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Tench Coxe and the Right to Keep and Bear Arms, 1787-1823

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In medieval English law, a trial on a contested issue would proceed until the matter could be settled by the resolution of a single fact. The continuing debate about whether the Second Amendment¹ guarantees a right of the American people to keep and bear arms, or a power of state governments to have a militia, can likewise be resolved by focusing on the political leader in the Early American Republic who wrote more than anyone else about the right to arms: Tench Coxe.

Coxe, a Philadelphian, wrote numerous widely-circulated articles in favor of the proposed new Constitution, and, later, about the proposed Bill of Rights. He was appointed to subcabinet positions (just below a Cabinet Secretary) by Presidents Washington, Adams, Jefferson, and Madison. In the Jefferson administration, his duties included procuring firearms for militiamen who could not afford to purchase their own weapons. From his appearance on the national stage in the late 1780s, until his death in 1824, Coxe wrote prolifically, with his work appearing in major newspapers, in lengthy reports for Presidents, and in personal correspondence with leading political figures.

Today, Coxe is known to economic historians as a leading forerunner of the American Nationalist School of economics, with his advocacy of a “balanced” and self-sufficient national economy in which both agriculture and manufacturing were emphasized. (As we shall see, part of his economic vision included what proved to be a very successful effort to develop the nascent American firearms industry.²) Coxe is known to political historians for his role in the election of

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1. The Second Amendment provides: “A well regulated militia, being necessary to the security of a free State, the right of the People to keep and bear arms, shall not be infringed.” U.S. CONST., amend. II.

2. See, e.g., HAROLD HUTCHESON, *TENCH COXE: A STUDY IN AMERICAN ECONOMIC DEVELOPMENT* (Baltimore: Johns Hopkins Press, 1938).

1800, when he wrote articles charging President Adams with sympathy for monarchy. To legal historians, Coxe is best known for his federalist writings in 1787-88, in favor of the new Constitution; these writings have been quoted approvingly by the Supreme Court, and Coxe has been recognized as belonging to the “other Federalists”—men such as John Dickinson, James Wilson, and Noah Webster whose federalist writings (while not contributing as much to enduring political theory as did Madison, Hamilton, and Jay in *The Federalist*) played a major role in winning popular support for the Constitution, and in explaining what the Constitution meant to its contemporaries.

Coxe is also central to the Second Amendment debate. In the past two decades, the once-ignored Second Amendment has been the subject of scores of law review articles. Almost all of these articles adopt what is now called the “Standard Model” of the Second Amendment—the interpretation that the Amendment guarantees the right of individual Americans to own and carry firearms.³ In the Standard Model literature, Coxe is very common,⁴ while critics of the Standard

JACOB E. COOKE, *TENCH COXE AND THE EARLY REPUBLIC* (U.N.C. Pr. 1978) is the major comprehensive work on Tench Coxe. A bibliography of scholarship about Coxe is available in LUCY FISHER WEST, *GUIDE TO THE MICROFILM OF THE PAPERS OF TENCH COXE* 18 (Historical Soc. of Penn. 1977). Coxe’s papers are available to the public on microfilm. *PAPERS OF TENCH COXE IN THE COXE FAMILY PAPERS AT THE HISTORICAL SOCIETY OF PENNSYLVANIA* (Microfilm, Phil.: Hist. Soc. of Penn., 1977) Reels 113-14. (Hereinafter cited as “PAPERS OF TENCH COXE.”)

References to Coxe’s role as Purveyor of Public Supplies in the Jefferson and Madison administrations abound in accounts of the development of firearms technology in the early republic. *E.g.*, S. NORTH AND R. NORTH, *SIMEON NORTH: FIRST OFFICIAL PISTOL MAKER OF THE UNITED STATES* 75, 90-91 (1913); J. HICKS, *NOTES ON U.S. ORDNANCE, II: 1776-1941* 21, 52 (1941); F. DEYRUP, *ARMS MAKING IN THE CONNECTICUT VALLEY* 41-48 (1970).

3. Perhaps surprisingly, what distinguishes the Second Amendment scholarship from that relating to other constitutional rights, such as privacy or free speech, is that there appears to be far more agreement on the general outlines of Second Amendment theory than exists in those other areas. Indeed, there is sufficient consensus on many issues that one can properly speak of a “Standard Model” in Second Amendment theory, much as physicists and cosmologists speak of a “Standard Model” in terms of the creation and evolution of the Universe. In both cases, the agreement is not complete: within both Standard Models are parts that are subject to disagreement. But the overall framework for analysis, the questions regarded as being clearly resolved, and those regarded as still open, are all generally agreed upon. This is certainly the case with regard to Second Amendment scholarship.

Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 *TENN. L. REV.* 461, 463 (1995).

4. L.A. Powe, Jr., *Guns, Words, and the Constitutional Interpretation*, 38 *WM. & MARY L. REV.* 1311, 1353 (1997); Thomas McAfee & Michael J. Quinlan, *Bringing Forward the Right to Keep and Bear Arms: Do Text, History, or Precedent Stand in the Way?* 75 *N.C. L. REV.* 781 (1997); David E. Murley *Private Enforcement of The Social Contract: Deshaney and The Second Amendment Right to Own Firearms*, 36 *DUQ. L. REV.* 15 (1997); Frank Espohl, *The Right to Carry Concealed Weapons for Self-defense*, S. ILL. *U.L.J.* 151 (1997); Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 *TENN. L. REV.* 461, 467-68 (1995); Clayton Cramer and David B. Kopel, *Shall Issue: The New Wave of Concealed Handgun Laws*, 63 *TENN. L. REV.* 679 (1995); David B. Kopel *Lethal Laws*, 15 *N.Y. L. S. J. INTL. & COMP. L.* 355 (1995); Anthony J. Dennis, *Clearing the Smoke From the Right to Bear Arms and the Second Amendment*, 29 *AKRON L. REV.* 1 (1995); Stephen P. Halbrook, *Second Class Citizenship and the Second Amendment in the District of Columbia*, 5 *GEO MASON U. CIV. RTS.*

Model never admit his existence.⁵ But even in the Standard Model literature, the focus has almost exclusively been on Coxe's writings in 1787-89, in derogation of his subsequent writings and his service in the subcabinet, both of which reveal important aspects of what the right to keep and bear arms meant to its early advocates.

As the Standard Model has become a near-unanimous consensus among legal scholars who have written on the Second Amendment, the competing "state's rights" theory of the Second Amendment has nearly vanished from legal literature. Instead, the opponents of the Standard Model have adopted what might be called the "nihilist theory" of the Second Amendment: the Second Amendment means nothing at all. This view was first advanced by Garry Wills in a *New York Review of Books* article in which Wills asserted that James Madison, author of the Second

L.J. 105, 123 (1995); Thomas J. Walsh, *the Limits and Possibilities of Gun Control* 23 CAPITAL U. L. REV. 639 (1994); Stephen P. Halbrook, *Rationing Firearms Purchases And The Right to Keep Arms: Reflections on The Bills of Rights of Virginia, West Virginia, And The United States* 96 W.V. L. REV. 1 (1993); Stephen P. Halbrook, *The Right of the People or the Power of the State: Bearing Arms, Arming Militaries, and the Second Amendment*, 26 VAL. U. L. REV. 131, 140 (1991); Stephen P. Halbrook, *Encroachments of the Crown on the Liberty of the Subject: Pre-Revolutionary Origins of the Second Amendment*, 15 DAYTON L. REV. 91, 121 (1989); Robert Shalhope, *The Armed Citizen in the Early Republic*, 49 LAW & CONTEMP. PROBS. 125 (1986); David Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, 9 HARV. J.L. & PUB. POL'Y 559, 609-10 (1986); Stephen P. Halbrook, *What the Framers Intended: A Linguistic Analysis of the Right to "Bear Arms"*, 49 L. & CONTEMP. PROBS. 151, 155-56 (1986); Don Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204 (1983); Robert Dowlut, *The Right to Arms*, 36 OKLA. L. REV. 65 (1983); Robert Dowlut & Janet A. Knoop, *State Constitutions and the Right to Keep and Bear Arms*, 7 OKLA. CITY L. REV. 177, 207 n. 128 (1982); Stephen P. Halbrook, *To Keep and Bear their Private Arms: The Adoption of the Second Amendment, 1787-1791*, 10 N. KY. L. REV. 13, 17, 29-30 (1982); Stephen P. Halbrook, *The Jurisprudence of the Second and Fourteenth Amendments*, 4 GEO. MASON U. L. REV. 1 (1981).

The above articles comprise about a third of the total of "Standard Model" articles published since 1980. For a complete list of such articles, see, e.g., David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 B.Y.U. L. REV. (1998, forthcoming).

5. The sole exception is David C. Williams, who cites Coxe, quite properly, for the proposition that the militia was intended to be universal. (Williams goes on to argue that since the government has failed to promote civic virtue through a universal militia, the Second Amendment right to arms has vanished.) David C. Williams, *The Militia Movement and Second Amendment Revolution: Conjuring with the People*, 81 CORNELL L. REV. 879 (1996); David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551 (1991).

For anti-Standard Model articles which fail to address Coxe's writings, see Carl Bogus, *The Hidden History of The Second Amendment*, 31 U.C. DAVIS L. REV. 309 (1998); John Dwight Ingram & Alison Ann Ray, *The Right (?) To Keep and Bear Arms*, 27 N.M. L. REV. 491 (1997); Andrew D. Herz, *Gun Crazy: Constitutional False Consciousness and the Dereliction of Dialogic Responsibility*, 75 B.U. L. REV. 57 (1995); Carl Bogus, *Race, Riots, And Guns*, 66 U.S.C. L. REV. 1365 (1993); George Anastaplo, *Amendments to the Constitution of the United States*, LOYOLA U. OF CHI. L.J. 631 (1992); Michael J. Palmiotto, *The Misconception of the American Citizen's Right to Keep and Bear Arms*, 4 J. FIREARMS & PUB. POL. 85 (1992); Dennis A. Henigan, *Arms, Anarchy and the Second Amendment*, 26 VAL. U.L. REV. 107 (1991); Keith A. Ehrman & Dennis A. Henigan, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?* 15 DAYTON L. REV. 5 (1989); Warren Spannaus, *State Firearms Regulation and the Second Amendment*, 6 HAMLINE L. REV. 383 (1983); Samuel Fields, *Guns, Crime and the Negligent Gun Owner*, 10 N. KY. L. REV. (1982). The above list comprises virtually all of the anti-individual law review articles written about the Second Amendment since 1980.

Amendment, had pulled a hoax on the entire nation; despite what Madison's contemporaries thought, the Second and Third Amendments have no content.⁶ In a letter to the editor, Glenn Harlan Reynolds quoted the most contemporaneous known exposition of the Second Amendment—a newspaper by article written by Tench Coxe, just days after Madison introduced the Bill of Rights in Congress.⁷ Coxe described the Second Amendment as an individual right, and Madison wrote Coxe a letter praising Coxe's article.⁸ Wills replied angrily that just because Madison wrote to Coxe approvingly about Coxe's article does not mean that Madison agreed with the article.⁹ (Indeed, if Madison were so dishonest that he would defraud the American nation when writing the Bill of Rights, it would be reasonable to expect that Madison would also lie in his personal correspondence.)

Thus, as Wills implicitly acknowledged, to accept Coxe is to accept the Standard Model. Was Wills right to dismiss Coxe so curtly? Coxe was certainly not in the first-rank of historical importance with Madison and Jefferson, with whom he corresponded. But the *Dictionary of American Biography* concludes that Coxe “was a handsome, winning person, capable and versatile, high in the second rank of men of his day.”¹⁰

Even if the evidence for the Standard Model is overwhelming without Coxe (for example, there is no writing from the 1787-93 which states either the “state's rights” or the “nihilist” thesis¹¹; all legal scholarship from the creation of the Second Amendment through the first decades of the twentieth century considered the Second Amendment to guarantee an individual right¹²; the Supreme Court has repeatedly treated the Second Amendment as an individual right, and never as anything else¹³), Coxe is still important. No-one in the Early Republic wrote more about the right to arms than did Coxe. The nature of a well regulated militia, the meaning of a free state, who constitutes the people, the penumbras of keeping and bearing, and the arms protected from infringement were all topics discussed by Coxe.

This article will be divided into four Parts, each of which correspond to major developments in the republic's early history and to Coxe's attention to the right to keep and bear arms. In the first phase, discussed in Part I, Coxe emerges as a leading proponent of the Constitution. After tirelessly defending the proposed new government from anti-federalist criticism,

6. Garry Wills, *To Keep and Bear Arms*, N.Y. REV. BOOKS, Sept. 21, 1995.

7. Glenn Harlan Reynolds, N.Y. REV. BOOKS, Oct. 1995.

8. See text at *infra* note 77.

9. Garry Wills, N.Y. REV. BOOKS, Oct. 1995. Wills' use of invective rather than reason was unfortunate, but probably would not have surprised Coxe. Just after the election of 1800, during which Coxe had written article after article in support of Thomas Jefferson's successful candidacy, the pro-Federalist *Philadelphia Gazette* ran a large-type headline—with no supporting text—which shrieked “TENCH COXE IS INSANE.” *PHIL. GAZ.*, Dec. 9, 1800, quoted in COOKE, *supra* note 2, at 381.

10. *DICTIONARY OF AMERICAN BIOGRAPHY* (1997)(CD-Rom edition).

11. All known documents relating to the creation of the Second Amendment are collected in *ORIGIN OF THE SECOND AMENDMENT* (David E. Young ed., 1991).

12. David B. Kopel, *The Second Amendment in the Nineteenth Century*, B.Y.U. L. REV. (1998, forthcoming).

13. David B. Kopel, *Communitarians, Neo-Republicans, and Guns: Assessing the Case for Firearms Prohibition*, 56 *MARY. L. REV.* 384, 525-41 (1997)(discussing Supreme Court cases).

he championed the Bill of Rights. The second phase begins with Coxe's service in the Treasury Department of Presidents Washington and Adams, and ends with Coxe heralding the Jeffersonian banner against President Adams in the 1800 election, chastising him for his alleged neglect of the militia.

In Part III, Coxe advises the Republican president on arming the populace and avoiding standing armies. Appointed Purveyor of Public Supplies under Presidents Jefferson and Madison, Tench Coxe encouraged the American firearms industry, and procured arms for militias in the period leading up to the War of 1812. At the request of the Madison administration, Coxe undertakes a thorough analysis of the American economy, including the role of the burgeoning gun manufacturers. In the fourth and final phase, discussed in Part IV, the aging warrior once again picks up the pen in an effort to defeat the election of an Adams as president. Writing against the candidacy of John Quincy Adams, Coxe provides his most comprehensive exposition of the protection accorded the right to keep and bear arms in republics, and the infringement of this right in monarchies.

I. "To Keep And Bear Their Private Arms": The Adoption of The Constitution and the Bill of Rights

A. Who Was Tench Coxe?

Tench Coxe came from a family used to a leading role in public affairs. His great-grandfather Daniel Coxe was a physician to Charles II and to Queen Anne.¹⁴ Although Daniel Coxe never left England, he served as Governor of New Jersey, and bought huge tracts of land throughout America. He attempted to settle a colony of Huguenots in Virginia, but failed.¹⁵ (The Huguenots, having been disarmed by the French government, were being oppressed through the quartering of standing armies in their homes, and many of them were attempting to emigrate.) Daniel Coxe's son, also named Daniel Coxe, served as Colonel in the British Army in North America, settled in Pennsylvania, and served on the colony's Supreme Court, and later as Speaker of the state Assembly, and still later on the New Jersey Supreme Court.¹⁶ Daniel Coxe was, as his grandson would be, a strong advocate of American unity; in 1722 he wrote a book proposing that the 13 colonies be united by an assembly of delegates from each state, and by a national executive.¹⁷

Tench Coxe on his mother's side was the grandson of Tench Francis, "the undisputed leader of the Pennsylvania bar of his time," whose eloquence earned him the appointment of

14. DICT. AM. BIO., *supra* note 10.

15. *Id.*

16. *Id.*

17. DANIEL COXE, A DESCRIPTION OF THE ENGLISH PROVINCE OF CAROLANA, BY THE SPANIARDS CALL'D FLORIDA, AND BY THE FRENCH LA LOUISIANE ALSO OF THE GREAT AND FAMOUS RIVER MESCHACEBE OR MISSISSIPPI (London, 1722).

