court, Justice Oliver Wendell Holmes, Jr. stated:

---

5. Glenn Harlan Reynolds, *Up in Arms About a Revolting Movement*, CHIC. TRIB., Jan. 30, 1995, § 1, at 11.

6. U.S. CONST. amend. X.

7. 241 U.S. 394 (1916).

> Only words from which there is no escape could warrant the conclusion that Congress meant to strain its powers almost if not quite to the breaking point in order to make the probably very large proportion of citizens who have some preparation of opium in their possession criminal or at least *prima facie* criminal and subject to the serious punishment made possible by § 9. It may be assumed that the statute has a moral end as well as revenue in view, but we are of opinion that the District Court, in treating these ends as to be reached only through a revenue measure and within the limits of a revenue measure, was right.[8]

According to this view, the Congress has no more power to prohibit or regulate the private possession of handguns or semi-automatic rifles than it does to prohibit or regulate the private possession of alcohol, tobacco, or opium. Were this view of congressional power still held by Congress and by the Supreme Court, there could be no federal ban on the possession of firearms by law-abiding adults because there would be no federal power to implement such a ban, and those who advocate banning handguns and semi-automatic rifles without passage and ratification of a constitutional amendment pursuant to Article V would be dismissed as constitutional kooks and crazies.

Since then, of course, all those who have attended law school have been taught that this 150-year-long understanding of the Constitution was in error and that those who might still agree with it are kooks and crazies. Notwithstanding the words of the Tenth Amendment, establishment defenders of federal power have claimed that the Congress has the power to regulate or prohibit every activity which it was not specifically prohibited from regulating by some express provision of the Constitution.

The primary textual vehicle for this exercise of power is no longer the taxing power but is instead Congress' Article I power to "regulate Commerce with foreign Nations, and among the several States, and with the

---

8. *Id.* at 402. The court reversed itself on this issue two years later after the ratification of the Eighteenth Amendment and the commencement of World War I, in the cases of United States v. Doremus, 249 U.S. 86 (1919) and Webb v. United States, 249 U.S. 96 (1919)—both 5-4 decisions. In *Doremus*, the dissent adopted the District Court's opinion which followed *Jin Fuey Moy* and made the delegated powers point even more clearly than had Holmes:

> To extend the incident moral objects of the taxing measure by a liberal construction would be to unfairly and without certain right encroach upon the state's sovereign powers. . . .
>
> It is accordingly held that the indictment does not state an offense against the laws of the United States, in that the acts of the defendant charged in the words of the statute to have been omitted and committed therein are violations of police regulations incidental to the taxing purpose of the act, but which do not tend to render effectual its prime object, revenue. To that extent the act is in violation of article 10 of the amendments to the Constitution of the United States.

United States v. Doremus, 246 F. Supp. 958, 965 (W.D. Tex. 1918).

Indian Tribes."[9] All who have attended law school now know that this power extends even to telling a farmer how much wheat he may grow on his own land to feed his own family and livestock because such activity, though it is not itself commerce among the several states, might "affect" interstate commerce.[10]

Citizens who have not been privy to a constitutional law course in law school could be forgiven if they read the Constitution somewhat differently. They might read various textual provisions as well as the statements of the framers of the Constitution, the Bill of Rights, and the Fourteenth Amendment to have shared their, as opposed to the political establishment's, interpretation of the Constitution. And in recent days, even the Supreme Court of the United States has issued an opinion that generally supports the traditional interpretation.

In *United States v. Lopez,*[11] the Supreme Court held that a federal law criminalizing the possession of a firearm within 1000 feet of a school was beyond the enumerated powers of Congress. In so doing, the court stated:

> We start with first principles. The Constitution creates a Federal Government of enumerated powers. See U.S. Const., Art. I, § 8. As James Madison wrote, "[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." The Federalist No. 45, pp. 292-293 (C. Rossiter ed. 1961). This constitutionally mandated division of authority "was adopted by the Framers to ensure protection of our fundamental liberties." Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) (internal quotation marks omitted).[12]

The court rejected the claim that the gun ban was warranted as an exercise of the Commerce Power:

> Section 922(q) is a criminal statute that by its terms has nothing to do with "commerce" or any sort of economic enterprise, however broadly one might define those terms. Section 922(q) is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.[13]

---

9. U.S. CONST. art. I, sec. 8, cl. 3.
10. *See* Wickard v. Filburn, 317 U.S. 111, 121 (1942).
11. 115 S. Ct. 1624 (1995).
12. *Id.* at 1626.
13. *Id.* at 1630-31 (footnote omitted).

