United States v Miller, 59 S. Ct. 816 (1939)

Mr. Justice McREYNOLDS delivered the opinion of the Court.

An indictment in the District Court Western District Arkansas, charged that Jack Miller and Frank Layton 'did unlawfully, knowingly, wilfully, and feloniously transport in interstate commerce from the town of Claremore in the State of Oklahoma to the town of Siloam Springs in the State of Arkansas a certain firearm, to-wit, a double barrel 12-gauge Stevens shotgun having a barrel less than 18 inches in length … said defendants, at the time of so transporting said firearm in interstate commerce as aforesaid, not having registered said firearm as required by …[Section 11 of] the 'National Firearms Act' [of] 1934… [The defendant argued that] The National Firearms Act … offends the inhibition of the Second Amendment to the Constitution… The District Court held that section 11 of the Act violates the Second Amendment

In the absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.

The Constitution as originally adopted granted to the Congress power-- 'To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.' U.S.C.A.Const. art. 1, s 8. With obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view.

The Militia which the States were expected to maintain and train is set in contrast with Troops which they were forbidden to keep without the consent of Congress. The sentiment of the time strongly disfavored standing armies; the common view was that adequate defense of country and laws could be secured through the Militia-civilians primarily, soldiers on occasion.

The signification attributed to the term Militia appears from the debates in the Convention, the history and legislation of Colonies and States, and the writings of approved commentators. These show plainly enough that the Militia comprised all males physically capable of acting in concert for the common defense. 'A body of citizens enrolled for military discipline.' And further, that ordinarily when called for service these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time.

Blackstone's Commentaries, Vol. 2, Ch. 13, p. 409 points out 'that king Alfred first settled a national militia in this kingdom' and traces the subsequent development and use of such forces.

Adam Smith's Wealth of Nations, Book V. Ch. 1, contains an extended account of the Militia. It is there

said: ‘Men of republican principles have been jealous of a standing army as dangerous to liberty.’ ‘In a militia, the character of the labourer, artificer, or tradesman, predominates over that of the soldier: in a standing army, that of the soldier predominates over every other character; and in this distinction seems to consist the essential difference between those two different species of military force.’

’The American Colonies in The 17th Century’, Osgood, Vol. 1, ch. XIII, affirms in reference to the early system of defense in New England-

> ’In all the colonies, as in England, the militia system was based on the principle of the assize of arms. This implied the general obligation of all adult male inhabitants to possess arms, and, with certain exceptions, to cooperate in the work of defence.’ ‘The possession of arms also implied the possession of ammunition, and the authorities paid quite as much attention to the latter as to the former.’…..

By an Act passed April 4, 1786 (Laws 1786, c. 25), the New York Legislature directed: ‘That every able-bodied Male Person, a Citizen of this State, or of any of the United States, and residing in this State, (except such Persons as are herein after excepted) and who are of the Age of Sixteen, and under the Age of Forty-five Years, shall, by the Captain or commanding Officer of the Beat in which such Citizens shall reside, within four Months after the passing of this Act, be enrolled in the Company of such Beat. * * * That every Citizen so enrolled and notified, shall, within three Months thereafter, provide himself, at his own Expense, with a good Musket or Firelock, a sufficient Bayonet and Belt, a Pouch with a Box therein to contain not less than Twenty-four Cartridges suited to the Bore of his Musket or Firelock, each Cartridge containing a proper Quantity of Powder and Ball, two spare Flints, a Blanket and Knapsack; * * *.’

The General Assembly of Virginia, October, 1785 (12 Hening’s Statutes c. 1, p. 9 et seq.), declared: ‘The defense and safety of the commonwealth depend upon having its citizens properly armed and taught the knowledge of military duty.’ It further provided for organization and control of the Militia and directed that ‘All free male persons between the ages of eighteen and fifty years,’ with certain exceptions, ‘shall be inrolled or formed into companies.’ ‘There shall be a private muster of every company once in two months.’….

Most if not all of the States have adopted provisions touching the right to keep and bear arms. Differences in the language employed in these have naturally led to somewhat variant conclusions concerning the scope of the right guaranteed. But none of them seem to afford any material support for the challenged ruling of the court below.