Attorney General of Pennsylvania.¹⁸ One of Tench Coxe's uncles (by marriage) was Chief Justice Edward Shippen of the Pennsylvania Supreme Court.¹⁹ Coxe's cousin Tench Tilingham served as a negotiator with the Onandaga Indians on behalf of the Continental Congress, and then as aide-de-camp to General Washington throughout the Revolutionary War.²⁰ Through the Tilinghams, Tench Coxe was related to one of the leading families in Maryland and Pennsylvania, which contained outstanding lawyers who also served as militia officers and in the Continental Army.²¹

Tench Coxe was a twenty-year-old son of a merchant residing in Philadelphia, Pennsylvania, in 1775 when the War for Independence broke out. Although he was not politically motivated and did not formally choose sides in the early years of the Revolution, he did a thriving business with Loyalists and the British army when the city was occupied—a business which would have been impossible had not the British military commanders decided to allow it.

There is no indication that young Tench Coxe played any role in the Pennsylvania constitutional convention of 1776, which adopted a Declaration of Rights reflecting the experiences of Boston as follows: "That the people have a right to bear arms for the defense of themselves, and the state"²² The Constitution also provided that "the freemen of this commonwealth and their sons shall be trained and armed for its defense"²³ and that "the inhabitants of this state shall have liberty to fowl and hunt" in unenclosed lands.²⁴

After radical Patriots took power, Coxe left Philadelphia for a few months, returning when the city was occupied by British General Howe in September 1777. Coxe remained in Philadelphia after the British departed in 1778, and was **credibly** accused by some Patriots of having Royalist sympathies, **and of having briefly served in the British army.**²⁵ Although Coxe's trading successes during the period of British occupation lent **considerable support** ~~some credence~~ to the charges, nothing came of the allegations, and the Revolution ended before Coxe became active in politics.²⁶

18. DICT. AM. BIO., *supra* note 10.

19. One of the Chief Justice's daughters, Margaret, married Benedict Arnold.

20. DICT. AM. BIO., *supra* note 10.

21. *Id.*

22. CONST. OF PENN., art. I, § 13 (1776).

23. *Id.* at art. II, § 5.

24. *Id.* at art. III, § 43.

25. Coxe's uncle by marriage, Chief Justice Edward Shippen, was a "moderate Loyalist." DICT. AM. BIO., *supra* note 10. Coxe's cousin-once-removed, Benedict Arnold, was a Patriot general, and then a traitor.

26. **In this regard, Coxe was fortunate. Although nothing was proven against him, his move into Philadelphia when the British returned, coupled with British tolerance for his trading company, suggest that the British regarded him as a sympathizer. Since Coxe was related to Peggy Shippen—a prominent lady of Philadelphia society, who was also Benedict Arnold's wife—it is not impossible that Coxe was passing to the British information that Coxe gleaned from his commercial activities.**

At the least, Coxe was no Patriot in the early part of the Revolution. This fact would be used against him again and again by his enemies in Pennsylvania politics. But other Americans, including Hamilton, Jefferson, and Madison, apparently did not consider Coxe's error as a young man to bar him forever from appointment to important positions. See text at notes - , - , -. Indeed, a policy restricting federal work only to persons who were "right from the start" in 1776 would have deprived the United States of the services of John Jay. Jay opposed war with Great Britain, played a leading role in the Olive Branch Petition sent to King George,

Coxe was listed as a militia private in the Pennsylvania militia records of 1780, 1787, and 1788.²⁷

Despite Coxe's failure to play a leading role in the Revolution in Pennsylvania, the events of the Revolution appear to have influenced Coxe's political philosophy on the issue of man and arms, since most of what Coxe later wrote about the connection between arms and freedom was consistent with revolutionary Patriot philosophy. For example, Coxe, like the delegates who created Pennsylvania's 1776 Constitution, and like other Patriots of revolutionary Pennsylvania, saw a direct connection between the right to hunt and the strength of the militia as a check on tyranny.²⁸

Also, General Howe, when occupying Philadelphia in 1778, had disarmed the population,²⁹ and (as reported in Philadelphia newspapers), General Gage had done the same to the citizens of Boston in 1775.³⁰ Although we do not know how Coxe reacted to the disarmament at the time,

and seriously considered leaving the United States when war broke out. Sandra F. VanBurkleo, *John Jay*, in *THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES* 446, 446 (ed. Kermit Hall 1992).

It seems probable that Coxe's desire to rid himself of all taint associated with sympathy for the British played some role in his fervent attacks on John Adams in 1800 for Adams' lack of hostility towards the British. See text at notes - .

27. HUTCHESON, *supra* note 2, at 8.

28. See PENN. CONST. (1776), *supra* note . Coxe's criticisms of John Quincy Adams (see text at notes - -, *infra*) follow the same reasoning as a 1776 Patriot article showing the connection between Britain's restrictive hunting laws and the disarmed British public's reliance on a standing army:

[T]he possession of *hunting dogs, snares, nets, and other engines* by unprivileged persons [in Britain], has been forbidden, and, under pretense of the last words, *guns* have been seized. . . . [T]his was not legal, as guns are not engines appropriate to kill game. . . .
. . . Thus . . . the freeholders of moderate estates are deprived of a natural right. Nor is this all; the body of the people kept from the use of guns are utterly ignorant of the arms of modern war, and the kingdom effectually disarmed, except of the standing force

Remarks on the Resolve, PENN. EVE. POST, Nov. 5, 1776, at 554.

29. Howe's disarming policies were carried out by Joseph Galloway, a Pennsylvania Loyalist:

Galloway was requested to recruit his staunchest supporters and assume responsibility for taking a census of the city. He was instructed to . . . apprehend any residents suspected of being dangerous to the security of the city, and confiscate any weapons in their possession. He selected personal henchmen in every ward to conduct the survey and take the necessary action against the disaffected rebels.

JOHN W. JACKSON, *WITH THE BRITISH ARMY IN PHILADELPHIA, 1777-1778* 20 (1979).

30. As reported in Philadelphia's *Pennsylvania Evening Post*, shots were first fired by the British in Lexington when militiamen refused to obey an officer's command, "Disperse, you rebels, D--N you, throw down your arms, and disperse" PENN. EVE. POST, May 11, 1775, at 3, col. 1. The opening of hostilities in the countryside provoked British General Gage to proclaim that the private citizens of Boston, even though not involved in any way, must deliver their arms to the authorities.

The *Post* reported that "the Governor and gentlemen of Boston have agreed to open the town, on condition of the inhabitants delivering up their arms to the Selectmen." *Id.*, May 2, 1775, at 2, col. 2. The writer added: "The Governor engages to protect the lives and property of such as choose to stay. To who choose

his later writings, and sometimes his language, are closely aligned with the political philosophy of vehement opposition to firearms confiscation which was expressed by the Patriots of the time in Philadelphia.

B. Before the Constitutional Convention

When the Revolution ended, Coxe formed the international merchant firm of Coxe & Frazier. He began to take an interest in political reform. Besides playing a leading role in the Philadelphia Society for Alleviating the Miseries of Public Prisons³¹, Coxe served as secretary of the Pennsylvania Society for Promoting the Abolition of Slavery,³² of which Benjamin Franklin was

to quit the town, to go where they please" After collecting the arms, Gage refused to allow the people to leave Boston. It was reported from New London:

By the post, who left the head quarters at Roxbury, last Monday o'clock P.M. we learn that only two persons have been permitted to come out of Boston that day, that no more of the inhabitants would be permitted to leave the town for the present; and that on the same day a town meeting was to be held in Boston, when the inhabitants were determined to demand the arms they had deposited in the hands of the Selectmen, or have liberty to leave the town.

Id., May 20, 1775, at 3, cols. 1-2.

Meanwhile British troops began plundering houses in Boston, and Gage proclaimed martial law, ordering the Patriots to lay down their arms. *Id.*, May 25, 1775, at 2, col. 1; June 24, 1775, at 2. The following is a typical Patriot's response:

What terms do you hold out in this gracious proclamation? . . . Now, Sir, waiving all that may be said of your hypocrisy, cruelty, villanry, treachery, perfidy, falsehood, and inconsistency, are you not ashamed to throw out such an insult upon human understanding, as to bid people disarm themselves till you and your butchers murder and plunder them at pleasure! We well know you have orders to disarm us, and what the disposition of the framers of these orders is, if we may judge from the past, can be no secret.

E. Ludlow, *To the Vilest Tool of the most profligate and tyrannical Administration that ever disgraced a Court. Inhuman Butcher! Id.*, June 27, 1775, at 1, cols. 1-2.

An editorial on Gage's proclamation stressed that an armed populace must keep government in check:

The opposing an arbitrary measure, or resisting an illegal force, is no more rebellion than to refuse obedience to a highway-man who demands your purse, or to fight a wild beast, that came to devour you. It is morally lawful, in all limited governments, to resist that force that wants political power, from the petty constable to the king. . . . *They* are rebels who arm against the constitution, not *they* who defend it by arms.

"A Freeman," *id.* at 2, cols. 1-2.

31. The society was the "first effective reform organization of its kind of the country." Cooke, *supra* note 2, at 92.

32. "The bulk of the societies paperwork was handled by Cox, who more than any other individual deserve credit for the accomplishments of the group." Cooke, *supra* note 2, at 93. Among the group's accomplishments

president.³³ In 1786, Coxe represented Pennsylvania and served as the Secretary for the Annapolis Convention, the effort to revise the Articles of Confederation, which set the stage for the constitutional convention the following year.³⁴ (In 1997, Justice Thomas cited Coxe's Annapolis Convention analysis of the barriers to interstate trade.³⁵) Coxe was also appointed to represent Pennsylvania in the Continental Congress.³⁶

Among the many commodities dealt in for many years by the firm of Coxe & Frazier were firearms. A sample of business records from the year 1786 exemplify the extent of the company's involvement in the firearms businesses, and also reflect politico-military conditions at that time. Some New York militia companies lacked sufficient muskets of a common bore, and ordered two hundred stands from the firm.³⁷ (Two decades later, Coxe, as the federal government's Purveyor of Public Supplies, would make a major effort to standardize militia firearms.) The state of Georgia had ordered 500 stands of arms for the Georgia state militia, and a Southern distributor observed how dangerous conditions were in the deep South: "you apprehend they will want them for there is scarcely a doubt, but they will be engaged in an Indian war -- if they should not purchase we apprehend this state [South Carolina] will" ³⁸ A Northern distributor who ordered from Coxe likewise noted how the people were arming themselves in response to political instability: "The present uneasiness in Massachusetts [Shay's Rebellion] had caused a great demand for muskets, in consequence of which we have disposed of about three hundred of yours with bayonets & c at three dollars each" ³⁹ Like most others in the arms business, Coxe made arms for private purchase (the firearms sold in Massachusetts), for state militias (Georgia), and for more local militia

were disseminating arguments against slavery to a national audience, assisting in the formation of anti-slavery societies in other states, providing free legal aid to free blacks in Pennsylvania, and convincing the Pennsylvania Legislature to pass legislation constricting slavery in Pennsylvania so severely as to put it on the road to ultimate extinction. *Id.*

33. Franklin also happened to be a very strong militia enthusiast. As a member of the Pennsylvania Assembly, Franklin wrote the militia act of 1755. *An Act for the Better Ordering and Regulating Such as are Willing and Desirous to be United for Military Purposes in Pennsylvania*, in 3 THE WORKS OF BENJAMIN FRANKLIN 48 (Jared Sparks ed., Boston: Hilliard, Gray, & Co. 1837). While the bill was being considered, Franklin wrote a lengthy article touting the militia, which Franklin later credited for having made possible the bill's passage. Benjamin Franklin, *A Dialogue Between X, Y, & Z, Concerning the Present State of Affairs in Virginia*, in *id.* at 84. After the Royal Governor vetoed a militia bill in 1764, Franklin wrote a scathing criticism of the governor's rationale. "Veritas," *Remarks on a Particular Militia Bill Rejected by the Proprietor's Deputy, or Governor*, Sept. 28, 1764 (Phil.). 4 *Id.* at 95.

34. HUTCHESON, *supra* note 2, at 10-14; Cooke, *supra* note 2, at 96.

35. *Camps Newfound/Owatonna, Inc. V. Town of Harrison*, -U.S.- (1997)(Thomas, J., dissenting).

36. HUTCHESON, *supra* note 2, at 15-16.

37. Rich. Warick to Capt. John Stagg, Nov. 13, 1786, PAPERS OF TENCH COXE, , *supra* note 2, at Reel 49, at 556. Subsequent correspondence indicated this contract was not fulfilled, due to insufficient quantities with the same bore.

"A *stand of arms* consists of a musket, bayonet, cartridge-box and belt, with a sword. But for common soldiers a sword is not necessary." 1 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 13 (9th ed. 1996)(1828)(emphasis in original).

38. Robt. Hazlehurst to Harrison & Nichols, Nov. 14, 1786, *id.* at 569.

39. Clarke & Nightingale to Coxe & Fraizer, Nov. 16, 1786, *id.* at 581.

groups (New York).

In the summer of 1787, while the constitutional convention met in Philadelphia, Coxe presented a paper urging industrial development before the Society for Political Inquiries at the house of Benjamin Franklin. The paper presaged the major role he would play in Jefferson and Madison administrations promoting an early version of American industrial policy. Among the articles of which he urged domestic manufacture were gunpowder and ironworks.⁴⁰

C. Defending the Proposed Constitution

Less than ten days after the constitutional convention in Philadelphia ended, Tench Coxe began defending the Constitution, in a series of essays published in the Philadelphia *Independent Gazetteer*, and reprinted throughout the United States.⁴¹ Coxe sent the first two essays to James Madison in New York, explaining, “My anxiety in favor of the new federal Constitution has induced me to attempt some comments on it, that might render it more clear and agreeable to the people at large”⁴² Madison responded, “I have received & perused with much pleasure the remarks on the proposed Constitution for the U.S. which you have been so good as to favor me with,” promised to see that they were published in Virginia, and kept his promise.⁴³

Justice William Brennan, citing one of Coxe’s essays about the jurisdiction of federal courts, noted that Coxe had been “widely reprinted” during the ratification debates.⁴⁴ Justice White described Coxe’s essays as “the first major defense of the Constitution published in the United States.”⁴⁵ “Although Coxe’s essays were not in the same literary league [as the *Federalist*], they perhaps were contemporaneously more influential, precisely because they were less scholarly and thus easier for most readers to follow. . . . As Madison, Rush, and other contemporaries recognized, Coxe’s writings . . . contributed materially to the Constitution’s adoption.”⁴⁶

While some historians in previous decades tended to look only to the authors of *The Federalist* (James Madison, Alexander Hamilton, and John Jay) to understand the arguments made for ratification of the Constitution, modern historians have a broader view; Tench Coxe—along with writers such as James Wilson, John Dickinson, Noah Webster, and others-- is recognized as a “leading defender” of the Constitution, one of the influential “Other Federalists”

40. TENCH COXE, AN INQUIRY INTO THE PRINCIPLES ON WHICH A COMMERCIAL SYSTEM FOR THE UNITED STATES SHOULD BE FOUNDED 21 (Philadelphia 1787).