Moreover, the Court reaffirmed a previous decision in which it had reserved the question as to "whether Congress could regulate, without more, the 'mere possession' of firearms."[14] The Court concluded:

> To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action. The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. To do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated, and that there never will be a distinction between what is truly national and what is truly local . . . . This we are unwilling to do.[15]

The Court's concern with the scope of federal powers in *Lopez* is theoretically significant because it helps us to distinguish between two different complaints: the expansion of federal powers (which I am discussing in this section) and the violation of individual rights (which I discuss in the next). Despite the fact that this statute involved firearms, the Second Amendment does not protect a right of a minor to carry a firearm in a public school.[16] Nonetheless, the statute in question is beyond the scope of *federal* powers.

While this case in no manner marks a return to the pre-1930s understanding of the Commerce Power,[17] it does represent a sharp departure by the Supreme Court from sixty years of its opinions interpreting this clause.

---

14. *Id.* at 1631 (discussing United States v. Bass, 404 U.S. 336 (1971)).

15. *Id.* at 1634 (citation omitted).

16. The view that a ban on the possession of firearms by minors in a public school does not violate the Second Amendment was endorsed in a brief to which I was a signatory. *See* Amicus Curiae Brief of Academics for the Second Amendment, *United States v. Alphonso Lopez, Jr.*, 115 S. Ct. 1624 (1995) (No. 93-1260). On the other hand, there are two respects in which the Second Amendment might to some degree be relevant to the statute in *Lopez*. First, the fact that the statute involved a restriction on the possession of firearms might have justified enhanced scrutiny under an interpretation that takes the Second Amendment as seriously as the First—a scrutiny which this statute would easily survive. Second, the statute would also make it a crime for an adult to pass within 1000 feet of a school while possessing a handgun—a prohibition that would raise legitimate Second Amendment concerns.

17. For one Justice's call for such a reconsideration see, United States v. Lopez, 115 S. Ct. 1624, 1642 (1995) (Thomas, J. concurring):

> [O]ur case law has drifted far from the original understanding of the Commerce Clause. In a future case, we ought to temper our Commerce Clause jurisprudence in a manner that both makes sense of our more recent case law and is more faithful to the original understanding of that Clause.

Id.

At a minimum, it has become much more difficult for those who favor an expanded view of federal powers to dismiss those Americans who question the constitutionality of these powers as ignorant, misguided, or otherwise beyond the pale. *Lopez* has made it harder to deny that these persons have a reasonable, if not a legitimate, constitutional complaint. Perhaps if the political establishment were to accord its opposition a modicum of respect, and certainly if the powers of Congress are contracted to anywhere near their pre-1930's scope, the frustration of millions of law-abiding Americans would be greatly ameliorated.

B. The Federal Government has violated the rights retained by the people.

The vast expansion of federal powers since the 1930s has shifted much of the focus of constitutional law to that of individual rights. The reason for this is obvious. If the Congress has no power to act in a particular area, then a fortiori, it has no power to violate the rights retained by the people. This point was well understood by the Federalist proponents of the Constitution who argued that a Bill of Rights was unnecessary.[18] When governmental powers are expanded, however, the government is then more likely to infringe upon the background rights retained by the people.[19]

For the past six decades, however, the scope of powers of the federal government has been viewed, not through the lens of the Tenth Amendment, but through the lens of a footnote in a 1938 Supreme Court opinion. Every law school graduate knows that, according to Footnote 4 of *United States v. Carolene Products Co.*,[20] the actions of Congress are presumed to be constitutional unless they violate a "fundamental right." When that occurs, legislation is no longer presumed to be constitutional but is instead subjected to heightened or strict scrutiny. As the Court in *Carolene Products* stated:

---

18. "[W]hy declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained when no power is given by which restrictions may be imposed?" THE FEDERALIST NO. 84, at 559 (Alexander Hamilton) (Mod. Lib. ed. 1937). According to the Federalists' theory, an unenumerated freedom of speech would be protected without a Bill of Rights. The First Amendment thus added nothing to the Constitution—or to the power of courts to nullify legislation—that was not already present in the unamended Constitution.