In the [footnote] some of the more important opinions and comments by writers are cited.[1]

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[1] Concerning The Militia-Presser v. Illinois, 116 U.S. 252, 6 S.Ct. 580, 29 L.Ed. 615; Robertson v. Baldwin, 165 U.S. 275, 17 S.Ct. 326, 41 L.Ed. 715; Fife v. State, 31 Ark. 455, 25 Am.Rep. 556;Jeffers v. Fair, 33 Ga. 347; Salina v. Blaksley, 72 Kan. 230, 83 P. 619, 3 L.R.A., N.S., 168, 115 Am.St.Rep. 196,7 Ann.Cas. 925; People v. Brown, 253 Mich. 537, 235 N.W. 245, 82 A.L.R. 341; Aymette v. State, 2 Humph., Tenn., 154; State v. Duke, 42 Tex. 455; State v. Workman, 35 W.Va. 367, 14 S.E. 9,14 L.R.A. 600; Cooley’s Constitutional Limitations, Vol. 1, p. 729; Story on The Constitution, 5th Ed., Vol. 2, p. 646; Encyclopaedia of the Social Sciences, Vol. X, p. 471, 474.

We are unable to accept the conclusion of the court below and the challenged judgment must be reversed. The cause will be remanded for further proceedings.

Reversed and remanded.

United States v. Tot, 131 F. 2d 261 (3rd Cir. 1942)

[Note that this case was not decided by the U.S. Supreme Court. It was decided by the Third Circuit, a federal court of appeals with jurisdiction over Pennsylvania, Delaware, and New Jersey.]

The defendant, Frank Tot, was convicted and sentenced for violation of the statute known as the Federal Firearms Act … by which it is made unlawful for any person who had been convicted of a crime of violence 'to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce* * *.' [Frank Tot, a person convicted of a crime of violence, was caught with a .32 caliber Colt Automatic pistol, which it was assumed had been shipped or transported in interstate commerce, because Colt's factory was in Connecticut.]

The appellant's contention is that if the statute under which this prosecution was brought is to be applied to a weapon of the type he had in his possession, then the statute violates the Second Amendment.

It is abundantly clear both from the discussions of this amendment contemporaneous with its proposal and adoption and those of learned writers since that this amendment, unlike those providing for protection of free speech and freedom of religion, was not adopted with individual rights in mind, but as a protection for the States in the maintenance of their militia organizations against possible encroachments by the federal power. The experiences in England under James II of an armed royal force quartered upon a defenseless citizenry was fresh in the minds of the Colonists. They wanted no repetition of that experience in their newly formed government. The almost uniform course of decision in this country, where provisions similar in language are found in many of the State Constitutions, bears out this concept of the constitutional guarantee. A notable instance is the refusal to extend its application to weapons thought incapable of military use.

The contention of the appellant in this case could, we think, be denied without more under the authority of United States v. Miller. This was a prosecution under the National Firearms Act of 1934 and the weapon, the possession of which had occasioned the prosecution of the accused, was a shotgun of less than 18 inch barrel. The Court said that in the absence of evidence tending to show that possession of such a gun at the time has some reasonable relationship to the preservation or efficiency of a well regulated militia, it could not be said that the Second Amendment guarantees the right to keep such an instrument. The appellant here having failed to show such a relationship, the same thing may be said as applied to the pistol found in his possession. It is not material on this point that the 1934 statute was bottomed on the taxing power while the statute in question here was based on a regulation of interstate commerce.

But, further, the same result is definitely indicated on a broader ground and on this we should prefer to rest the matter. Weapon bearing was never treated as anything like an absolute right by the common law. It was regulated by statute as to time and place as far back as the Statute of Northampton in 1328 and on many occasions since. The decisions under the State Constitutions show the upholding of regulations prohibiting the carrying of concealed weapons, prohibiting persons from going armed in certain public

places and other restrictions, in the nature of police regulations, but which do not go so far as substantially to interfere with the public interest protected by the constitutional mandates. The Federal statute here involved is one of that general type. One could hardly argue seriously that a limitation upon the privilege of possessing weapons was unconstitutional when applied to a mental patient of the maniac type. The same would be true if the possessor were a child of immature years. In the situation at bar Congress has prohibited the receipt of weapons from interstate transactions by persons who have previously, by due process of law, been shown to be aggressors against society. Such a classification is entirely reasonable and does not infringe upon the preservation of the well regulated militia protected by the Second Amendment….