41. 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 128 (M. Jensen ed. 1976) (Hereafter cited as DHRC). The convention ended on Sept. 17, 1787.

42. Sept. 27, 1787, 13 DHRC 251 (J. Kaminski and G. Saladino eds. 1981). See *An American Citizen*, I & II in PHILADELPHIA INDEPENDENT GAZETTEER [hereinafter PHIL. IND. GAZ.], Sept. 26, 28, 1787. No. III was published on Sept. 29.

43. Oct. 1, 1787, 13 DHRC, *supra* note 40, at 251-52; COOKE, *supra* note 2, at 113.

44. *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 273 n. 24 (1985) (Brennan, J., dissenting).

45. *Nixon v. Fitzgerald*, 457 U.S. 731, 773 n.14 (1982) (White, J., dissenting). Another Supreme Court case in which Coxe figures—although as a character rather than a source of authority-- involved his wife’s inheritance from her father. *M’Ilvaine v. Coxe’s Lessee*, 2 Cranch (U.S.) 280 (1802); 4 Cranch (U.S.) 207 (1804).

46. COOKE, *supra* note 2, at 111.

who played a major role in shaping the debate over the Constitution.⁴⁷ Indeed, even Garry Wills admits that Tench Coxe “coordinated the efforts at ratification, establishing a network of communications with federalists everywhere.”⁴⁸ Thus, it is not surprising that Coxe has been discussed and cited many times by legal historians—including scholars as diverse as Bruce Ackerman⁴⁹, Michael McConnell⁵⁰, Herbert Hovenkamp,⁵¹ and Raoul Berger⁵²—regarding the original understanding of the Constitution.

In No. IV of the series, Coxe argued that should tyranny threaten, the “friends to liberty . . . using those arms which Providence has put into their hands, will make a solemn appeal to ‘the power above’.”⁵³ Hence, the new Constitution no more needed a declaration of rights than did the Articles of Confederation: “Neither of them have a bill of rights, nor does either notice the liberty of the press, because they are already provided for by *the State Constitutions*; and relating only to personal rights, they could not be mentioned in a contract among *sovereign states*.”⁵⁴ As for the alleged danger of a standing army: “The militia, who are in fact the effective part of the people at large, will render many troops quite unnecessary. They will form a powerful check upon the regular troops, and will generally be sufficient to over-awe them”⁵⁵

Of this installment, Coxe wrote Madison:

At the request of Mr. Wilson, Dr. Rush and another friend or two I added a 4th paper, calculated to shew the general advantages & obviate some of the Objections to the System. . . . I . . . wish that you and Col. H[amilton] may make any use of them, which you think will serve the cause.⁵⁶

47. FRIENDS OF THE CONSTITUTION: WRITINGS OF THE “OTHER” FEDERALISTS 1787-1788 88 (Colleen A. Sheehan and Gary L. McDowell, eds., 1998).

48. GARRY WILLS, THE FEDERALIST PAPERS BY ALEXANDER HAMILTON, JAMES MADISON, AND JOHN JAY viii (1982).

49. Bruce Ackerman & Neal Katyal, *Our Unconventional Founding*, 62 U. CHI. L. REV. 475 (1995).

50. Michael W. McConnell, *Tradition and Constitutionalism Before the Constitution* 98 U. ILL. L. REV. 173 (1998); Michael W. McConnell, *The Origins And Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1443 (1990) (Expressing the same view as Madison, “Tench Coxe, a prominent essayist, stated that ‘[m]ere toleration is a doctrine exploded by our general constitution.’”)

51. Herbert Hovenkamp *Judicial Restraint and Constitutional Federalism: The Supreme Court's Lopez and Seminole Tribe Decisions*, 96 COL. L. REV. 2213 (1996).

52. Raoul Berger, *Original Intent and Boris Bittker*, 66 IND. L.J. 723 (1991).

53. PHIL. IND. GAZ., Oct. 21, 1787, *id.* at 433.

54. *Id.* at 434.

55. *Id.* at 435. It is interesting that the copy of the original edition of *An Examination of the Constitution* (1787) in the Jefferson Collection, Library of Congress, has this passage and no other marked at the margin, perhaps by the original reader, Thomas Jefferson. (Former President Jefferson donated his personal library to the Library of Congress, after the British burned the Library of Congress during the War of 1812.)

The first three installments of *An Examination of the Constitution of the United States* appeared in the *Independent Gazetteer*, on Sept. 26, 28, and 29, 1788. Around Oct. 21 of the same year, the publishing company of Hall and Sellers (publishers of the *Pennsylvania Gazette*) reprinted the first three essays together with Coxe’s fourth essay. FRIENDS, *supra* note 46, at 459.

56. Oct. 21, 1787, 13 DHRC, *supra* note 40, at 437.

Madison replied that he had disposed of the papers as directed, and had given copies to Alexander Hamilton: "I have no doubt that he will make the best use of them. . . . The 4th is a valuable continuation, and I shall be equally desirous of seeing it in the Virginia Gazette; and indeed in those of every State."⁵⁷

The installment was widely published,⁵⁸ and the series circulated as a vital part of the national debate.⁵⁹

The argument that the militia would be sufficient to overawe a standing army was persuasive in Pennsylvania,⁶⁰ the first state to call a convention. But anti-federalists at the convention were not convinced. As John Smilie warned:

Congress may give us a select militia which will, in fact, be a standing army -- or Congress, afraid of a general militia, may say there shall be no militia at all. When a select militia is formed; the people in general may be disarmed.⁶¹

James Wilson, who had urged Coxe to write "An American Citizen, IV," contended that the Constitution already allowed for the ultimate force in the people: "In its principles, it is surely democratical; for, however wide and various the firearms of power may appear, they may all be traced to one source, the people."⁶²

The Pennsylvania convention adopted the Constitution in mid-December, 1787, but not without strong opposition. A large number of delegates had opposed the new Constitution, especially if it did not contain a bill of rights. The anti-federalist delegates explained their reasoning

57. Oct. 26, 1787, *id.* Madison also praised "as well timed as they are judicious" Coxe's words in his article "To the Inhabitants of the Western Counties of Pennsylvania," in which Coxe argued that there was no risk of the federal government imposing direct taxes on the west. HUTCHESON, *supra* note 2, at 74, citing James Madison, letter of July 30, 1788, to Tench Coxe, in 9 THE PAPERS OF JAMES MADISON (1975).

58. 13 DHRC, *supra* note 40, at 431.

59. 2 DHRC, *supra* note 40, at 5. Coxe's writings republished in Virginia "had a very valuable effect." Madison to Coxe, Jan. 3, 1788, in 10 THE PAPERS OF JAMES MADISON 349 (R. Rutland ed. 1977).

60. Coxe was by no means the only Pennsylvania federalist to make this argument. Noah Webster, *An Examination into the Leading Principles of the Federal Constitution* (Oct. 16, 1787), in PAMPHLETS OF THE CONSTITUTION OF THE UNITED STATES 56 (P. Ford ed. 1888) states:

Before a standing army can rule, the people must be disarmed; as they are in almost every kingdom in Europe. The supreme power in America cannot enforce unjust laws by the sword; because the whole body of the people are armed, and constitute a force superior to any band of regular troops that can be, on any pretence, raised in the United States.

And see "Foreign Spectator," PHIL. IND. GAZ., Sept. 21, 1787: "even the power of a veteran army could not subdue a patriotic militia ten times its number . . ." 2 DHRC, *supra* note 40, at Mfm. Supp. 384. *A Supplement to the Essay on Federal Sentiments*, PHIL. IND. GAZ., Oct. 23, 1787 states: "The whole personal influence of the Congress, and their parricide army could never prevail over a hundred thousand men armed and disciplined, owners of the country . . ." 2 DHRC, *supra* note 40, at Mfm. Supp. 801.

61. 2 DHRC, *supra* note 40, at 509.

62. *Id.* at 336.

in *The Address and Reasons of Dissent of the Minority*. The Pennsylvania minority castigated the majority for not allowing the proposal of amendments-- in particular a bill of rights which would have provided in part:

That the people have a right to bear arms for the defense of themselves and their own state, or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals⁶³

Coxe immediately set out to refute the objections of the convention minority. Under the penname. "Philanthropos," Coxe pointed out the the Pennsylvania minority's demand for a Bill of Rights had not (yet) been raised by prominent anti-federalists in other states:

The right of the people to fish, fowl and hunt, the freedom of speech, provision against disarming the people, a declaration of the subordination of the military to the civil power, annual elections of representatives, and the organization and call of the militia, are considered by the minority of our convention, as on an exceptional footing; but none of these are even mentioned by Governor Randolph, Mr. Mason or Mr. Gerry. ⁶⁴

And, Coxe contended in another article, the minority's fears of the federal standing army was ridiculous, as was the minority's fear the Congress might disarm the people:

The power of the sword, say the minority of Pennsylvania, is in the hands of Congress. My friends and countrymen, it is not so, for THE POWERS OF THE SWORD ARE IN THE HANDS OF THE YEOMANRY OF AMERICA FROM SIXTEEN TO SIXTY.⁶⁵ The militia of these free commonwealths, entitled and accustomed to their arms, when compared with any possible army, must be *tremendous and irresistible*. Who are the militia? *are they not ourselves*. Is it feared, then that we shall turn our arms *each man against his own bosom*. Congress have no power to disarm the militia. Their swords, and every other terrible implement of the soldier, are *the birth-right of an American*. What clause in the state or federal constitution hath *given away* that important right. . . . [T]he unlimited power of the sword is not in the hands of either the *federal or state*

63. *Id.* at 623-24.

64. Philanthropos, *To The People of the United States*, PHIL. GAZ., Jan. 16, 1788, at 3, col. 2.

65. Compare this line with James Harrington's *The Commonwealth of Oceana*, a major work of Whig political theory from the previous century: "The hand which holds this sword is the militia of a nation; and the militia of a nation is either an army in the field, or ready for the field upon occasion." JAMES HARRINGTON, THE COMMONWEALTH OF OCEANA (1656), available on the Internet at <http://www.ecn.bris.ac.uk/het/harrington/oceana>.

*governments, but where I trust in God it will ever remain, in the hands of the people.*⁶⁶

Of this series, Coxe's modern biographer has written:

The articles signed "A Pennsylvanian" were Coxe's most noteworthy contribution to the ratification debate and invite comparison to the best of the literature spawned by that controversy, including the *Federalist* essays, which Coxe approvingly quoted and to which his work was superior in its treatment of some subjects.⁶⁷

It is possible that Coxe influenced the writers of *The Federalist*, for Madison and Hamilton had read and disseminated his publications before composing their own, and there is some similarity in treatment of subject matter.⁶⁸ For instance, after having read "An American Citizen, IV," Hamilton argued in the *Federalist* No. 29 that an "army can never be formidable to the liberties of the people while there is a large body of citizens, little if at all inferior to them in discipline and the use of arms, who stand ready to defend their rights and those of their fellow-citizens."⁶⁹

Such was the cross-fertilization of ideas that before Coxe published his thoughts on the power of the sword in the hands of the people, Madison had sent Coxe *The Federalist* No. 45.⁷⁰ Madison rejected fears of a federal standing army, because to a regular army "would be opposed a militia amounting to near half a million of citizens with arms in their hands." Madison lauded "the advantage of being armed, which the Americans possess over the people of almost every other nation . . ."⁷¹ That the federal standing army would be held in awe by popular militias ready to defend strong state governments and individual liberty was part of the pro-Constitution philosophy developed by Coxe, Madison, Hamilton, and other federalists.⁷²

66. A Pennsylvanian, *To The People of the United States*, PHIL. GAZ., Feb. 20, 1788, at 2, col. 2, in 2 DHRC, *supra* note 10, at mfm. supp. 1778-80. Other installments are in PHIL. GAZ., Feb. 6, 13, and 27, 1788.

67. COOKE, *supra* note 5, at 118.

68. Seventy-six numbers of the *Federalist* were first published in New York City newspapers between Oct. 27, 1787 and April 2, 1788. 13 DHRC, *supra* note 10, at 490.

69. THE FEDERALIST NO. 29 (Alexander Hamilton). "Little more can reasonably be aimed at with respect to the people at large than to have them properly armed and equipped . . ." *Id.*

70. "What goes by name of consolidation in Pena. is I suspect at the bottom of the opposition to the New Government almost every where; and I am glad to find you engaged in developing the subject. I enclose some papers [THE FEDERALIST NOS. 44 and 45] in which it has been taken up here, that if any hints are contained in them, they may be pursued in your enquiry." Madison to Coxe, 10 MADISON PAPERS, *supra* note 58, at 445.

71. THE FEDERALIST NO. 46 (James Madison). Madison added: "Notwithstanding the military establishments in the several kingdoms of Europe, which are carried as far as the public resources will bear, the governments are afraid to trust the people with arms." Compare with Noah Webster, *supra* note 59.

72. Other Coxe writings in this period were published in newspapers in most of the states. For example, his *An American, Address to the Members of the Convention of Virginia*, PHIL. GAZ., May 21, 28, 1788, and 3 A MERICAN MUSEUM 426-33, 544-48 (1788) were distributed by Madison in Virginia. COOKE, *supra* note 2, at 121. Anonymous Coxe articles also appeared in the *Federal Gazette* during 1788-90.

Among the advantages Coxe saw in the new Constitution was that ex post facto laws “are exploded by the new system.” The explicit prohibition on ex post facto laws would raise peoples’ consciousness of their rights, and encourage them to armed revolt against any future government which attempted to impose ex post facto laws:

If a time of public contention shall hereafter arrive, the firm and ardent friends to liberty may know the length to which they can push their noble opposition, on the foundation of the laws. Should their country's cause impel them further, they will be acquainted with the hazard, and using those arms which Providence has put into their hands, will make a solemn appeal to “the power above.”⁷³

In other essays written in response to the objections of the Pennsylvania minority, Coxe argued that the new federal government would not be able to interfere with the state militias, because the Constitution provided that states would train their own militia and choose the officers for the state militia.⁷⁴

D. The Bill of Rights

The existing guarantees for personal rights in the state constitutions, the presence of an armed populace, and the lack of a grant of power in the proposed Constitution to infringe on

Query whether Coxe was “Philodemos,” who wrote in PHIL. GAZ., May 7, 1788: “Every free man has a right to the use of the press, so he has to the use of his arms.” 2 DHRC, *supra* note 40, at mfm. supp. 2579. A similar link of a free press and the use of arms appears in Coxe’s observation that “the efforts of industry and genius in the German nation have been successfully applied to subjects of the most useful and curious nature, and among the several proofs of their disposition and capacity of such pursuits, are the invention of GUN-POWDER . . . and that of TYPE-FOUNDING . . .” Philanthropos, *To the Friends of Religion, Morality and Useful Knowledge*, PHIL. GAZ., Aug. 6, 1788, at 2, col. 1.

In a society where “Gun-Smiths” marched in the July 4th parade (PHIL. GAZ., July 9, 1788, at 3), the benefits of firearms in the hands of the public were undisputed. In one of the same issues where “A Pennsylvanian” appeared, the editor lauded the role of citizens, “having armed themselves” with muskets, apprehending violent criminals. “Future villains may now see, however safe they may think themselves by being armed in the pines, that there are men who will brave the greatest danger to take them.” PHIL. GAZ., Feb. 27, 1788, at 3, col.2.

73. TENCH COXE, AN EXAMINATION OF THE CONSTITUTION FOR THE UNITED STATES OF AMERICA, 18-19, in FORD, *supra* note 59, at 147-48.