19. The fallback function of the constitutional rights led opponents of the Constitution to demand and Federalists to promise a Bill of Rights. In keeping this promise, Madison devised the Ninth Amendment to ensure that it does not "follow, by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure." THE DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES 456 (J. Gales & W. Seaton eds., 1834) (statement of Rep. Madison) [hereinafter ANNALS OF CONG.].

20. 304 U.S. 144 (1938).

> There may be a narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.[21]

Whether or not the "other" *un*enumerated rights retained by the people referred to in the Ninth Amendment[22] can be considered "fundamental" is an issue that is hotly debated.[23] What is not supposed to be controversial under the Footnote 4 theory of the Constitution is the claim that infringement of a right *enumerated* in the first ten amendments would justify subjecting legislation to strict scrutiny. As James Madison explained in his speech to the first Congress:

> If they are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will naturally be led to resist every encroachment upon rights *expressly stipulated* for in the constitution by the declaration of rights.[24]

Yet though the Second Amendment does explicitly protect the right of the people to keep and bear arms, it has yet to be deemed by the Court to be a fundamental right. And it has yet to be applied by the federal judiciary to the states via the Fourteenth Amendment, notwithstanding the fact that it was among the privileges or immunities that the Thirty-ninth Congress specifically contemplated when it proposed that amendment.[25] The lengths

---

21. *Id.* at 152 n.4. Of course, the Court also suggested that the presumption may be rebutted by showing that discrete and insular minorities are adversely affected or that the political process is being impeded. *Id.*

22. *See* U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.").

23. I have argued repeatedly and at length that it does. *See* Randy E. Barnett, *Introduction: Implementing the Ninth Amendment*, 2 THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT 1 (Randy E. Barnett ed., 1993) [hereinafter Barnett, *Implementing*]; Randy E. Barnett, *Reconceiving the Ninth Amendment*, 74 CORN. L. REV. 1 (1988) [hereinafter Barnett, *Reconceiving*].

24. 1 ANNALS OF CONG., *supra* note 19, at 457 (statement of Rep. Madison). Raoul Berger has argued that *only* those rights expressly stipulated for are protected by the judiciary. *See* Raoul Berger, *The Ninth Amendment, as Perceived by Randy Barnett*, 88 NW. U. L. REV. 1508, 1517 (1994). I have disputed this claim. *See* Barnett, *Reconceiving*, *supra* note 23, at 20-22; Barnett, *Implementing*, *supra* note 23, at 43-44.

25. The evidence that the right to keep and bear arms was one of the central rights that the framers of the Fourteenth Amendment intended the Privileges or Immunities Clause to protect is painstakingly detailed by Michael Kent Curtis in a well-regarded book. *See* MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1986). He concludes that "the Second Amendment right to bear arms and the Seventh Amendment right to a jury trial were regarded by framers of the Fourteenth

to which the political establishment has gone to deny that this enumerated right is fundamental and that it applies to the states via the Fourteenth Amendment, suggests to millions of reasonable law-abiding citizens that the Constitution is being willfully interpreted in a politically partisan way by those who disagree with the *merits* of the Second Amendment. At a minimum, it is hard to dismiss the frustration of such persons as unreasonable or irrational.

The papers in this symposium contribute importantly to a reasoned discussion of both the meaning of the Second Amendment and the merits of gun prohibition. Glenn Harlan Reynolds presents an admirably balanced summary of the scholarship concerning the original meaning of the Second Amendment.[26] He provides a concise introduction into Second Amendment scholarship that would greatly profit those who are new to the scholarly debate.