The judgment is affirmed.

U.S. v Warin, 530 F. 2d 103 (6th Cir. 1976)

[Note that this case was not decided by the U.S. Supreme Court. It was decided by the Sixth Circuit, a federal court of appeals with jurisdiction over Kentucky, Michigan, Ohio, and Tennessee.]

The defendant appeals from his conviction of the charge that he 'willfully and knowingly possessed a firearm, that is a 9 mm prototype submachine gun … which had not been registered to him in the National Firearms Registration and Transfer Record as required by [federal law]….. [T]he defendant, as an adult male resident and citizen of Ohio, is a member of the 'sedentary militia' of the State.[2] It was not contended that Warin was a member of the active militia. The court also found that the defendant was an engineer and designer of firearms whose employer develops weapons for the government and. . . that the defendant had made the weapon in question, which is indeed a firearm as described in the Act. It is also clear from the evidence that the weapon was of a type which is standard for military use, and fires the ammunition which is in common military use for the weapons used by individual soldiers in combat. The defendant testified that he had designed and built the weapon for the purpose of testing and refining it so that it could be offered to the Government as an improvement on the military weapons presently in use….
In United States v. Miller, the Supreme Court held that the National Firearms Act of 1934 did not violate the Second Amendment. In its opinion the Court stated:

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[2] The source of the term 'sedentary militia' is unclear. The district court's finding was based in part upon Ohio Constitution, Art. IX s 1, which does not by its own force make adult citizens of Ohio members of the organized or active militia, but merely subjects them to enrollment in that body:

> ARTICLE IX: MILITIA
> s 1 Who shall perform military duty.
> All citizens, resident of this state, being seventeen years of age, and under the age of sixty-seven years, shall be subject to enrollment in the militia and the performance of military duty, in such manner, not incompatible with the Constitution and laws of the United States, as may be prescribed by law. (As amended Nov. 7, 1961.)

The rest of this footnotes was not written by the court, but by Prof. Klerman. Indiana statutes shed some light on the meaning of "sedentary militia." :

> IC 10-16-6-2 Classes of militia
>
> The militia shall be divided into two (2) classes, the sedentary militia and the national guard, as follows:
>
> (1) The sedentary militia consists of all persons subject to bear arms under the Constitution of the State of Indiana who do not belong to the national guard.
>
> (2) The national guard consists of those able-bodied citizens between the proper ages as established by this article who may be enrolled, organized, and mustered into the service of the state as provided in this article. The organized militia of the state constitutes and shall be known as the Indiana national guard.

> In the absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense. Id. at 178, 59 S.Ct. at 818 (citation omitted).

Warin argues that the necessary implication of the quoted language is that a member of the 'sedentary militia' may possess any weapon having military capability and that application of [The National Firearms Act of 1934] to such a person violates the Second Amendment. We disagree. In Miller the Supreme Court did not reach the question of the extent to which a weapon which is 'part of the ordinary military equipment' or whose 'use could contribute to the common defense' may be regulated. In holding that the absence of evidence placing the weapon involved in the charges against Miller in one of these categories precluded the trial court from quashing the indictment on Second Amendment grounds, the Court did not hold the converse-that the Second Amendment is an absolute prohibition against all regulation of the manufacture, transfer and possession of any instrument capable of being used in military action.

Within a few years after Miller v. United States was announced the First Circuit dealt with arguments similar to those made by Warin in the present case. In Cases v. United States, 131 F.2d 916 (1st Cir. 1942), the court held that the Supreme Court did not intend to formulate a general rule in Miller, but merely dealt with the facts of that case. The court of appeals noted the development of new weaponry during the early years of World War II and concluded that it was not the intention of the Supreme Court to hold that the Second Amendment prohibits Congress from regulating any weapons except antiques 'such as a flintlock musket or a matchlock harquebus.' If the logical extension of the defendant's argument for the holding of Miller was inconceivable in 1942, it is completely irrational in this time of nuclear weapons.
Agreeing as we do with the conclusion in Cases v. United States, supra, that the Supreme Court did not lay down a general rule in Miller, we consider the present case on its own facts and in light of applicable authoritative decisions. It is clear that the Second Amendment guarantees a collective rather than an individual right. In Stevens v. United States, 440 F.2d 144, 149 (6th Cir. 1971), this court held…:
Since the Second Amendment right 'to keep and bear Arms' applies only to the right of the State to maintain a militia and not to the individual's right to bear arms, there can be no serious claim to any express constitutional right of an individual to possess a firearm.