74. A Freeman [Tench Coxe], *To the Minority of the Convention of Pennsylvania*, PENNSYLVANIA GAZETTE, Jan. 23, 1788, reprinted in FRIENDS, *supra* note 46, at 92; A Freeman [Tench Coxe], *To the Minority of the Convention of Pennsylvania*, PENNSYLVANIA GAZETTE, Jan. 30, 1788, reprinted in FRIENDS, *supra* note 46, at 93. See also An American Citizen [Tench Coxe], *An Examination of the Constitution of the United States* (Phil., pamphlet, approx. Oct. 21, 1788, printed by Hall and Sellers), reprinted in FRIENDS, *supra* note 46, at 475 (noting that states, not the federal government, would control the appointment of various important posts, including “Officers of the Militia”).

individual liberties were cited by federalists as precluding the need for a bill of rights. In keeping with this approach, Coxe questioned the wisdom of considering amendments before the experiment had been tried.⁷⁵

In 1788 Coxe served as one of Pennsylvania's last delegates to the Continental Congress, which held its final session early the following year. In the meantime, the Constitution was ratified by nine states. Many federalists then reversed their position against a bill of rights in order to entice the remaining states to ratify, as a compromise with the Constitution's opponents, who agreed not to oppose the Constitution further. On June 8, 1789, in the newly formed U.S. House of Representatives, Madison proposed a bill of rights which included the following:

The right of the people to keep and bear arms shall not be infringed; a well armed, and well regulated militia being the best security of a free country: but no person religiously scrupulous of bearing arms shall be compelled to render military service in person.⁷⁶

Coxe was in an excellent position to know what Congress was doing; he was living in New York City (where the first Congress was meeting), and was serving as an unofficial policy advisor to several leading Congressmen. In this capacity, he helped shape the Judiciary Act of 1789 (creating the lower federal courts), legislation regarding the President's power to remove his appointees, and the patent bill.⁷⁷

Perhaps alerted to Madison's proposals in advance of the general public, within ten days "A Pennsylvanian" again appeared in print, this time in the Philadelphia *Federal Gazette* with his "Remarks on the First Part of The Amendments to the Federal Constitution." Probably the most comprehensive section-by-section exposition on the Bill of Rights to be published during its ratification period, Coxe's "Remarks" included the following:

As civil rulers, not having their duty to the people duly before them, may attempt to tyrannize, and as the military forces which must be occasionally raised to defend our country, might pervert their power to the injury of their fellow-citizens, the people are confirmed by the next article in their right to keep and bear their private arms.⁷⁸

75. An American Citizen, *Thoughts on the Subject of Amendments*, PHIL. GAZ., Dec. 3, 10, 24, and 31, 1788.

76. 1 ANNALS OF CONGRESS 434 (June 8, 1789). As adopted, what became the Second Amendment to the U.S. Constitution more concisely stated: "A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed." As to the deleted clause concerning the religiously scrupulous, see Coxe's undated manuscript on the invalidity of pacifist arguments against support for a militia in PAPERS OF TENCH COXE, *supra* note 2, at Reel 114, at 38 ff.

77. COOKE, *supra* note 2, at 137-39, 150-51.

78. FEDERAL GAZ., June 18, 1789, at 2, col. 1. The amendments had been published in the issue of June 16, 1789, at 2, cols. 2-3. The first page of newspapers of the time was normally reserved for advertisements and official notices.

Coxe sent a copy of his essay to Madison along with a letter of the same date.⁷⁹

Madison wrote back acknowledging “Your favor of the 18th instant. The printed remarks inclosed in it are already I find in the Gazettes here [New York].” Madison approvingly added that ratification of the amendments “will however be greatly favored by explanatory strictures of a healing tendency, and is therefore already indebted to the co-operation of your pen.”⁸⁰

Madison apparently saw Coxe’s defense of the amendments in the *New York Packet* the day before he wrote to Coxe.⁸¹ The Coxe article was also prominently displayed on the first page of the July 4 celebration issue of the *Massachusetts Centennial*,⁸² and was no doubt reprinted elsewhere.

Just as Coxe had written energetically for the proposed Constitution, he now wrote energetically for the proposed Bill of Rights, reversing his early stand that there was no need to list rights which Congress had no power to infringe.⁸³

II. Coxe’s Service in the Washington and Adams Administrations, and the Election of 1800

79. Coxe to Madison, June 18, 1789, 12 THE PAPERS OF JAMES MADISON 239-40 (C. Hobson and R. Rutland eds. 1979).

80. Madison to Coxe, June 24, 1789, *id.* at 257.

81. NEW YORK PACKET, June 23, 1789, at 2, col. 1-2.

82. BOSTON MASSACHUSETTS CENTENNIAL, July 4, 1789, at 1, col. 2.

83. It has been argued by many against a bill of rights, that the omission of some in making the detail would one day draw into question those that should not be particularized. It is therefore provided, that no inference of that kind shall be made, so as to diminish, much less to alienate an ancient tho’ unnoticed right, nor shall either of the branches of the Federal Government argue from such omission any increase or extension of their powers.

Tench Coxe, *Remarks on the Second Part of the Amendments*, FED. GAZ., June 30, 1789, at 2, cols. 1-2. As adopted, the Ninth Amendment to the U.S. Constitution provides: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” U.S. CONST., amend. IX.

A review of subsequent issues of the above newspapers reveals agreement with Coxe’s analysis of the meaning of the Amendments—in particular, that the Amendments guaranteed freedoms which Congress had no authority to infringe anyway. “One of the People” wrote in the *Federal Gazette* that “the very idea of a bill of rights” is “a dishonorable one to freemen.”

What should we think of a gentlemen, who, upon hiring a waitingman, should say to him “my friend, please take notice, before we come together, that I shall always claim the liberty of eating when and what I please, of fishing and hunting upon my own ground, of keeping as many horses and hounds as I can maintain, and of speaking and writing any sentiments upon all subjects.”

In short, as a mere servant, the government had no power to interfere with individual liberties in any manner absent a specific delegation: “[A] master reserves to himself . . . every thing else which he has not committed to the care of those servants.” One of the People, *On a Bill of Rights*, FED. GAZ., July 2, 1789, at 2, col. 1.

The Bill of Rights would be ratified by a sufficient number of states by the end of 1791. Meanwhile, in 1790, Treasury Secretary Alexander Hamilton appointed Coxe Assistant Secretary of the Treasury, making him Hamilton's second in command; two years later, Hamilton, at Coxe's request, made Coxe the Commissioner of the Revenue.⁸⁴

As Commissioner of the Revenue, Coxe was in charge of the collection of all tax revenues, including the revenues from the Hamilton-inspired federal excise tax on distilled spirits, which prompted the 1794 Whiskey Rebellion in western Pennsylvania. While there is no evidence that Coxe personally supported the tax—which bore unfairly on western farmers in general, and on his state of Pennsylvania in particular (since farmers needed to distill their grain before taking it to market, in order to make it more compact and thus transportable)—Coxe strongly opposed the western Pennsylvania farmers taking up arms in protest against the excise tax.⁸⁵

Critics of the individual rights interpretation of the Second Amendment sometimes claim that the Standard Model implies that people can go to war with the government whenever they disagree with any government decision, such as an unpopular tax increase. Coxe refutes this claim. Coxe clearly believed in the individual right to arms, and he just as clearly believed that it was wrong for the Pennsylvania farmers to take up arms against a lawful tax which had been duly created through proper constitutional methods. Coxe would continue to support the right to arms as a mechanism allowing popular revolt as a last resort against tyranny—but Coxe, like the vast majority of Americans, could tell the difference between a tyrant and George Washington. And today, when federal taxes are vastly higher than the taxes that sparked the Whiskey Rebellion, the vast majority of Americans (including those who support Coxe's understanding of the Second Amendment), agree that a tax constitutionally imposed by Congress is no grounds for a Second Amendment revolution to rescue the Constitution from a tyrant.

While serving President Washington's administration, Coxe wrote a major book analyzing the future of the American economy: *A View of the United States of America*.⁸⁶ The book was a leading work of the time on commerce, industry, and agriculture, and has earned a modern reprint because of its comprehensive and insightful examination of American economic development. Coxe was the first American economist to foresee the immense economic potential of cotton culture in

84. COOKE, *supra* note 2, at 242. As Commissioner of the Revenue, Coxe received what appeared to be an attempt to bribe him regarding the construction of a lighthouse off Cape Hatteras in North Carolina. Coxe promptly reported the attempted bribe to Attorney General Ingersoll, and the case eventually made its way to the United States Supreme Court. *United States v. Worrall*, 2 U.S. 384 (1798)(discussing venue for federal crimes). At the time that Coxe rejected the attempted bribe, Coxe was "financially pressed" by the need to support his large family, as Coxe would be for most of the rest of his life. HUTCHESON, *supra* note 2, at 41.

85. Coxe made his views known in a forcefully worded letter to Hugh Henry Brackenridge, prominent author in western Pennsylvania (and a future Chief Justice of the Pennsylvania Supreme Court). HUTCHESON, *supra* note 2, at 36 n. 132. For more on the Whiskey Rebellion, see Gerald Carson, *Watermelon Armies and Whiskey Boys*, in *RIOT, ROUT, AND TUMULT: READINGS IN AMERICAN SOCIAL AND POLITICAL VIOLENCE* 70 (Roger Lane & John J. Turner, Jr. eds., 1978).

86. TENCH COXE, *A VIEW OF THE UNITED STATES OF AMERICA IN A SERIES OF PAPERS WRITTEN AT VARIOUS TIMES, IN THE YEARS BETWEEN 1787 AND 1794* (N.Y.: Augustus M. Kelley, 1965)("Reprints of Economic Classics" series)(Phil. 1794).

the United States.⁸⁷ He also observed that “*Manufactures of iron* form a very increasing and useful branch . . . [including] *arms* of various kinds.”⁸⁸ “The Indian War and the renewal of our militia system has greatly revived the manufacture of arms.”⁸⁹ Coxe argued that gunpowder was already being manufactured in several places more cheaply than it could be imported.⁹⁰ “The *manufacture of gunpowder* has advanced with the greatest rapidity to the point of desire in regard both to quantity and quality.”⁹¹ In an economic analysis written in 1789, Coxe had urged moderate protection for a variety of essential domestic industries, including firearms and gunpowder,⁹² but the industries were apparently improving without need for much protection.⁹³

87. HUTCHESON, *supra* note 2, at 143. Unfortunately, Coxe failed to foresee the impact that cotton cultivation would have on his hopes for the abolition of slavery.

Focusing on some of Coxe's earlier writings, the technology historian Leo Marx ranks Cox as one of the greatest of American political economists for daring to challenge "the whole body respectable economic theory" which claimed that America could never become an important manufacturing nation. Marx argues that Coxe was one of the very first to understand how America—with vast natural resources and a relatively small labor supply—enjoyed ideal conditions for the rapid development of technology. LEO MARX, *MACHINE IN THE GARDEN: TECHNOLOGY AND THE PASTORAL IDEAL IN AMERICA* 158-63 (1967).

88. COXE, *A VIEW* 272.

89. *Id.* at 273.

90. *Id.* at 273.

91. *Id.* at 278.

92. TENCH COXE, *OBSERVATIONS ON THE AGRICULTURE, MANUFACTURES, AND COMMERCE OF THE UNITED STATES* 32-33 (N.Y.: 1789), cited in HUTCHESON, *supra* note 2, at 94.

93. COXE, *A VIEW*, *supra* note 85, at 334 (“We have actually almost ceased to import...gunpowder...”). Coxe's book is loading with economic data. Between Oct. 1, 1790 and Sept. 30, 1791, the United States exported 12 dozen muskets and 25,854 pounds of gunpowder. *Id.* at 406, 408. During the next fiscal year, the United States exported 42 dozen muskets, all from New York, plus 467 quarter casks for gunpowder, from Massachusetts, Connecticut, New York, Pennsylvania, and Maryland. *Id.* at 415. In the 1792-93 fiscal year, the United States exported 1,286 quarter casks for gun powder. *Id.* at 473.

Tariff schedules for imports were as follows; firearms not otherwise enumerated (starting on July 1, 1794) 15% ad valorem; gunpowder, free from May 22, 1794 till May 22, 1795, thereafter 10%; lead and musket ball, free for the same time as gunpowder, thereafter 1 cent per pound; muskets and fire locks [“fire lock” is an alternative term for “matchlock,” a type of long gun in which the shooter ignited the gunpowder by lighting a match to a short fuse] with bayonets fitted to frame, free for the same time as gunpowder, thereafter 15%; muskets and fire locks without bayonets, 15%; pistols, free for the same period as gunpowder, thereafter 15%. *Id.* at 459-65.

One of Coxe's essays described how a model town might be built on the Susquehanna River, using money raised in a capital subscription. Among the economic units to be constructed in the town would be “Two boring and grinding mills for guns, scythes, sickles, &c.” and “Two gun smith's shops.” *Id.* at 390-91. Pointing the vast tracts of unsettled forest land in the United States, Coxe suggested that they could speedily be cleared settled by persons, making, among other products, “gun-stocks and other military implements for the sea and land service.” *Id.* at 450.

An essay describing “the principal facts, which characterize the American people,” with the intent to make America appear attractive to immigrants, Coxe on one page extolled the complete freedom of religion, and on the next page bragged that “The production and manufactures of military supplies and articles, enable the United States to derive from their own resources ships of war, gun-powder, cannon and musket-balls, shells and bombs, cannon and carriages, muskets, rifles and cutlasses...holsters,” and various other military equipment. *Id.* at 427, 438-39.

Coxe's growing alignment with Thomas Jefferson and other Republicans led to his dismissal from office by President John Adams in 1797.⁹⁴ Coxe then plunged into political activity supportive of the Republican cause, adherents of which within a year claimed to be suffering repression under the Sedition Act.

Coxe closely associated himself with the Philadelphia *Aurora*, the leading Jeffersonian newspaper of the time. By mid-1799, according to accounts in this paper, armed conflict between Federalists and Republicans threatened. The *Aurora* published reports of bullying, weapons brandishing and rioting by soldiers in the Federalist faction. In retaliation, a mob of "federal savages" attacked and beat *Aurora* editor William Duane. In consequence of the mob's threat to destroy the press, "a number of republican citizens collected with arms and ammunition, continue to mount guard in the Printing-Office."⁹⁵

The same issue of the *Aurora* which reported the above included, besides an article signed by Tench Coxe, an urgent appeal by "Mentor" addressed "To the Republican Citizens of Pennsylvania." The article vividly expressed the premises upon which Republican doctrine rested:

But as men intent upon hostility have associated themselves in military corps, it becomes your duty to associate likewise--Arm and organize yourselves immediately

Do you wish to preserve your rights? Arm yourselves--Do you desire to secure your dwellings?

--Arm yourselves--Do you wish to be defended against assassins or the Bully Rocks of faction? Arm yourselves--Do you wish to assemble in security to consult for your own good or the good of your country? Arm yourselves.--To arms, to arms, and you may then sit down contented, each man under his own fig-tree and have no one to make him afraid.

. . . and

If you are desirous to counteract a design pregnant with misery and ruin, then arm yourselves; for in a firm, imposing and dignified attitude, will consist your own security and that of your families--To arms, then to arms.⁹⁶

Subsequent issues of the *Aurora* charged that newspaper offices were being attacked around the country wherever Federalists were losing elections.⁹⁷ The riot, the attack on Duane, and President Adams' dismissal of Tench Coxe were all pictured as elements of a Federalist conspiracy to institute monarchy.⁹⁸ Finally, the Adams administration had Duane arrested for seditious libel for publishing a letter Adams wrote (while Vice President) to Coxe which admitted British influence

94. While out of federal office, Coxe served as secretary of the Pennsylvania Land Office. In that capacity, he did an outstanding job of protecting the rights of farmers and settlers against the illegal encroachments of speculators. COOKE, *supra* note 2, at 365-70; *Holland Land Co. v. Coxe*, 4 Dal. (Pa.) 170 (1803).