First, in contrast to the claims of political advocates of gun prohibition, he reports the overwhelming consensus among constitutional scholars that the amendment was indeed intended to protect the individual's right to keep and bear arms.[27] Although the Supreme Court has tended to avoid interpreting the Second Amendment, in the 1939 case of *United States v. Miller*,[28] by remanding the case to determine whether a sawed-off shotgun was a type of a weapon protected by the Second Amendment, it too implicitly assumed that the right to keep and bear arms was an individual one.[29] Moreover, as revealed by Stephen Halbrook, even Congress has officially endorsed this interpretation of its powers on a number of occasions, most recently in 1986.[30] Whether or not we are bound by Congress' interpretation of its own powers when it seeks to expand them, we should surely pay attention when it claims its powers to be limited.

Second, Reynolds summarizes the evidence showing that the individual right to keep and bear arms "was considered an essential form of protection not just for home and hearth, but also against government tyranny. It can be understood as yet another of the forms of division of power that the

---

Amendment as particularly precious rights, a view less in vogue today." *Id.* at 203.

26. *See* Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461 (1995).

27. To his credit, Professor Reynolds also reports and responds to the argument recently made by David Williams that, although the rights to keep and bear arms was considered to belong to individuals, the social context in which this right was thought to be appropriate has changed to the extent that it should no longer be enforced. *See id.* at 485-88 (discussing David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551 (1991)).

28. 307 U.S. 174 (1939).

29. *See* Reynolds, *supra* note 26, at 499-502.

30. *See* Stephen P. Halbrook, *Congress Interprets the Second Amendment: Declarations by a Co-Equal Branch on the Individual Right to Keep and Bear Arms*, 62 TENN. L. REV. 597 (1995).

Framers created to protect citizens' liberties."[31] The constitutional right to keep and bear arms was thought an essential means for individuals and groups to exercise their natural right of self-defense against both criminals and despots.[32]

Once again, the radical disconnection between the scholarship on the Second Amendment and the treatment of this provision by the political establishment and the federal courts goes far to explain the frustrations of millions of citizens. This is not to claim that most citizens are aware of this scholarship. Far from it. It is only to claim that most citizens can read, and the reasonableness of how they interpret what they read in the Constitution concerning the right to keep and bear arms is bolstered by this scholarship, just as their reading of the Tenth Amendment is bolstered by *United States v. Lopez*. Perhaps if those judges and professors who do read legal scholarship were to accord some respect to those citizens (and academics) whose views it supports, the alienation of many towards the political establishment would be reduced.

Ironically, the recent formation of private militias that has led to such disquiet by antigun activists (and many others) can be viewed as a reaction to the dominance of the discredited antigun theory that the right to keep and bear arms is limited to militia members. As Reynolds observes:

> Indeed, the growth of the militia movement is an unintended consequence of antigun arguments that the Second Amendment only protects the right to belong to a militia—for that movement has its roots in individuals who organized their militias in response to just this argument.[33]

Although one can disagree about the efficacy of an armed citizenry as a deterrent to governmental tyranny,[34] there is no controversy among Second

---

31. Reynolds, *supra* note 26, at 469.

32. *See, e.g.*, JOYCE L. MALCOLM, TO KEEP AND BEAR ARMS (1994) (describing the English antecedents to the amendment and the influence it had on the framers). Professor Malcolm, a historian, contributes a book review to this symposium. *See* Joyce Lee Malcolm, *Gun Control and the Constitution: Sources and Explorations on the Second Amendment* (book review), 62 TENN. L. REV. 813 (1995) (reviewing GUN CONTROL AND THE CONSTITUTION (Robert Cottrol ed., 1994).

33. Reynolds, *supra* note 26, at 507.

34. In his contribution to this symposium, Air Force Colonel Charles Dunlap presents some powerful reasons why suggesting "that civilians equipped with Second Amendment-type weapons are any match for modern security forces invites murderous confrontations that armed civilians will inevitably lose." Charles J. Dunlap, Jr., *Revolt of the Masses: Armed Civilians and the Insurrectionary Theory of the Second Amendment*, 62 TENN. L. REV. 643, 676 (1995). Reynolds counters that "the argument that irregulars with light arms are ineffective against modern armies—though no doubt pleasing to the self-esteem of military professionals—is not especially compelling based on the facts." Reynolds, *supra* note 26, at 483. He cites the difficulty that Russia has had subduing the Chechens. Though the Russians are likely to prevail, "some believe that the fighting will bring down the Yeltsin government, and pretty much everyone agrees that this will make the Russian authorities less