It is also established that the collective right of the militia is limited to keeping and bearing arms, the possession or use of which 'at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, ...' United States v. Miller.

The fact that the defendant Warin, in common with all adult residents and citizens of Ohio, is subject to enrollment in the militia of the State confers upon him no right to possess the submachine gun in question. By statute the State of Ohio exempts 'members of . . . the organized militia of this or any other state, . . .' from the provision, 'No person shall knowingly acquire, have, carry, or use any dangerous ordnance.' Ohio Revised Code s 2923.17. 'Dangerous ordnance' is defined to include any automatic firearm. O.R.C. s 2923.11. There is no such exemption for members of the 'sedentary militia.' Furthermore, there is absolutely no evidence that a submachine gun in the hands of an individual 'sedentary militia' member

would have any, much less a 'reasonable relationship to the preservation or efficiency of a well regulated militia.' Miller. supra. Thus we conclude that the defendant has no private right to keep and bear arms under the Second Amendment which would bar his prosecution…

Even where the Second Amendment is applicable, it does not constitute an absolute barrier to the congressional regulation of firearms. After considering several arguments the Third Circuit in United States v. Tot, stated that it decided the case on the 'broader ground' that '(w)eapon bearing was never treated as anything like an absolute right by the common law. It was regulated by statute as to time and place as far back as the Statute of Northampton in 1328 and on many occasions since.' …

Warin argues that to uphold a tax on firearms transactions by one entitled to Second Amendment protection 'would be to sanction a tax on an activity which is constitutionally guaranteed and protected.' He cites First Amendment cases such as Murdock v. Pennsylvania, 319 U.S. 105 (1943), for the proposition that a person cannot be compelled to pay a license or tax in order to exercise a privilege granted by the Constitution. First Amendment rights occupy a 'preferred position' among those guaranteed by the Bill of Rights, Id. at 115, 63 S.Ct. 870, a position never accorded to Second Amendment rights. Yet even the First Amendment has never been treated as establishing an absolute prohibition against limitations on the rights guaranteed therein…

As the legislative history of the Act under consideration clearly shows, Congress was dealing with problems which threaten the maintenance of public order. There can be no question that an organized society which fails to regulate the importation, manufacture and transfer of the highly sophisticated lethal weapons in existence today does so at its peril. The requirement that no one may possess a submachine gun which is not registered to him in the National Firearms Registration and Transfer Record is a reasonable regulation for the maintenance of public order…

The judgment of the district court is affirmed.

Sanford Levinson, "The Embarrassing Second Amendment" 99 Yale L. J. 637-59 (1989)

To put it mildly, the Second Amendment is not at the forefront of constitutional discussion, at least as registered in what the academy regards as the venues for such discussion --law reviews, casebooks, and other scholarly legal publications. As Professor Larue has recently written, "the second amendment is not taken seriously by most scholars." …

Clearly the Second Amendment is not the only ignored patch of text in our constitutional conversations. One will find extraordinarily little discussion about another one of the initial Bill of Rights, the Third Amendment: "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law." Nor does one hear much about letters of marque and reprisal or the granting of titles of nobility…

The Second Amendment, though, is radically different from these other pieces of constitutional text just mentioned, which all share the attribute of being basically irrelevant to any ongoing political struggles. To grasp the difference, one might simply begin by noting that it is not at all unusual for the Second Amendment to show up in letters to the editors of newspapers and magazines. That judges and academic lawyers, including the ones that write casebooks, ignore it is most certainly not evidence for the proposition that no one else cares about it. The National Rifle Association, to name the most obvious example, cares deeply about the Amendment, and an apparently serious Senator of the United States averred that the right to keep and bear arms is the "right most valued by free men." Campaigns for Congress in both political parties, and even presidential campaigns, may turn on the apparent commitment of the candidates to a particular view of the Second Amendment. This reality of the political process reflects the fact that millions of Americans, even if (or perhaps especially if) they are not academics, can quote the Amendment and would disdain any presentation of the Bill of Rights that did not give it a place of pride.