95. PHIL. AURORA, May 21, 1799, at 2, cols. 4-5.

96. *Id.*, cols. 3-4. A lengthy account of the Federalist riot is included in the *Aurora*, May 24, 1799, at 2.

97. *Id.*, May 27, 1799, at 2, June 29, 1799, at 2 (danger of standing army to free press).

98. *Id.*, June 21, 1799, at 2.

in the government.⁹⁹ Duane was vindicated, and the Federalists embarrassed, when he offered to produce the authentic letter.¹⁰⁰

The Alien and Sedition Acts and other Federalist transgressions were not the only aspects of the administration of John Adams which the Republicans attacked in the election campaign of 1800. Tench Coxe and other supporters of Jefferson emphasized that the monarchical tendencies of Adams were also exemplified in his neglect of the militia and support for a standing army.

Writing “To the American People” under the pen-name “Humanus,” Coxe decried “the substitution of a hired army, and of *rich armed townsmen and partymen*, under *the cloak of volunteers* for the general constitutional Militia.”¹⁰¹ A whole section of the lengthy article was devoted to the topic “Volunteers, liable to be passed through the Strainers of party, substituted for the constitutional Militia.” Coxe pointed out that just before the militia law of June 1797 expired, Congress passed the act of May 28, 1798 “authorizing the President to accept *any* number of Volunteer Corps.” But the Act of March 1799 limited volunteers to 75,000.¹⁰²

Coxe described Federalist objectives in these terms: “The proposed and ordinary arming and equipment of the militia, could thus, by law, be avoided, omitted, or postponed, and the same arms, accoutrements, and cannon could be applied at the discretion of the Executive, to the equipment of those Volunteer Corps.” Thus the constitutional militia of all the armed people would be superceded, with the following inevitable result:

A well-armed Party-corps of 75,000 men, and tens of thousands of hired army, on the one hand; and a neglected, disused and un-armed militia, on the other. The militia includes all the owners of all the property of the state, and are its sure defenders.¹⁰³

Coxe enunciated similar sentiments in further articles,¹⁰⁴ and in a major series sought to

99. *Id.*, June 24, 1799.

100. *See* Coxe, *To the Public*, *id.*, Oct. 6, 1800, at 2.

101. AURORA, Sept. 6, 1800, at 2, col. 1.

102. *Id.* at col. 2.

103. *Id.*

104. *E.g.*, Coxe et al., *To the Republican Citizens of the State of Pennsylvania*, AURORA, Sept. 27, 1800, at 2, col. 4: “It is greatly to be regretted, too, that so extensive an authority to levy regular troops relaxed the attention to the Militia, and (with the new and extensive plan of volunteers) tended to diminish the wholesome influence of that *Constitutional* force.” *See also* *Address to the Citizens of the County of Lancaster*, AURORA, Sept. 18, 1800, at 3 (danger of army, monarchy).

Coxe could have been the author, and at least agreed with the sentiments, of an article signed “FACT” and entitled *The Touchstone, No. II*, AURORA, Aug. 12, 1800, at 2, which argued:

With five millions of people America had a million of militia, a million of men able to bear arms. A foreigner, knowing of this grand constitutional means of defense, would at once suppose that the President, as constitutional commander in Chief of the public force, had labored night and day to prepare the militia for the much talked of invasion by France.

Id. at col. 3.

demonstrate the alleged support of John Adams for a hereditary president.¹⁰⁵ While Coxe's analysis correctly stated the American preference for an armed people over a standing armed elite, it cited no specific writing of John Adams which denied the right of the people to keep and bear arms. To the contrary, Adams was, and would remain, a supporter of the private possession of arms, and of a universal militia.¹⁰⁶

III. Arming the Militia: Coxe in the Jefferson and Madison Administrations

Coxe had first met Jefferson in 1790, when introduced by Benjamin Rush (whom Coxe had met through their mutual work in the Pennsylvania anti-slavery society). Thereafter, Coxe served as an unofficial economic advisor to Jefferson, helping the Secretary of State prepare reports to Congress about America's international commerce.¹⁰⁷ Having written so assiduously on behalf of Jefferson in the 1800 election, Coxe began angling for a position in the Jefferson administration.¹⁰⁸ But Coxe did not succeed until 1803, when President Jefferson—at the recommendation of Secretary of Treasury Albert Gallatin, himself a former arms manufacturer¹⁰⁹--

The same author continued that Adams did nothing to check the army with the militia. "Mr. Adams before his Installation promised attention to the militia. 'A well regulated militia is necessary to the security of a FREE state,' says the fourth [proposed] Amendment of the Constitution." In other nations, mercenaries conjoin "the people (when unarmed and undisciplined) to kick the Beam." The purse, the executive, and the sword "require a well regulated militia to counterbalance and check them." *Id.* at col. 4. *See also* Coxe's article *Address to the County of Lancaster*, AURORA, Sept. 18, 1800, at 3.

105. A Constitutionalist, *The Friends of the Constitution to the People of the United States*, Nos. 1-7, AURORA, Sept. 19, 21, 22, 24, 25, 29, 30, 1800.

106. Coxe failed to address Adams' defense of the right to have and use arms for resistance to oppression and for individual self-defense. *Compare* Coxe, *id.*, Sept. 21, at 2, cols. 2-4, with 3 JOHN ADAMS, DEFENCE OF THE CONSTITUTIONS 471-75 (1787-88). In *Defence of the Constitutions*, Adams, troubled by Shays' Rebellion argued for a system of government using checks and balances, in which no one force (not even the people) would have unrestrained power. One implementation of the checking principle was that there should be a universal militia under the command of the executive; this popular force should not be under the command of the popular branch of government (the legislature), but under the sole command of the executive. Adams described "arms in the hands of citizens, to be used at individual discretion" only for "private self-defence" as consistent with good government, but mass use of arms when not under executive control as destructive of government.

107. HUTCHESON, *supra* note 2, at 28-29.

108. While Jefferson was at first inclined to give Coxe a job, the presumptuous tone of Coxe's office-seeking letters alienated Jefferson. COOKE, *supra* note 2, at 392-99. Although the two men resumed a professional relationship when Coxe joined the Jefferson administration, Jefferson was never again Coxe's friend. *Id.* at 458.

109. H. KAUFFMAN, *THE PENNSYLVANIA-KENTUCKY RIFLE* 82 (Harrisburg 1960). Like Coxe, Gallatin considered the right to arms one of the many human rights protected by the Bill of Rights. "The whole of that Bill is a declaration of the right of the people at large or considered as individuals...It establishes some rights of the individual as unalienable and which, consequently, no majority has a right to deprive them of." Albert Gallatin, letter of Oct. 7, 1789, to Alexander Addison, in *Albert Gallatin Papers*, New York Historical Soc., quoted in STEPHEN HALBROOK, *THAT EVERY MAN BE ARMED* 225 n. 169 (1984).

appointed Coxe as Purveyor of Public Supplies.¹¹⁰ Coxe held the post through the rest of the Jefferson Administration, and for the first four years of Madison Administration—including the opening months of the War of 1812.

Aside from political considerations of gratitude for Coxe's work against Adams in the election of 1800, the selection of Coxe as the head of military procurement stemmed from both his experience as a merchant and his political commitment to the militia as the defense of a free society. Halving the size of the standing army and arming the militias were important objectives of the Jefferson administration.

Even as Jefferson was attempting to shrink the standing army, the Napoleonic wars in Europe had created a constant foreign policy crisis for the United States. Under the Adams administration, the United States had nearly gone to war with France, and certainly would have done so if a hawk like Alexander Hamilton, rather than a steady statesman like John Adams had been President. As Purveyor of Public Supplies, Coxe was responsible for procuring arms for both the standing army and the militia during years when war and foreign invasion were a constant threat—a threat which materialized in 1812.¹¹¹

A. Coxe's Concept of Federal Arms Policy for the Militia

The arming of the militia was the subject of an opinion Coxe wrote to President Jefferson in January 1807. Coxe began by reviewing the militarization of Europe which stemmed from the struggle by hierarchies and aristocracies against revolutionary, later, Napoleonic France. The republican principles which threatened European powers originated in America:

In the long course of stupendous events from the time of the meeting of the

110. Coxe's appointment was ironic. As Alexander Hamilton's Commissioner of Revenue, Coxe had been ordered to supervise the purchase of supplies for the Army and for the state militias involved in suppressing the Whiskey Rebellion. Although Coxe continued to strongly support the crushing of the Pennsylvania insurrection, he resented Hamilton's giving him a task with considerably less policy influence than Coxe was used to. Hamilton's decision, and Coxe's angry reaction, led to the final break between Coxe and Hamilton; the relationship had been under strain due to Coxe's growing friendship with Thomas Jefferson, and Coxe's failure to accept that he was Hamilton's subordinate, not his equal. COOKE, *supra* note 2, at 262-64. As a result of the conflict in the Treasury Department, Congress created the post of Purveyor of Public Supplies. The first person to serve in the job was Tench Francis (Coxe's uncle); although Francis had built a distinguished record of public service (*see* text at note), he was past his prime, and unable to organize the Purveyor's office efficiently. COOKE, *supra* note 2, at 413.

111. President Madison was just as ardent as his predecessor in wanting an armed militia. Madison's First Inaugural Address announced his goal "to keep within the requisite limits a standing military force, always remembering that an armed and trained militia is the firmest bulwark of republics--that without standing armies their liberty can never be in danger, nor with large ones safe." Madison's Second Annual Message to Congress praised the armament program, and urged that training be increased: "These preparations for arming the militia having thus far provided for one of the objects contemplated by the power vested in Congress with respect to that great bulwark of the public safety, it is for their consideration whether further provisions are not requisite for the other contemplated objects of organization and discipline."

notables in 1788¹¹² to the present day, the United States of America have been wonderfully preserved from actual war, and political and civil injury. But it is a manifest and solemn truth, that the vital principles of our constitutions were the incipient causes of these conflicts, and that they were unceasing objects of the fears, resentments, and hatreds of all the crowns, aristocracies, and hierarchies as well among the vanquished as the victims.¹¹³

It was “an immense collection of powerful military despotisms, covering the face of the transatlantic world,” which threatened the infant states in America.¹¹⁴ Yet a potential invader would pay dearly in any attempt to subjugate the land, particularly if more stress was laid on arming the people:

Tis to *implements of war* that we should turn our attention, our exertions and our funds to ensure and complete our means of defense.

The free people of these states may be estimated at five millions. The men able to bear arms may be computed at one million. It is respectfully requested and it is most anxiously suggested that measures for the immediate acquisition by purchase, importation and manufacture of muskets, rifles and pistols to arm our one million of effective free men . . . should be taken into consideration.¹¹⁵

Coxe went on to recommend that arms and/or funds should be offered to the more vulnerable states, to enable “our governments to arm every free man, who has personal rights or property to watch, maintain and defend.”¹¹⁶ This would deter any potential aggressor from attack:

To encounter a nation of 5 or 6 millions of armed free men . . . would be a conflict unpromising of any kind or degree of real advantage . . . In short, it is confidently believed, that *completely armed* -- duly temperate -- and *reasonably just*, we may rely, under Heaven, on the preservation of our accustomed peace, our liberty and our safety.¹¹⁷

Jefferson thanked Coxe for “your ideas, which have often been useful . . .” “Your idea of providing as many arms as we have fighting men is undoubtedly a sound one.” It was a matter that should be impressed upon the Congress, which moved slowly, thought Jefferson. Only

112. In France, as part of the prelude to the French Revolution.

113. Coxe to Jefferson, Jan. 1807, in JEFFERSON PAPERS 2-3 (Library of Congress).

114. *Id.* at 3.

115. *Id.* at 4.

116. *Id.* at 5.

117. *Id.* at 6.

the session before last I proposed to them . . . that every man should receive a stand of arms¹¹⁸ the first year he entered the militia. This would have required 20,000 stands a year and in a few years would have armed the whole besides the stock in the public arsenals

The President believed that the measure would prevail eventually. Private and public manufacture could produce “40,000 stand of arms a year but they come so much dearer than the imported of equal quality” In any event, the European governments were too busy fighting each other to invade republican America.¹¹⁹

During the same period, Coxe published his *Thoughts on the Subject of Naval Power*, which further clarified the superiority of the militia over standing land and sea forces. A primary objection to a large fleet was that impressment might be resorted to:

Will the seamen of the United State submit to a civil regimen in this case, like that of Great Britain? Will the rest of the people of this country consent to such an example of coercion and limitation of wages? . . . It may be fairly and prudently asked, whether a standing naval establishment is not liable to a large proportion of the objections to a standing army¹²⁰

In a second part to the same work, the superiority of the armed people over standing establishments for defense consistent with freedom was stressed. In some respects, a naval power may be more difficult to check than a land force, and besides would produce wars through foreign contacts:

When the United States determined to avoid the expenses and dangers of “a standing army,” they found in the rights and habits of the chase and of arms, and in their universal militia, adequate and safe means of suppressing insurrection and repelling invasion. They did not desire an army for ambitious wars. . . . Even in the season of war we have believed, that a proper establishment of the militia will be indispensable to counterbalance the weight of the army.

. . . If we should create a powerful fleet, it will not be controllable by the militia, who never can have ships on their establishment.¹²¹

Here Coxe sounded a theme which had already been stated strongly in the Pennsylvania

118. “A *stand of arms* consists of a musket, bayonet, cartridge-box and belt, with a sword. But for common soldiers a sword is not necessary.” 1 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 13 (9th ed. 1996)(1828)(emphasis in original).

119. Jefferson to Coxe, Mar. 17, 1807, in JEFFERSON PAPERS, *supra* note 112.

120. [Tench Coxe], THOUGHTS ON THE SUBJECT OF NAVAL POWER 6 (Phil. 1806).

121. *Id.*, No. II, at 1 (Philadelphia 1807). Also published under pen-name “Pacifcus” in *Philadelphia Democratic Press*, May 29, 1807.

Constitution¹²², by Pennsylvania Patriots during the Revolution,¹²³ and the minority report from the Pennsylvania ratifying convention¹²⁴: the close connection between “the rights and habits of the chase and of arms,” and the “universal militia,” as elements ensuring “adequate and safe means of suppressing insurrection and repelling invasion.”¹²⁵ Coxe would develop the issue at much greater length later in his career, in his critiques of the British and French game laws.

Not only would lack of a strong navy decrease foreign friction and diminish the possibility of oppression, but properly armed citizens were fully capable of defending the ports:

It is submitted, therefore, whether if the 10 or 1,200,000 men, able to bear arms in the United States, were provided with depots of every useful and necessary species of arms from large cannon and heavy mortars to musquets, pistols, and swords, at and around our sea ports, they would not prove a more effectual bar to any considerable mischief in our ports, than the limited navy, which is so ardently desired.¹²⁶

Coxe provided President Jefferson with his manuscript on naval policy, and the President replied: “I have read with great satisfaction your observations on the principles for equalizing the power of the different nations on the sea, and think them perfectly sound.”¹²⁷

B. Coxe’s Role in Arming the Militias

In 1807 and 1808, Congress finally passed legislation to arm, providing an annual

122. See text at note *supra*.

123. See text at note *supra*.

124. See text at note *supra*.

125. COXE, NAVAL POWER, No. II, at 1.

126. *Id.* at 2. Nos. III-VI were printed in the Philadelphia Democratic Press, June 1, 3, 5, and 8, 1807.

By the time of his 1807 articles on naval power, Coxe found in a new periodical an agreeable philosophical stance which would result in the periodical being the main outlet for expression of Coxe’s views for the next decade and a half. John Binns, editor of the Philadelphia Democratic Press, formulated this stance in the first issues:

That every capable man in the Union should be armed and disciplined, so as to be ready to rise *en mass*, and hurl destruction on the foe who should dare to pollute our shores with hostile feet is a truth which it shall be the pride and pleasure of the Editor frequently to inculcate.