Amendment scholars that these "militias" are not the "well regulated militia" spoken of in the Second Amendment and deserve no special constitutional protection under this clause. Their only constitutional protection, and it is not inconsiderable, comes from their Second Amendment right (as individuals) to keep and bear arms, their First Amendment rights of freedom of speech and association, and their Fourth Amendment rights to be free from unreasonable searches and seizures.[35]

On the issue of whether there is a rational basis for limiting ownership of firearms for the purpose of preventing violence or reducing injuries, Don Kates, Henry Schaffer, John Lattimer, George Murray, and Edward Cassem critically assess the quality of the public health literature that makes such a claim and contrast it with the criminology literature that generally concludes the opposite.[36] And Clayton Cramer and David B. Kopel analyze the effects of recently enacted concealed handgun permit laws to see whether they help reduce crime (as alleged by proponents), or increase the risk of handgun injuries (as alleged by opponents).[37]

Were the people made to feel secure that the Constitution would be interpreted to protect their right to keep and bear arms, surely this would go a considerable distance to alleviate the frustration of millions of law-abiding citizens. Is it unreasonable to ask those who disagree with the Second Amendment to seek its repeal, just as those who disagreed with the Eighteenth Amendment (prohibition) were compelled to do and as those who might today oppose the Sixteenth Amendment empowering Congress to tax incomes are now compelled to do? Fair is fair.

C. The federal government has employed brutal measures to suppress and even to kill dissidents.

Two incidents in the past two years have greatly inflamed the passions of those who might already have been alienated by the decades-long expansion of federal powers and infringements of the rights retained by the people.

---

likely to crack down in the same fashion again: it has just been too expensive." *Id.*

35. Of course, some of their activities, such as the wearing of military-style uniforms and engaging in training exercises, might also be protected by the Ninth Amendment, but these rights are no more absolute than the freedom of speech. They too may be subject to a reasonable regulation of the time, place, and manner in which they can be exercised, so long as this is not a pretext for prohibition.

36. *See* Don B. Kates et al., *Guns and Public Health: Epidemic of Violence, or Pandemic of Propaganda?*, 62 TENN. L. REV. 513 (1995).

37. *See* Clayton E. Cramer & David B. Kopel, *"Shall* Issue*": The New Wave of Concealed Handgun Permit Laws*, 62 TENN. L. REV. 679 (1995).

On August 21, 1992, on Ruby Ridge in the Idaho mountains some 40 miles south of the Canadian border, six heavily-armed, camouflaged United States Marshals entered the property of Randy Weaver and approached his cabin.[38] Some eighteen months before, Weaver had failed to appear in court on the criminal charge of selling two illegal sawed-off shotguns to an undercover agent of the federal Bureau of Alcohol, Tobacco and Firearms (BATF).[39] The agents threw rocks to get the attention of Weaver's dogs and they began to bark. When Weaver's fourteen-year-old son Sammy and Kevin Harris, a twenty-five-year-old family friend who lived in the cabin, went to see what the dogs were barking at, agents shot one of the dogs. Sammy returned fire in the direction of the shots and Randy yelled to his son to return to the cabin. As he ran towards the cabin, Sammy was shot in the back by the marshals and killed. Kevin Harris then responded to this attack by shooting and killing one of the marshals.

After the death of the marshal, four hundred federal agents were brought to the scene and surrounded the cabin.[40] The next day, Weaver was shot from behind by a sniper as he was attempting to open the door to the shack in which his son's body lay.[41] He struggled back to the cabin where his wife, Vicki, stood in the doorway, holding a ten-month-old baby in her arms. As she called for her husband to hurry, the sniper fired again, striking her in the head and killing her instantly.