I cannot help but suspect that the best explanation for the absence of the Second Amendment from the legal consciousness of the elite bar, including that component found in the legal academy, is derived from a mixture of sheer opposition to the idea of private ownership of guns and the perhaps subconscious fear that altogether plausible, perhaps even "winning," interpretations of the Second Amendment would present real hurdles to those of us supporting prohibitory regulation. Thus the title of this essay -- The Embarrassing Second Amendment -- for I want to suggest that the Amendment may be profoundly embarrassing to many who both support such regulation and view themselves as committed to zealous adherence to the Bill of Rights (such as most members of the ACLU). Indeed, one sometimes discovers members of the NRA who are equally committed members of the ACLU, differing with the latter only on the issue of the Second Amendment but otherwise genuinely sharing the libertarian viewpoint of the ACLU….

There is one further problem of no small import; if one does accept the plausibility of any of the arguments on behalf of a strong reading of the Second Amendment, but, nevertheless, rejects them in the name of social prudence and the present -day consequences produced by finicky adherence to earlier

understandings, why do we not apply such consequentialist criteria to each and every part of the Bill of Rights? As Ronald Dworkin has argued, what it meant to take rights seriously is that one will honor them even when there is significant social cost in doing so. If protecting freedom of speech, the rights of criminal defendants, or any other parts of the Bill of Rights were always (or even most of the time) clearly cost less to the society as a whole, it would truly be impossible to understand why they would be as controversial as they are. The very fact that there are often significant costs -- criminals going free, oppressed groups having to hear viciously racist speech and so on -- helps to account for the observed fact that those who view themselves as defenders of the Bill of Rights are generally antagonistic to prudential arguments. Most often, one finds them embracing versions of textual, historical, or doctrinal arguments that dismiss as almost crass and vulgar any insistence that times might have changed and made too "expensive" the continued adherence to a given view. "Cost-benefit" analysis, rightly or wrongly, has come to be viewed as a "conservative" weapon to attack liberal rights. Yet one finds that the tables are strikingly turned when the Second Amendment comes into play. Here it is "conservatives" who argue in effect that social costs are irrelevant and "liberals" who argue for a notion of the "living Constitution" and "changed circumstances" that would have the practical consequence of removing any real bite from the Second Amendment.

As Fred Donaldson of Austin, Texas wrote, commenting on those who defended the Supreme Court's decision upholding flag-burning as compelled by a proper (and decidedly non-prudential) understanding of the First Amendment, "[I]t seems inconsistent for [defenders of the decision] to scream so loudly" at the prospect of limiting the protection given expression "while you smile complacently at the Second torn and bleeding. If the Second Amendment is not worth the paper it is written on, what price the First?" The fact that Mr. Donaldson is an ordinary citizen rather than an eminent law professor does not make his question any less pointed or its answer less difficult.

For too long, most members of the legal academy have treated the Second Amendment as the equivalent of an embarrassing relative, whose mention brings a quick change of subject to other, more respectable, family members. That will no longer do. It is time for the Second Amendment to enter full scale into the consciousness of the legal academy. Those of us who agree with Martha Minow's emphasis on the desirability of encouraging different "voices" in the legal conversation should be especially aware of the importance of recognizing the attempts of Mr. Donaldson and his millions of colleagues to join the conversation. To be sure, it is unlikely that Professor Minow had those too often peremptorily dismissed as "gun nuts " in mind as possible providers of "insight and growth," but surely the call for sensitivity to different or excluded voices cannot extend only those groups "we" already, perhaps "complacent[ly]," believe have a lot to tell "us." I am not so naive as to believe that conversation will overcome the chasm that now separates the sensibility of, say, Senator Hatch and myself as to what constitutes the "right[s] most valued by free men [and women]." It is important to remember that one will still need to join up sides and engage in vigorous political struggle. But it might at least help to make the political sides appear more human to one another. Perhaps "we" might be led to stop referring casually to "gun nuts" just as, maybe, members of the NRA could be brought to understand the real fear that the currently almost uncontrolled system of gun ownership sparks in the minds of many whom they casually dismiss as "bleeding-heart liberals." Is not, after all, the possibility of serious, engaged discussion about political issues at the heart of what is most attractive in both liberal and republican versions of politics?