To the Public, DEMOCRATIC PRESS, Mar. 30, 1807 [Vol. 1, No. 2, and in successive issues], at 1, col. 1. See *Defence of the Seaports*, *id.*, Apr. 3, 1807, at 3, col. 3 (supporting “provision of the instruments, implements, and utensils of defence for the militia in their vicinity: Cannon, battering and field, iron and brass; ovens for heating balls; mortars and shells; horse artillery; muskets, rifles, pistols, swords and bayonets.”); “Standing Army,” *id.*, June 8, at 2 (the sword rules). That arms were to be handled only in a safe manner was implicit in such headlines as “Careless Use of Firearms - AGAIN,” *id.*, May 25, at 2, col. 5 (boys hunting in New York, fourteen year old killed when firearm discharged while being half-cocked.).

127. Jefferson to Coxe, Sept. 21, 1807, JEFFERSON PAPERS, *supra* note 112.

appropriation “for the purpose of providing arms and military equipment for the whole body of the militia of the United States, either by purchase or manufacture” The arms were to be transmitted to the states for distribution to their militias.¹²⁸ The federal armories in Springfield, Massachusetts, and Harper's Ferry, Virginia were not capable of meeting the production demands of Congress.¹²⁹ So in administering the program, Coxe contracted with and made monetary advances to private arms manufacturers. This system of government patronage greatly advanced the development of small arms making from a handicraft to a modern industry, including by promoting the development of interchangeable parts.¹³⁰

Today, critics of the Standard Model individual rights view of the Second Amendment sometimes point to efforts like the Jefferson/Coxe arms program, and argue that since the government supplied some militia forces with arms, the right to keep and bear arms must not be a right of individuals.¹³¹ But this view is incoherent on its face. Just because the government (today) gives people things to read (such as the vast output of books from the Government Printing Office) does not mean that individuals do not have a right to read other books of their own choosing. This would still be true even if the government ordered the people to read certain books considered essential to public service. (For example, Americans are, today, required to read the IRS 1040 form and associated documents, or to pay someone else to read it for them.)

Moreover, the anti-individual rights argument ignores the well-known distinction between “private arms” and “public arms.” “Public arms” were supplied by the government to persons for public use—for militia service. Public arms might at some point have to be returned to the government.¹³² “Private arms” were firearms (or swords) owned by individuals; individuals could use them for militia service, and a person with his own private arms would not need the charity of public arms. The distinction between the two types of arms was set forth in the 1823 Return of the Adjutant General of the enrolled militia in Pennsylvania, inventorying the supply of arms (of all types) available for militia use. The editor of the *Democratic Press* described the Return in these words:

128. Act of Apr. 23, 1808, 2 STAT. 490 (1808). *See also* Act of Feb. 24, 1807, 2 STAT. 419 (1807).

129. COOKE, *supra* note 2, at 430.

130. F. DEYRUP, *ARMS MAKING IN THE CONNECTICUT VALLEY* 33-46 (York, Penn., 1970); S. & R. NORTH, *SIMEON NORTH: FIRST OFFICIAL PISTOL MAKER OF THE UNITED STATES* 73-77 (Concord, N.H. 1913). “When Tench Coxe, at the close of the Revolution, turned his prophetic eye and his practical instinct to the manufacturing development of his country, he was thwarted in his efforts by the impossibility of obtaining the machinery with which to start the enterprises he had in mind. . . . Colonel North devised and worked out the principle of interchangeable parts He applied and developed it in the manufacture of pistols” *Id.* at 90-91.

Extensive information on Coxe’s dealings with the firearms manufacturers is presented in 1 J. HICKS, *NOTES ON UNITED STATES ORDNANCE* 29-39 (Mt. Vernon, N.Y. 1940).

131. Michael Bellisles, *The Origins of Gun Culture in the United States, 1760-1865*, 83 J. AM. HIST. 425 (1996).

132. While the proposed United States Constitution was being debated, the government of Pennsylvania attempted to collect the public arms for cleaning and maintenance. A very large number of Pennsylvanians, however, refused to surrender their public arms even temporarily—fearing that the new federal government might be oppressive, and the Pennsylvania government might be attempting to prevent resistance to that government.

Our stock of Public Arms are respectable but it is more gratifying to observe the number of Private Arms returned. There are no less than *twelve thousand six hundred and seventy-eight* Rifles reported as *private* property, and *two thousand and thirty-eight* public rifles Sharp Shooting, Good Marksmanship, is eminently a trait in the American Character¹³³

Explaining the Second Amendment, Tench Coxe (the great purveyor of public arms) had written in 1789 that “the people are confirmed by the next article in their right to keep and bear their private arms.” Public arms could certainly help achieve the Second Amendment’s goal of a well-regulated militia; depending on the wealth of the people of any given region, the number of public arms donated in order fully to supply the militia might exceed the number of private arms brought to militia service. But the donation of public arms hardly negated the right to keep and bear “private arms.”

To Coxe, the 1808 Act was an ideal opportunity to use federal resources to help build a strong domestic firearms industry. Coxe’s letters to Secretary of War William Eustis set forth the relation between the industry and an armed populace. To defeat a standing army, a populace must be well armed:

*No part of Europe will permit us to obtain arms from them. . . . A general armament for the purpose of a general stand is a measure . . . worthy of consideration. The omnipresence of the public force is the consequence of a general armament. The skill of modern regular armies require the mass of the population to be equipped for resisting the potent invaders of this time.*¹³⁴

Sales of arms to the public would not only arm them, but would also generate industry advances:

A decided tone, a good inspection, good *patterns* and in short much care, pains and vigilance are necessary to procure substantial Arms from public & private Armories. If sales to the Militia & private persons [&] to ships should at any time be desired and practicable, it would keep up the manufacture and enable us to improve the standard quality.¹³⁵

Coxe proposed the sale of 10,000 muskets, rifles, pistols, and swords.¹³⁶ The Jeffersonian promotion of the firearms industry represented a return to values of the Revolution, according to Coxe:

133. *Democratic Press*, Mar. 8, 1823, at 2, col. 1.

134. *Id.* at 25 (Apr. 9, 1809).

135. *Id.* at 27 (Nov. 28, 1809).

136. *Id.* at 28 (Mar. 3, 1810).

The manufacture of Arms was dormant at the time of the first operations for rifles, pistols and swords. Same had been since the War till the end of Adams' presidency. The private arms makers were generally discontinued for regular Military use. We had to revive them.¹³⁷

In a circular to contracting gunsmiths, Coxe emphasized: "The importance of good arms is manifest. . . . The lives of our fellow citizens, to whom the use of them is committed, depend upon the excellence of their arms."¹³⁸ In his correspondence with manufacturers and inspectors, Coxe demonstrated great technical expertise in the design and manufacture of muskets, rifles, pistols, and swords.¹³⁹ But despite Coxe's expertise and dedication, the public arms program ran into trouble.

C. The Quality Controversy

Coxe's small office was overwhelmed by the procurement needs for the militia and the rapidly expanding standing army as tensions with Great Britain increased; he was working seven days and nights a week, and still had to bring in his adult sons as unpaid assistants.¹⁴⁰ In 1810, Coxe fired the inspector in charge of quality control for the arms being acquired. In a series of articles published in early 1811, Coxe former Pennsylvania political associate William Duane charged that Purveyor Coxe had accepted large quantities of inferior firearms. (Duane and Coxe, having once been close allies, had become bitter enemies as a result of factional dispute in the Pennsylvania Republican party in 1804.¹⁴¹) In the first article, Duane made the sweeping allegation "that arms we had seen, which had been manufactured for the MONEY (for we cannot say the use) of the United States, were better adapted to kill American soldiers into whose hands they were put than an enemy."¹⁴² Coxe rejoined in the same issue, flatly denying the charges and noting that all arms were inspected before being paid for. Besides, the purveyor was not an inspector:

137. *Id.* at 29 (Nov. 10, 1810). *But see* speech of John Adams, Nov. 22, 1800, in support of domestic arms manufactories, 9 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 149 (Charles Francis Adams ed., 1854).

138. Purveyor's Office, Dec. 9, 1808, cited in AURORA, Jan. 14, 1811, at 2, col. 3.

139. 2 J. HICKS, *supra* note 2, at 17-39, 49-57, 88-106, and 142 ff.

140. COOKE, *supra* note 2, at 480. **Coxe's hard work on arms procurement did not lead to any personal financial gain on his part as an arms merchant. He was buying for the federal government, not selling to it, and thus could not profit from the increased demand resulting from his militia program. If Coxe had remained at his trading company while someone else carried out the arms acquisitions, Coxe doubtless would have enjoyed some increased business, although arms were not a particularly large share of his total revenues.**

141. COOKE, *supra* note 2, at 346-47. Duane disagreements with Coxe were based on personalities, not policy. Like Coxe, Duane was a strong advocate of a popular militia, and a fierce opponent of permanent federal military establishments. *See* WILLIAM DUANE, EXPERIENCE: THE TEST OF GOVERNMENT 55 (Phil. 1807)(proposing amendments to the Penn. Constitution to ensure that militia officers would be chosen by militiamen); WILLIAM DUANE, POLITICS FOR AMERICAN FARMERS 8-10 (Phil. 1807)(condemning a large navy, and praising Coxe's essay on the subject).

142. AURORA, Jan. 14, 1811, at 2, col. 2.

It is impossible for the purveyor to be present at the inspections, which take place at various work shops, and public stores from Culpeper, in Virginia, to Exeter in New Hampshire There are probably sixty contractors, who have delivered arms¹⁴³

In subsequent installments, Duane relied on averments of the former inspector who was discharged for incompetency. Duane claimed that some rifle barrels lacked grooves (rifling), had grooves only six inches down the barrel, or had grooves which were too shallow. Some were made with unfit Dutch locks, or had stocks filled with glue and sawdust.¹⁴⁴ There were Hessian or Hanoverian arms (German imports) which needed inspecting. “There were nine hundred pairs of pistols, but not one pair fit for public service.”¹⁴⁵ Duane did not provide any further details.¹⁴⁶

In a series of articles addressed “To the Public,” Coxe responded to “the late unfounded attack upon the public muskets and private manufacturers of *muskets* for the United States”¹⁴⁷ The muskets, rifles and pistols in question were as good as had been manufactured in this country. Coxe stated that, thanks to federal procurement program, the number of private armourers had increased ten-fold in just a few years. Now, “The rifle and pistol makers were constantly sending in arms,” much to the Purveyor’s dismay. Coxe urged appointment of a rifle inspector, “as there is not a pattern rifle, to govern the workmen as in the case of the pistol.”¹⁴⁸ Pistols for sale to the government were becoming regularized, but rifles not yet.

In the second installment of “To the Public,” Coxe claimed that he upheld “a strict and rigorous inspection, according to my rifle and pistol contracts; also a minute inspection *in all parts*’ viz.: *The riffling*, the breechpins, the interior of the locks, & c.”¹⁴⁹ Coxe’s knowledge of firearms was from the perspective of a merchant, not an inspector, but he defended his discharge of the unqualified inspector. The purveyor denied “the passing of *one* bad stand of arms or pair of pistols, by him.”¹⁵⁰

In Coxe’s third article, the charge that the American muskets were adopted “to kill American soldiers” was answered by the fact that not a single musket had been proven bad. Further, “the present inspector in this department has given a recent opinion in favor of the American muskets.”¹⁵¹

143. *Id.* at col. 3.

144. *Id.*, Jan. 16, 1811, at 2, cols. 1-2.

145. *Id.*, Jan. 18, 1811, at 2, cols. 1-2.

146. The fourth and final number is in *id.*, Jan. 19, 1811, at 2, cols. 3-5. While some of his charges appeared to be based on rumor, Duane’s expertise on the subject of firearms is clear. See DUANE, THE AMERICAN MILITARY LIBRARY (Phil. 1809) and A MILITARY DICTIONARY (Phil. 1810).

147. PHIL. DEMOCRATIC PRESS, Jan. 19, 1811, at 2, cols. 2-4.

148. *Id.*

149. *Id.*, Jan. 21, 1811, at 2, cols. 3-5.

150. *Id.*

151. The want of a sufficient number of pattern pistols or indeed of one to guide each maker, and the want of even one pattern rifle, for the office, has produced much real difficulty The entire want of practice in *military* pistol making, . . . the general habits of using German and other imported locks for rifles and pistols, prevailing among the armourers, and the great

The fourth and final article of the series is filled with details about American pistol and rifle manufacture in that epoch. The purveyor had encountered numerous problems in moving towards standardization of firearms from manufacturer to manufacturer.¹⁵² In the article, Coxe listed some of the firearms makers from whom he had procured weapons;¹⁵³ most were prominent manufacturers who produced both for state militia contracts and for the private market.¹⁵⁴

While defending his record, Coxe admitted the need for both technological and inspection improvements.¹⁵⁵

Months passed without further public controversy, but at the end of 1811 Duane renewed “The Military Establishment” series. Duane insinuates that in America there were those who placed

difficulty, which the late Secretary found . . . to refuse permission to use such locks as the two German locks and the pistol locks of Lancaster, which the purveyor submitted to him, will be remembered and considered.

Id., Jan. 31, 1811, at 2, cols. 2-3.

152. *Id.*, Feb. 2, 1811, at 2.

153. “200 pistolbarrels” by Joseph Henry. “The pair of pistols from Mr. Shuler, near Quaker Town with *German locks, said to be improved here.*” “Military rifles, received from Lancaster, Pennsylvania . . . by Henry DeHuff and Co. sometimes called Peter Gonter and Co. since the death of Mr. DeHuff; and by Abraham Henry, John Guest and Peter Brong and company. The Indian rifles of J. Guest and Dickert” “The *Proofs* of musket barrels, and *inspection* of muskets, under the contracts of the Henry's, J. Miles, Nippes, Steinman and Winner, &c. in Pennsylvania and New Jersey will require *early* and *effectual* attention” “The arms of Ginok (Hanoverian) require an early and complete cleaning” “Rifles and pistols made by A. Henry, J. Guest and P. Brong for army use, and of rifles made by J. Guest, for Indian use.”

154. See N. FLAYDERMAN, GUIDE TO ANTIQUE AMERICAN FIREARMS (1980): Joseph Henry, Philadelphia, 1807-1808 contract pistols, also made for private sale, in 54 cal. and 10" barrel. *Id.* at 298-99. John Shuler, Liverpool, Penn., made in the same period and caliber with shorter barrel. *Id.* at 301. The following sold muskets to the Commonwealth of Pennsylvania under a 1797 legislative act: Henry DeHuff, Abraham Henry, Peter Brong, and Jacob Dickert, all of Lancaster. *Id.* at 423-24. The Model 1808 musket was produced by John Miles, of Bordertown, N.J., and James Winner, Abraham Nippes and John Steinman of Philadelphia (429). Miles also made various pistols in 59-64 cal. in Philadelphia. *Id.* at 300. John Guest of Lancaster also made pistols, using Sweitzer locks at times, and was a partner of Henry and Brong. *Id.* at 297, 301.

S.E. DYKE, THOUGHTS ON THE AMERICAN FLINTLOCK PISTOL 8, 20, 24 (1974) refers to DeHuff, A. Henry, Shuler, and J. Henry. Most rifles and pistols were manufactured in Eastern Pennsylvania due to the settlement of gunsmiths from Central and Southern Europe there, and the concentration of mines and furnaces in the area.

155. It will be admitted by those who are acquainted with arms, that the manufacture of rifles and pistols, is little known except in the public armories, and excepting, as to rifles, in parts of one or two states. -- Workman's skills and inspectoral judgment in these branches are rare. Perhaps we have not even settled good standards. If imperfections exist in the rifles and pistols, I am now well satisfied that some pronounce upon them, who have never *inspected* a score

Sixteen hundred rifles and eleven hundred pistols, made before we had lock forgers and inspectors, though at low prices for the country and under “*strict and rigorous*” contracts, seem to be the sum of that matter.