Randy Weaver surrendered after an eleven day standoff. A federal jury acquitted him of murder, finding him guilty of failure to appear in court. On the original gun charge, the jury found that he had been entrapped by

---

38. The facts presented here are taken from James Bovard, *No Accountability at the FBI*, WALL ST. J., Jan. 10, 1995, at A20. *See also* Malcolm Wallop, *Tyranny in America: Would Alexis De Tocqueville Recognize this Place?*, 20 J. LEGIS. 37, 50 (1994) (summarizing facts of the incident). A Westlaw search [(Ruby +1 Ridge) or (Randy +1 Weaver)] reveals Senator Wallop's to be the only law review article to date to mention, much less to criticize, the killings at Ruby Ridge. This Symposium includes another. *See* Dan Gifford, *The Conceptual Foundations of Anglo-Americal Jurisprudence in Religion and Reason*, 62 TENN. L. REV. 759 (1995).

39. According to Senator Wallop:

> In 1989, an undercover federal agent, negotiating a purchase of two shotguns, persuaded Weaver to cut the gun barrels 1/4 "short of the 16" legal restriction. Agents later asked Weaver to become an informant, threatening to arrest him on the firearms offense if he refused. He refused, and six months later was indicted.

Wallop, *supra* note 38, at 50.

40. According to James Bovard, "the federal agents at that time made no effort to contact Mr. Weaver to negotiate his surrender." Bovard, *supra* note 38, at A20.

41. Long-term advance surveillance had informed the authorities that Weaver and his family were always armed while on their property. According to the *Wall Street Journal*, "the rules of engagement allowed agents to shoot at any adult who emerged from the cabin with a firearm." *Faddish Justice?*, WALL ST. J., May 2, 1995, at A18.

the BATF agent.[42] No charges were filed in the deaths of Weaver's wife and son.

On Sunday morning, February 28, 1993, near Waco, Texas, a mile-long convoy of eighty government vehicles—including two cattle trailers, containing over seventy BATF agents in full SWAT gear and wearing commando costumes with ski-masks—and two Texas Air National Guard helicopters, converged on the property of a religious community known as the Branch Davidians.[43] Inside the residence were approximately one hundred men, women and children. The purported reason for this massive show of paramilitary force was to serve an arrest and search warrant for alleged weapons offenses.[44] No effort had been made to serve the warrant in a more peaceable fashion. Prior to that day, there had been no confrontation between BATF and the Branch Davidians. Four BATF agents and six members of the religious group were killed in a gun battle that erupted during the raid. Who shot first is disputed, but there is no dispute that the BATF agents attempted a forced entry through a second floor window on the side of the building, while others were charging up to the front door.[45]

A fifty-one day siege ensued during which federal agents cut off all electricity to the residence, subjected it to floodlights and round-the-clock blasts of Tibetan chants, Christmas music, and the cries of rabbits being slaughtered, intending to deprive the occupants of sleep. During this siege,

---

42. *See id.*

43. *See* Dean M. Kelley, *Waco: A Massacre and its Aftermath*, FIRST THINGS, May, 1995, at 22. Kelley is Counselor in Religious Liberty for the National Council of Churches. Space does not permit even a summary of his chilling account of the events preceding the raid, the raid itself, and the legal proceedings that ensued. *See also,* James Bovard, *Not So Wacko*, THE NEW REPUBLIC, May 15, 1995, at 18 (rebutting recent statements by President Clinton that Branch Davidians had "murdered" law enforcement agents and "made the decision to destroy all the children that were there").

44. For a discussion of the lack of basis for issuing these warrants, *see* Kelley, *supra* note 43, at 28. *See also* Wallop, *supra* note 38, at 50 (footnote omitted):

> Although none of the original justifications for launching the final assault have withstood the test of scrutiny, no additional information has been provided to explain the actions of the government. Apparently, none will, as the details of the events leading up to that holocaust have been placed outside the reach of the Freedom of Information Act. We were kept misinformed—and now we are uninformed.

Id.

45. It is also not disputed that the Davidians dialed 911 to report the attack on their residence and to seek assistance:

> A few minutes after the raid began, one of the Davidians, Wayne Martin, a Harvard-trained lawyer well-regarded in Waco, called the emergency number 911 and reached the sheriff's office in Waco, where he was heard (and recorded) to cry out, "There are seventy-five men around our building and they're shooting at us! Tell'em there are children and women in here and to call it off!"