Questions

1. The National Firearms Act of 1934 taxes and requires registration of both machine guns and shotguns "having a barrel of less than eighteen inches in length." Suppose Jack Miller and Frank Layton, the defendants in U.S. v Miller, had been caught transporting unregistered machine guns rather than unregistered short-barreled shotguns. If, in this situation, they challenged their indictment as violating the Second Amendment, do you think U.S. v Miller would have come out differently? Be sure to discuss parts of the opinion in U.S. v Miller that support your view as well as parts that might not.

2. Most of the opinion in U.S. v Miller discusses the role of the militia in 17th and 18th century America. Why? How is that historical material relevant to the decision?

3. At least one of the judicial opinions in this packet holds that the Second Amendment creates a "collective right," not an "individual right." Which opinion or opinions hold that the Second Amendment creates a collective right and which hold that the Second Amendment creates an individual right? What would it mean for the Second Amendment to create a collective right but not an individual right?

4. Suppose that, in 1987, Texas decided to revive the militia and required all persons (male or female) above the age of 18 to own a military grade fully automatic rifle, to know how to use those weapons, and to appear yearly at musters where their weapons would be inspected and their shooting skills assessed. Fully automatic weapons are capable of firing multiple bullets with a single pull of the trigger and would be classified as "machine guns." Under the National Firearm Act of 1934, all machine guns must be registered with the federal government, and all sales of machine guns are taxed $200. Under the Firearm Owners' Protection Act of 1986, it is illegal to transfer or possess a firearm that was not legally owned (i.e. manufactured and registered) before 1986. Suppose manufacturers in Texas started making machine guns in 1987, and Texans over 18 started purchasing such guns without paying the $200 tax and without registering them. If federal prosecutors prosecuted Texan gun manufacturers and purchasers, and those manufacturers and purchasers asserted their rights under the Second Amendment, who would win? What would be the federal government's strongest argument? What would be the manufacturers' and gun owners' strongest argument? In formulating your arguments, rely only on sources (e.g. cases) assigned so far in class.

5. How is the reasoning in U.S. v Tot different from that in U.S. v Miller? Why do you think the opinion in U.S. v Tot does not simply state:

> *United State*s v. *Miller* was a prosecution under the National Firearms Act of 1934, and the weapon, the possession of which had occasioned the prosecution of the accused, was a shotgun of less than 18 inch barrel. The Court said that in the absence of evidence tending to show that possession of such a gun at the time has some reasonable relationship to the preservation or efficiency of a well-regulated militia, it could not be said that the Second Amendment guarantees the right to keep such a weapon. Frank Tot has similarly failed to show a relationship between the .32 caliber Colt Automatic pistol he possessed and the preservation or efficiency of a well-

regulated militia. Therefore, the statute under which he was convicted is constitutional, and his conviction is affirmed.

6. Several of the sources in this packet compare or contrast the Second Amendment to the First Amendment. What are the similarities and differences they mention? Consider counter-arguments to the similarities and differences mentioned in the opinions. What do you think are the most important similarities and differences? The First Amendment states:

   > Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

7. Were you surprised by the decision in U.S. v. Warin? Why or why not? Is it consistent with U.S. v. Miller? Is it consistent with the text of the Second Amendment?

8. The court in U.S. v Warin stated:

   > Within a few years after Miller v. United States was announced the First Circuit dealt with arguments similar to those made by Warin in the present case. In Cases v. United States, … [the] court of appeals noted the development of new weaponry during the early years of World War II and concluded that it was not the intention of the Supreme Court to hold that the Second Amendment prohibits Congress from regulating any weapons except antiques 'such as a flintlock musket or a matchlock harquebus.' If the logical extension of the defendant's argument for the holding of Miller was inconceivable in 1942, it is completely irrational in this time of nuclear weapons.

   What is the court's argument here? Do you find it persuasive? Under the court's logic, what regulations would regulations would be constitutional? What regulations would be unconstitutional?