. . . From some lessons of late experience and observation, I am inclined to believe, that there are few countries, if any, which have reached *the principles* of the right construction of a musket, a pistol and a rifle.

Supra note .

“a military force before its enemy with saw dust cartridges or balls too large for the calibre, or with *rifles without touchholes*,¹⁵⁶ and without spiral grooves, and of which 8 out of 18 burst on the proof with powder only of 135, whilst the true proof should be of the standard of 150”¹⁵⁷

Coxe retorted in early 1812 with a broadside “To the Public” which was distributed in Congress.¹⁵⁸ Coxe defended the particulars of the situation¹⁵⁹, and then Duane fired back.¹⁶⁰ Although Coxe responded,¹⁶¹ he was not out of political trouble. Starting in 1810, his enemies in Congress (who were allies of Duane's faction in Pennsylvania Republican politics) had begun attempting to abolish the Purveyorship.

The Duane dispute quieted down, and Coxe continued the course of his work, soliciting “Home Made and Other Supplies,” including “Muskets, Pistols, Rifles and Swords.”¹⁶² But the outbreak of the War of 1812 in June of that year occasioned a military reorganization which gave Coxe's Congressional opponents the opportunity to eliminate the office of Purveyor of Public Supplies, the office being replaced with a quartermaster's department.

D. Coxe's Examination of the State of the American Firearms Industry

156. A “touch hole” is “in early guns, before invention of the various lock or firing systems, a hole or vent at the rear of the firearm which connected from the outside of the barrel to the chamber of the gun containing the powder charge.” R.A. STEINDLER, *THE FIREARMS DICTIONARY* 257 (Harrisburg: 1970).

157. Duane also made charges about supposedly inadequate uniforms purchased, and the rejection of a quantity of swords manufactured by a Richmond workman named Winner. *AURORA*, Dec. 21, 1811, at 2, cols. 1-2. In the issue of Dec. 23, 1811, at 2, cols. 1-2, Duane claimed that the purveyor discouraged American arms manufacture, resulting in the best workmen removing themselves to South America. The same article reiterates the allegation of “the admission of rifles without grooves or touchholes” and repeats a rumor “that when a demand was made for pistols, when an apprehension was entertained of a conflict in Florida, that these very pistols were . . . totally unfit”

158. Dated Jan. 4, 1812, printed copy in *PAPERS OF TENCH COXE*, *supra* note 2, at Reel 32, at 246-47.

159. As to the swords, the purveyor “justly doubts the fitness of American steel,” but in any case the swords were rejected by the inspector. Certain German steel swords were also rejected. As to the German locks on some rifles, the Secretary of War in Washington specifically approved them. Coxe reiterated that he was “a merchant and not a manufacturer,” and therefore dependent on recommendations and directives by government officials and firearms specialists. He added:

Much difficulty occurs in procuring standard patterns, and inspectors. The vastly greater failure of the state of Virginia in manufacturing arms, proves this.

. . . I can safely appeal to the Secretary of War, in regard to my giving material aid to him in the improvement of pistols, swords and other matters

Id.

160. Duane concentrated on buttons received by the purveyor which were supposedly unfit.

161. Coxe once again appealed “To the Public,” reiterating that the arms mentioned by Duane had passed inspection by two government officers. He added that Duane overlooked the fact that Coxe was acting at the direction of the Secretary of War: “I have procured the *Calibre* of the Harper's Ferry *pattern* pistol to be rejected by the present Secretary of War, on explicit military reasons and one of about twice the size adopted.” *DEMOCRATIC PRESS*, Jan. 18, 1812, at 2, col. 2.

162. Broadside dated Jan. 27, 1812, in *PAPERS OF TENCH COXE*, *supra* note 2, at Reel 32, at 248.

Despite relieving Coxe from the purveyor's office, the Madison administration continued to appreciate Coxe's talents. Madison appointed Coxe to the post of Collector and Supervisor of the Revenue at Philadelphia, although Coxe eventually left this position for the larger salary of clerk of the Quarter Sessions in Philadelphia, a post he held until his retirement in 1818. But Coxe's most important contribution came at the request of Treasury Secretary Albert Gallatin, who assigned Coxe to analyze the condition of industry in the republic.

While concerned with economic development of all types, Coxe devoted some attention to the area of firearms. His *Statement of the Arts and Manufacturers of the United States of America*, transmitted by President Madison to the Congress in 1814, included discussion of the arms industry. Under the topic "Defense," Coxe noted federal efforts both to restrain export of arms and to encourage their domestic manufacture. In addition to the establishment of state and federal armories, contracts with monetary advances assisted private manufacture of cannon, firearms and swords.¹⁶³ Noting "very considerable attention to the repair and manufacture of arms" in the past twenty years, Coxe predicted "no irremovable obstacle to the manufacture of every species of arms . . . of good qualities, and in sufficient quantities."¹⁶⁴ The tremendous progress in firearms and other military manufacture seemed to Coxe to be greatest success story of American industry since 1775.¹⁶⁵

In another part of the *Statement*, Coxe analyzed technological developments in the manufacture of cannon and muskets. "Cannon are constantly manufactured, when demanded, to a very considerable extent, in the public armories of the nation, and of the States, and on contracts, and for sale to associations of citizens, and to individual purchasers, for use at home, or for exportation."¹⁶⁶ That cannon were marketed to the citizens is an interesting revelation, given Coxe's prediction in 1787 that the armed populace would ever be more powerful than a standing army.¹⁶⁷ While noting improvements in the manufacture of small arms, Coxe advocated "a *judicious* and *rigorous* inspection" of military arms and pistols "to prevent deception, and its most evil consequences."¹⁶⁸ Perhaps William Duane had been right in his allegations concerning the poor quality of some contract arms. The problems with Coxe's public arms program illustrate, indirectly,

163. TENCH COXE, STATEMENT OF THE ARTS AND MANUFACTURERS OF THE UNITED STATES OF AMERICA, in 2 AMERICAN STATE PAPERS (FINANCE) 675 (1832).

164. *Id.* at 676.

165. *Id.*

166. *Id.* at 687.

167. *Supra* note and accompanying text. Whether cannon or other light artillery are within the scope of the "arms" whose private possession is protected by the Second Amendment is beyond the scope of this article. All of the published scholarship which examines the issue concludes that the Amendment, while protecting all (or almost all) types of firearms does not protect artillery. Stephen P. Halbrook, *What the Framers Intended: A Linguistic Analysis of the Right to "Bear Arms"*, 49 L. & CONTEMP. PROBS. 151 (1986); Don Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH L. REV. 204 (1983); Nelson Lund, *The Past and Future of the Individual's Right to Arms*, 31 GA. L. REV. 1 (1996). Cannon were not regulated until 1968, and may legally be possessed if registered with the federal government. *See* Gun Control Act of 1968, P.L. 90-618, Title II, 82 Stat. 1213, 1227 (1968).

168. *Supra* note . *See* Coxe, *Digest of Manufactures*, at 696 (statistics on arms manufacture).

the Second Amendment's protection of the possession of private arms as one means of arming the militia; a citizen buying a single arm for his own use may be more likely to inspect the arm in detail, and less likely to accept a poor quality firearm than would be a federal government inspector charged with inspecting hundreds of firearms, none of which would be used to defend his own life. The standardization advantages of mass procurement of public arms may have been outweighed by the quality control advantage of citizens obtaining private arms one at a time.¹⁶⁹

IV. Firearms, Game Laws, and Monarchy

Coxe retired in 1818 after having served three years as clerk of the Quarter Sessions in Philadelphia; he spent his remaining years as a writer. Coxe continued to correspond with Madison and his other political friends.¹⁷⁰ Jefferson, who as President had found Coxe's self-promotion to be offensively blunt, reconciled himself to Coxe's personality flaws, and lauded Coxe as "a long tried public and personal friend" and "a fellow laborer, indeed, in times never to be forgotten."¹⁷¹ Coxe also continued to write prolifically for public consumption, often on matters involving the right to arms. During his retirement years, Coxe was particularly energized by his opposition to the Presidential ambitions of John Quincy Adams—and by Adams' support of restrictive European laws regarding gun ownership for hunting. Coxe argued in detail that Adams' position undermined the entire right to keep and bear arms, and thereby threatened republican government.

Coxe first retirement writing about firearms was "Considerations Respecting the Helots"¹⁷²

169. Of course some citizens might not pay attention to the quality of their firearm, and others might not know enough to discern poor workmanship. But on the whole, it is reasonable to expect that, at the least, a large number of purchasers would pay careful attention when buying a product on which their lives would depend. Today, there are many people who buy firearms with little attention to quality, and many others who purchase with great attention to detail.

170. Madison and Coxe corresponded about the American economy and politics; Madison also wrote to President Monroe urging an appointment for Coxe's son. James Madison, letter of Feb. 12, 1819, to Tench Coxe, reprinted in *WRITINGS OF MADISON, VOLUME 3: 1816-1828*, p.116; letter of March 20, 1820, to Coxe, reprinted in *Id.* at 170; Nov. 4th, 1820, *Id.* at 184; Feb. 21, 1823, *Id.*, at 301 ("I have forwarded the letters, with the printed papers, to Mr. Jefferson. I know well the respect which he, as well as myself, attaches to your communications."); Mar. 1, 1823, *Id.* at 304 ("Mr. Jefferson has just returned your two letters and papers. Supposing that I had yet to acknowledge them, he annexes a line requesting me to do it for him also; observing that it would hurt him much to leave unnoticed an old friend, and that the difficulty of using his pen with his crippled hand had compelled him to abandon writing but from the most urgent necessities."); Oct. 12, 1823, *id.* at 337; Nov. 3, 1823, *id.*, at 341.

171. COOKE, *supra* note 2, at 521, citing Thomas Jefferson, letter to Tench Coxe, Nov. 11, 1820. Jefferson apparently retained so much interest in what Coxe had to say that Jefferson complained about Coxe's handwriting, which by 1823 had deteriorated so badly that Jefferson found reading it to be like "decomposing and recomposing...hieroglyphics." JOHN MORTON BLUM, *THE REPUBLICAN ROOSEVELT* 142 (1952).

172. A "helot" was "A member of the class of serfs in ancient Sparta, intermediate in status between slaves and citizens." 1 *THE NEW OXFORD ENGLISH DICTIONARY* 1216 (3d ed. 1993).

of the United States, African and Indian,” under the pen-name “A Democratic Federalist.” In the first installment Coxe noted that free Blacks in Pennsylvania were excluded from “the right to enter militia and to partake of public arms” and that the states “deny them the use of the public arms.”¹⁷³ In contrast with the term “private arms” which Coxe used in discussing the Second Amendment when it was proposed in 1789,¹⁷⁴ “public arms” meant arms supplied by and returnable to the state, such as the arms that Coxe had provided as Purveyor of Public Supplies. Pennsylvania’s free Blacks in 1820 were not prohibited from having private arms for personal use, but were not allowed the use of public arms which were issued to some members of the militia. While all free whites were members of the militia, public arms were likely issued either to those who could not afford them, or to groups which trained together and wished to have arms with a common bore.¹⁷⁵

In some states, free Blacks were entitled only to private arms, while in others—particularly in the South, where the rights of free Blacks were gradually constricted during the antebellum years—to neither private nor public arms. In No. VIII of the series, Coxe noted the fears of the opponents of “the day when a million and a half of black people, generally in the state of the untutored Africans, were to be made free in power, election, arms, civil, and religious combination.”¹⁷⁶

Abolitionist Coxe was quite accurate in noting the fears of opponents of civil rights for Blacks. In *Dred Scott*, Chief Justice Taney’s majority opinion insisted that free Blacks could not be citizens, because if they were, they would have “the full liberty of speech in public and private upon all subjects which [a state’s] own citizens might meet; to hold public meetings upon political affairs, and to keep and carry arms wherever they went.”¹⁷⁷

Coxe’s last writings on the subject of the armed populace were his most extensive. Penned in opposition to John Quincy Adams’ bid for election as president, Coxe’s final testament revived a 1791 debate between John Quincy Adams and Thomas Paine. A review of the 1791 debates about arms and game laws clarifies the context of Coxe’s polemics of 1823.

One of the chief impediments to the dissolving of monarchy in France in 1789 was centuries of weapons prohibitions.¹⁷⁸ In his 1791 bestseller *The Rights of Man*, which appeared when the Bill of Rights was still being debated in America, Thomas Paine described the situation just hours prior to the storming of the Bastille:

The event was to be freedom or slavery. On one side, an army of nearly thirty

173. DEMOCRATIC PRESS, Nov. 25, 1820, at 2, col. 2.

174. *Supra* text at note 77.

175. Firearms at that time were manufactured with many bore sizes and consequently bullets were often not interchangeable, a situation Coxe had sought to alleviate as Purveyor of Public Supplies in respect to the public arms he obtained. *See* Coxe correspondence in 2 J. HICKS, NOTES ON UNITED STATES ORDNANCE (1940) at 28 (common bore), 31 (“the public arms”).

176. DEMOCRATIC PRESS, Dec. 25, 1820, at 2, col. 1-2.

177. *Scott v. Sandford*, 60 U.S. (19 How.) 690 (1856).

178. Legislation in France from 1500-1789 to disarm commoners is summarized in LEE KENNETT AND JAMES ANDERSON, *THE GUN IN AMERICA* 11-16 (1973).

thousand men; on the other, an unarmed body of citizens: for the citizens of Paris, on whom the National Assembly must then immediately depend, were as unarmed and as undisciplined as the citizens of London are now. . . .

Arms they had none, nor scarcely anyone who knew the use of them; but desperate resolution, when every hope is at stake, supplies, for a while, the want of arms. Near where the Prince de Lambesc was drawn up, were large piles of stones collected for building the new bridge, and with these the people attacked the cavalry....

. . . The night was spent in providing themselves with every sort of weapon they could make or procure: Guns, swords, blacksmiths' hammers, carpenters' axes, iron crows, pikes, halberts, pitchforks, spits, clubs, etc., etc.¹⁷⁹

The French people were victorious, and quickly adopted a Declaration of Rights and a Constitution (although the people proved unable to maintain a stable and free government). As Paine noted, the abolition of the game laws by the new French republic was the embodiment of free trade:

The French constitution says, There shall be no game laws; that the farmer on whose lands wild game shall be found (for it is by the produce of this lands they are fed) shall have right to what he can take: that there shall be no monopolies of any kind -- that all trade shall be free In England, game is made the property of those at whose expense it is not fed Is this freedom?¹⁸⁰

Paine's work was attacked by John Quincy Adams in Adams' anonymous *Letters of Publicola*, which defended the Constitution of England, including that nation's right "to establish a Government in *hereditary succession*"¹⁸¹ as well as Parliament's right to enact game laws.¹⁸² Adams severely castigated Paine's defense of the French Constitution, which placed beyond legislative control "universal freedom of the chase."¹⁸³ The letters were originally thought to have been penned by John Adams, who had defended the British Constitution in his *Defence of the Constitutions* (1787-88) and *Discourse on Davila* (1790), the latter of which attacked the French Revolution.

At last, in 1823, John Quincy Adams revealed his own authorship of the *Letters of Publicola*, and renewed his criticism of "the inflammatory principles of Paine," whose works he called "worse than worthless."¹⁸⁴ All of the above writings of the Adamses were cited by Tench

179. THOMAS PAINE, RIGHTS OF MAN 76-77 (New York, 1969)(1st pub. 1791).

180. *Id.* at 96-97.

181. 1 JOHN QUINCY ADAMS, WRITINGS 70 (W.C. Ford ed. 1913).

182. *Publicola's* main purpose was to support President Washington's policy of neutrality in the war between England and France, as opposed to the followers of Jefferson, who wanted the U.S. to side with France.