Kelley, *supra* note 43, at 25.

no shots were fired by the residents, but distraction grenades were fired by federal agents at any resident who might emerge from the building. On the fifty-first day, federal agents attacked the residence with heavy Combat Engineering Vehicles equipped with long booms carrying cylinders of CS gas. These booms were used to puncture the walls of the residence so that the gas could be sprayed on the interior. Others fired some three hundred smaller canisters of CS at the building using grenade launchers. A United States Army field manual states:

> Exposure to CS may make [victims] incapable of evacuating the area. . . . The dispensers should not be used to introduce a riot control agent directly into a closed structure except in extreme circumstances. . . . Do not use around hospitals or other places where innocent persons may be affected. . . . Do not use where fires may start or asphyxiation may occur.[46]

The gas was injected for several hours with the intent of saturating the gas masks of the residents, though federal agents were aware that conventional gas masks would not fit the children. Eventually, the residence became engulfed in flames, the origin of which has been disputed, in which 75 more residents died.

I have not attempted to relate the entire story of either of these murderous affairs. As one would expect, much controversy surrounds the details of both federal actions and I have tried to confine myself to facts that are uncontroverted. Nor are these the only such incidents to have occurred.[47] At a minimum, however, these incidents represent an extraordi-

---

46. Kelley, *supra* note 43, at 34. Kelley reports that CS gas—which one of its manufacturers warns, "[e]mits toxic fumes under fire conditions: . . . . carbon monoxide . . . hydrogen cyanide . . . hydrogen chloride gas"—has been outlawed for use in warfare by the Chemical Weapons Convention of 1993, to which the United States is a party. *Id.*

47. Both Senator Wallop and Dan Gifford also discuss the killing of Donald P. Scott:

> On October 2, 1992, just before 9:00 a.m., LA sheriff's deputies, federal DEA agents and National Park Service officials raided the Malibu ranch of wealthy, eccentric rancher Donald Scott. They crashed through the front door before it could be answered, forcing Scott's terrified wife through several rooms. Scott, responding to his wife's screams, rushed into the room holding a gun over his head. As Scott lowered the gun in response to demands that he do so, he was shot twice and killed. Agents, claiming they believed Scott was growing marijuana, searched for hours without finding a single marijuana leaf.
>
> Years earlier, Scott had refused to negotiate with federal officials who had expressed an interest in acquiring his land to incorporate it into their scenic corridor. Just before the raid, sheriff's deputies had done an appraisal of the ranch, complete with a marginal notation of a recent nearby comparable sale. What did the value of the ranch have to do with serving a search warrant for marijuana? The Ventura County District Attorney suggested afterward that the real purpose for the raid may have been the government's desire to use forfeiture laws to acquire the Scott ranch. Rough justice.

Wallop, *supra* note 38, at 50. *See* Gifford, *supra* note 38, at 770 n.48.

nary use of paramilitary federal forces against civilians.[48] In Waco, the attack resulted in the deaths of many entirely innocent children.

Such shows of force and the willingness to use potentially deadly chemical weapons against dissidents who were not even alleged to have harmed anyone,[49] their spouses and their children, was clearly intended to send a message to the citizenry. Another message was sent by the treatment of then-Acting Deputy Directory of the Federal Bureau of Investigation (FBI), Larry A. Potts. Although he had been censured by the Bureau for his failure to properly oversee both the Ruby Ridge and Waco operations, the Attorney General promoted Potts to the position of Deputy Director.[50] Millions of law-abiding Americans cannot be blamed, and we cannot profess to be surprised, if these messages have been received. The political establishment should bear in mind that it does not get to pick the martyrs of its opponents.

III. CONCLUSION: THE PROBLEM OF LEGITIMACY

Most legislators, judges, and academics take it for granted that the citizenry will consider themselves obliged to obey properly enacted laws. On this assumption, they feel little, if any, inhibition about the nature of the laws they pass. Don't approve of a certain type of activity? Ban it! Like a certain type of conduct? Mandate it! (Or raise taxes to subsidize it.) No need to take into account the views of the minority (or majority) who may disagree. When you prevail in the legislative process, they will fall in line—or else.

---

48. Although these incidents involving federal paramilitary forces lie at the extreme, in recent years the "war on drugs" has resulted in a disturbing militarization of local police forces as well. Any reader can witness this simply by watching the television show, *Cops*. There you will routinely see videos of actual raids in which police officers dressed in military-style clothing knock front doors down with battering rams, providing residents with no opportunity to open the door. And these are the incidents which the police know are *televised*. One cause of this development is the exigencies of enforcing laws against possessing a prohibited substance that can sometimes be destroyed quickly.

49. During the siege federal authorities made allegations of child abuse committed by Koresh—charges which are sharply disputed by surviving Branch Davidians. Suffice it to say that these charges are outside the jurisdiction of the BATF, were not the subject of the warrants, and had nothing whatsoever to do with the paramilitary raid which was launched on February 28th.

50. *See Upward Failure*, THE NEW REPUBLIC, May 22, 1995, at 12:

> There are, we suppose, two ways to interpret this decision: (a) government departments are routinely immune to criticism and often appoint failures to higher and higher positions; or (b) the Justice Department and the FBI are, for some reason, choosing to escalate their conflict with the Weavers and Koreshes of this world by appointing their nemisis to the second-highest position in the FBI.

Those who advocate using law in this way take for granted that their laws will be perceived as legitimate by the citizenry. They fail to realize that the legitimacy of the process that produces laws is precious and must be preserved. By "legitimacy" I mean the likelihood that a particular enactment is not unjust and is binding in conscience.[51] But such legitimacy must be earned and once undermined, is difficult to reclaim.

Those who make laws claim (a) that they have been empowered to do so and (b) that we are morally obliged to obey these laws. Those who are expected to obey are then entitled to ask whether the law-making process has given us good reason to think that either of these claims are true. One assurance that these claims are true is that an independent judiciary scrutinizes such laws to ensure that they lie within the powers delegated by the Constitution and that they do not infringe upon any of the rights retained by the people, especially a right enumerated in the Bill of Rights.

When courts fail to engage in such oversight or even distort the Constitution to rationalize the *ultra vires* actions of government, and when academics and political activists aid and abet them in this activity by devising ingenious rationalizations for ignoring the Constitution's words, they are playing a most dangerous game. For they are putting at risk the legitimacy of the lawmaking process and risking the permanent disaffection of significant segments of the people. When courts and scholars adopt a Holmesian "bad man" theory of law,[52] then they must rely solely on intimidation and punishment to obtain compliance with the law.

---

51. For an elaboration of this concept of legitimacy, *see* Randy E. Barnett, *Getting Normative: The Role of Natural Rights in Constitutional Adjudication*, 12 CONST. COMM. 93 (1995).

> By "legitimacy," I do not mean the question of whether a particular law is "valid" because it was enacted according to the accepted legal process . . . . Nor do I equate the legitimacy of a law with its "justice," . . . or with the mere *perception* that a law is just. Rather, the concept of legitimacy that I am employing refers to *whether the process by which a law is determined to be valid is such as to warrant that the law is just.* That is, was a particular law made in such a manner as to prove some assurance that it is just? A law produced by such justice-assuring procedures is legitimate.

Id. at 98.

52. *See* Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897):

> If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.

Whether or not this is the best *concept* of law, if a *particular* law is viewed solely in this way by those who make, enforce, or interpret it, then calling a command a law does nothing to bind the citizenry in conscience. That is, it provides no reason to the "good man" for why he *ought* to obey the law apart from the desire to avoid punishment for disobedience. *See* Barnett, *supra* note 51, at 100-105; Randy E. Barnett, *Foreword: The Ninth Amendment and Constitutional Legitimacy*, 64 CHI.-KENT L. REV. 37 (1988).

Are Waco and Ruby Ridge signposts along that road? Let us hope not, but hoping will not make it so. We may not rest easy until lawmakers, enforcement agencies, and judges fully respect the scheme of enumerated and limited federal powers and the rights retained by the people—including "the right of the people to keep and bear arms."