183. *Id.* at 99-100, 109.

184. *Id.*, vol. 6, at 337-38.

Coxe and others as reflecting dangerous monarchical tendencies which John Quincy Adams would represent if elected president. Under the pen-name “Sidney,” Coxe wrote an 1823 series entitled “To the Friends of the Principles of the Constitution of the United States” in the Philadelphia *Democratic Press*, in which Coxe criticized monarchical sympathizers in America, which particular reference to John Quincy Adams, including Adams’ views about the deprivation of arms in France and England.

In pre-revolutionary France, Coxe recalled, “not only were the commons or people of the third estate deprived of the ownership, possession and use of arms, but they were bound to leave their farming works at the command of the lord, in order to surround forests, and to keep therein, game which their Lord was about to hunt for sport”¹⁸⁵ In *The Rights of Man*, Thomas Paine had “commended the repeal of the system and provisions of the hunting laws which had debased the people of France below the beasts of the fields, [and] held the commons or third estate in the ignorance and privation or non-possession of arms”¹⁸⁶

Under the forest and game laws of England, continued Coxe, “the people, the body of the commons, the inefficient 199 two hundredth parts *are deprived of the right to own, keep and use arms*. It is, Blackstone says, ‘*a tyranny*,’ and *a fatal tyranny* on the commons of England.”¹⁸⁷ Coxe depicted John Adams and John Quincy Adams as apologists of the French and English game laws, and thus as “opposed to the Liberties of France, England and the United States, *on the all important subject of the militia*, and its precious emanation, our real volunteer companies”¹⁸⁸ Like Cromwell, President John Adams had increased the regular army and sought to dispense with the militia. An unarmed people could mean a monarchy in America, Coxe concluded: “

Without a free omnipresent constitutional militia army unstrangled by game laws, . . . a president could be quickly authorized to continue for life, and the office could be made to run in the persons of his sons”¹⁸⁹

In the next serial, “Sidney” faulted the Adamses for their defense of the British constitution:

We proceed from the total destruction or rather prevention of the right to own and keep and use arms and consequently of *self-defense* and of the *public militia power or force, the army of the constitutions* of the United States, stated in our last number, to the still more precious object of the right of *conscience*.¹⁹⁰

For John Quincy Adams, charged Coxe, England’s establishment of one church, coupled with “a deprivation of the ownership and use of arms, and other abuses of a like nature” were not sufficient to justify the calling of a convention by the people to change the British constitution.¹⁹¹

185. DEMOCRATIC PRESS, Jan. 16, 1823, at 2, col. 1.

186. *Id.* at col. 2.

187. *Id.*

188. *Id.*

189. *Id.* at col. 3.

190. *Id.*, Jan. 23, 1823, at 2, col. 2.

191. *Id.*

British impressment of sailors, which to Coxe was “personal, though not hereditary, slavery,” was the subject of Coxe’s following article. “Coerced service” was anathema to American freedom, which instead depended on self-armed volunteers:

A western or southern volunteer militia officer or private, who had served, . . . in the battles of Orleans . . . , would illy brook the application to his person, of *the British institution of sailors* impressment, transferred into the constitution and practice of the United States, by the rapturous, or indiscriminate admirers and defenders of the constitution of England.¹⁹²

Serving as Secretary of State under President Monroe, John Quincy Adams stood on the traditional stepping-stone to the Presidency (which Adams, in fact, would win in 1824), and so Coxe continued his anti-Adams articles. Written under the pen-name “Sherman,” Coxe’s most comprehensive analysis of the deprivation of the right to have and use arms was published as an address “To the People of the United States.”¹⁹³ Again, the thrust of the article was the manner in which commoners in England and France were disarmed by the game laws. Coxe’s purpose was to show the monarchical inclinations of John Quincy Adams in Adams’ attacks on Thomas Paine.

Coxe began by reviewing the feudal oppressions of the rights of the chase in France, and Paine’s praise for their abolition at the time of the revolution: “Mr. Paine’s approbation of this humane, wise and liberal act (tho it is certain they put the right of the chase and of arms on nearly the same footing as ourselves in our constitutions) is among the specified grounds of Mr. Adams, junior, reply of 1791, to the rights of man”¹⁹⁴ Coxe then analyzed the impact of England’s

192. *Id.*, Jan. 28, 1823, at 2, col. 2.

193. The article was No. IX of a series with this title apparently published in the Democratic Press or in the Philadelphia Sentinel and Mercantile Advertiser in 1823, or possibly 1824. The issue in which the article appeared could not be located. (The pen-name “Sherman” appears in the Democratic Press, Dec. 24, 1823.) The manuscript is in PAPERS OF TENCH COXE, *supra* note 2, at Reel 113, at 713 ff.

194. *Id.* at 715.

Coxe was not entirely accurate here. The 1789 *Declaration of the Rights of Man and of the Citizen* said nothing to about hunting or the right to arms. The 1789 *Decree to Abolish the Feudal System* said nothing about the right to arms but did comprehensively to establish a right to hunt:

III. The exclusive right to hunt and to maintain uninclosed warrens is likewise abolished, and every landowner shall have the right to kill, or to have destroyed on his own land, all kinds of game, observing, however, such police regulations as may be established with a view to safety of the public

All hunting *captaineries* [preserves], including the royal forests, and all hunting rights under whenever denomination, are likewise abolished. Provision shall be made, however, in a manner compatible with the regard due to property and liberty, for maintaining the personal pleasures of the King.

The president of the Assembly shall be commissioned to ask of the King the recall of those sent to the galleys or exiled, simply for violations of hunting regulations, as well as for the release of those at present imprisoned for offenses of this kind, and dismissal of such cases as are now pending.

game laws in 1791:

No man of less freehold estate than about 433 Dollars per Annum may own, keep and use a gun or engine to kill any of the wild beasts or birds, called game, *on his own land*. It is easy to see, that this game law deprives the great body of the people of England, Ireland, Wales and Scotland of all knowledge in the construction, use, care and value of arms; unfits them for the militia, gives undue weight to the army, navy, . . . and other legalized forces, and to the armed and privileged nobility and gentry.¹⁹⁵

Coxe's belief that the game laws of England had been used to disarm the English populace was widely shared in America; statements to that effect can be found in the three leading constitutional law treatises of the antebellum era.¹⁹⁶ But that view, while influential, was wrong. Most Englishmen could not legally hunt, but they could legally own guns for non-hunting purposes, such as personal defense and target shooting.¹⁹⁷

As Blackstone recognized, the game laws which were meant "to disarm the people," originated as part of a system of slavery. "The *Rustics* or people of the country were every where in Europe forbidden by the German and Gothic invaders to carry arms." So too, the ancient Britons, beset by successive conquerors, were "made and continued disarmed Serfs, Villeins or Slaves."¹⁹⁸

The most despotic governments have, for these reasons, the most oppressive and cruel game laws. They are peculiarly opposite to the free spirit of such bodies as our American Constitution, the French National Assembly, and the courts of Spain, Portugal and their late American colonies. His own firearms are the second and better right hand of every freeman, and Mr. Adams, junior, has shown an utter disregard of them in this part of his reply to Mr. Paine.¹⁹⁹

So prudent, faithful and provident have our people and constitutions been, that we find in their precious bills of rights, schedules of duties, reasons of powers, and declarations recognizing the right to own, keep and use arms, provisions

THE GREAT DOCUMENTS OF WESTERN CIVILIZATION 186-92 (Milton Viorst ed. 1965).

195. PAPERS OF TENCH COXE, *supra* note 2, at Reel 113, at 715.

196. 3 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES, WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND THE COMMONWEALTH OF VIRGINIA 414 n.3 (1996)(1803); WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 125-26 (1970, reprint of 2d ed. 1829); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION 747 (1833).

197. JOYCE MALCOLM, THE RIGHT TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT 126-30 (1994); STEPHEN P. HALBROOK, THAT ARMED MAN BE ARMED 51-53 (1984).

198. PAPERS OF TENCH COXE, *supra* note 2, at Reel 113, at 716.

199. *Id.* At the time Coxe wrote, Spain and Portugal were enjoying brief periods of constitutional liberalism, and the republican wars of independence in Latin American were all but victorious.

preventing and forbidding the legislatures to interfere with and to abrogate, that all important right of the citizens.²⁰⁰

Coxe continued, noting that Blackstone wrote that the English game laws were meant “to disarm the people” and resulted in “a Tyranny to the Commons.” Thus Adams’ opposition to Paine on the issue of game laws was tantamount to opposition to Blackstone.

Why all this insensibility to the most odious and pernicious part of the regime of ancient tyranny by which the French *unarmed* people for many centuries were held in Chains. Why all this devotion to the . . . British Constitution, by which that distinguished people have been held *unarmed*, since the kings and nobles of the Norman race rang the knell of their departed freedom in the sound of the curfew, sunk their liberties in a base oppressive villeinage, and riveted their chains by specious game laws, at once disarming them and tyrannously keeping the commons of England completely ignorant and helpless in arms.²⁰¹

As had been his practice since the Constitution was being debated in 1787, Coxe sent copies of the “Sidney” articles and possibly “Sherman” too, to Madison and Jefferson with an explanatory letter. His purpose was to show how the Adamses, both father and son, labored “to the same end; the setting up the British, and the undermining the principles and character of our Constitution.”²⁰² Neither Madison nor Jefferson was interested in attempting to influence Presidential politics in their retirement years; Jefferson’s declining health left him able to reply to only a few correspondents, and thus Madison conveyed to Coxe Jefferson’s apology “that it hurt him much to leave unnoticed an old friend.”²⁰³ In the fall of 1823, Coxe was still sending his articles to Jefferson and Madison.²⁰⁴

Tench Coxe died on July 16, 1824, a few months after John Quincy Adams took office as President. He predeceased his old friend, Thomas Jefferson, and his old foe, John Adams, by two years.²⁰⁵ While John Quincy Adams was wrong in underestimating the pernicious effect of the European game laws, Coxe was wrong in his estimation of Adams, whose 1825-29 Presidency was untouched by any trace of monarchy.

200. *Id.* at 717.

201. *Id.* at 718-19.

202. Coxe to Jefferson and Madison, Jan. 31, 1823, at 5-6, JAMES MADISON PAPERS, Library of Congress. In a second letter to Jefferson and Madison written a day later, Coxe warned that “the times are most dangerous to the cause of liberty, religious and civil, in Europe, and . . . a total failure (by power, numbers, arms and combination) *there*, will end us and our own system, in *the two Americas* . . .” *Id.*, Feb. 1, 1823, at 2. Coxe suggested that the circulation of the newspapers which published the above articles “in your parts of the country” would be useful in the coming presidential election. *Id.* at 3.

203. Madison to Coxe, Mar. 1, 1823, *id.*

204. Coxe to Madison, Oct. 3, 1823; Madison to Coxe, Oct. 12, Nov. 3, 1823, *id.*

205. Adams and Jefferson both died on July 4, 1826, exactly fifty years after the Declaration of Independence.

Coxe's retirement writings provide further detail about the scope of the individual right which Coxe had first elucidated four decades before. The right was, of course, personal, for "His own firearms are the second and better right hand of every freeman." The duty and the right of militia service (along with the possible use of public arms) belonged to the freeman; persons not exercising full civil rights (such as Blacks and Indians) did not possess the right. Conversely, when the slaves were one day free, they too would enjoy the full right to arms, like other civil rights.

In late twentieth-century analysis of the Second Amendment, it is not uncommon to attempt to break the right to arms into separate units: militia service, personal defense in the home, personal defense in public, defense against tyranny, hunting, and so forth. The attempt is then made to argue that only one unit (or only some units) comprise the real right to keep and bear arms, and that firearms ownership and carrying for other purposes is outside the Second Amendment. At the most extreme, the argument is that the Second Amendment is only for militia service, and (since the militia is said to be only the National Guard) therefore no-one except a National Guardsman has a right to keep and bear arms, and even then only when ordered to do so. Or in a less extreme version, the Second Amendment is only about personal defense, and so all citizens have a right to own guns, but none of them have a right to own guns useful for hunting but not for personal defense.

Coxe's writings show the error in the cafeteria approach to the Second Amendment: The right to hunt is integral to the right to own private arms; the right to private arms is an essential part of both "self-defense" and of the "public militia power."²⁰⁶ To be deprived of arms is, in the long run, to be deprived of a meaningful role in the governance of the republic. So while hunting might, at first, seem to have little to do with politics, there was a direct connection between anti-gun laws which affected a personal activity like hunting, and the advent of tyranny. Blackstone had made exactly this point, and so did each of the three major American constitutional treatise writers of antebellum America: Joseph Story, William Rawle, and St. George Tucker.²⁰⁷ Coxe's views on the right to arms were thus securely within the mainstream of American legal theory.

Conclusion

Tench Coxe was the leading interpreter of the meaning of the right to keep and bear arms in the first four decades of the republic. His writings on the Constitution earned the approval of James Madison, and his services to the young American republic earned him important positions in the subcabinets of each of America's first four presidents.

As is typical in partisan editorializing, Coxe sometimes saw his own position clearly, and failed to understand the complexity or the strength of his opponents' position. Arguing that the armed populace could always overawe a standing army, he belittled the anti-federalists for demanding a bill of rights. Likewise, based on the sympathy of the Adamses for the British

206. "Sidney," *To the Friends of the Principles of the Constitution*, DEMOCRATIC PRESS, Jan. 23, 1823, at 2, col. 2.

207. TUCKER, *supra* note 39, at ; RAWLE, *supra* note 195, at ; STORY, *supra* note 195, at .

Constitution, Coxe accused them of opposing the militia and the right to keep and bear arms. Yet John Adams explicitly endorsed the militia and the right to arms.²⁰⁸ While John Quincy Adams and his father might have been wrong for defending the European game laws, neither Adams never displayed the slightest hostility towards the American right to keep and bear arms.

Although the leaders of the early republic engaged in bitter partisan conflict, there was no disagreement on the value of the right to keep and bear arms in a free state. Coxe today is recognized as a leading expositor of federalist doctrine, and his subsequent career as a public servant and as a political writer supply depth and nuance to the original understanding of the right to keep and bear arms in the early republic.²⁰⁹

To Coxe and his contemporaries, the Second Amendment guaranteed the right of every freeman to own, possess, carry and use rifles, muskets, pistols, and other firearms for self-defense, hunting, and militia purposes, including resistance to oppression. Private arms were constitutionally protected, although uniformity for militia purposes suggested the wisdom of governmental purchase and distribution of public arms to the general populace. The right was injured by disarmament laws, by over-reliance on standing armies, and by game laws that prevented learning how to use arms. Given the centrality of the right to arms in a free state, the development of the American firearms manufacturing industry was worthy of national encouragement.

The individual right to keep and bear arms went unquestioned in the early republic, but no one championed it as vigorously over such a long span of public service as did Tench Coxe. The sentiments of the generations that built the Constitution and the new nation are aptly summarized by Coxe's words written in retirement: "His own firearms are the second and better right hand of every freeman"²¹⁰

208. See text as notes - , - *supra*. In 1823, the same year Coxe attacked Adamses for the last time, the senior Adams reaffirmed his commitment to a universal militia and his opposition to a select militia and standing army. W. SUMNER, AN INQUIRY INTO THE IMPORTANCE OF THE MILITIA TO A FREE COMMONWEALTH IN A LETTER . . . TO JOHN ADAMS . . . WITH HIS ANSWER 69-70 (Boston 1823).

209. Coxe was, of course, not the equal of the men for whom he work—Hamilton, Jefferson, and Madison; his conduct at the start of the Revolution, his personality flaws, and his partisanship ensured that, despite his writing ability and his energy, he would be in the second rank of the Founders, not the first.

210. *Supra* note 198.