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

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TENCH COXE AND THE RIGHT TO KEEP AND BEAR ARMS, 1787-1823

Stephen P. Halbrook*

David B. Kopel**

Tench Coxe, a member of the second rank of this nation's Founders and a leading proponent of the Constitution and the Bill of Rights, wrote prolifically about the right to keep and bear arms. In this Article, the authors trace Coxe's story, from his early writings in support of the Constitution, through his years of public service, to his political writings in opposition to the presidential campaigns of John Adams and John Quincy Adams. The authors note that Coxe described the Second Amendment as guaranteeing an individual right, and believed that an individual right to bear arms was necessary for self-defense and hunting, as well as for militia purposes and protection against oppression by large standing armies.

The views of this important Founding Era political commentator and public servant inform the ongoing Second Amendment debate. The authors argue that Coxe's depiction of an individual right to bear arms encompassing hunting, self-defense, and the public militia power supports the "Standard Model" of the Second Amendment prevalent in the legal literature.

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INTRODUCTION

Under medieval English law, common law pleadings in a civil case would proceed until the matter could be settled by the resolution of a single fact or question of law.¹ The continuing debate about whether the Second Amendment² guarantees a right of the American people to keep and bear arms, or a power of state governments to have a militia, likewise can be resolved by focusing on the political leader in the Early American Republic who wrote more than anyone else about the right to bear arms: Tench Coxe.

Tench Coxe, a Philadelphian, wrote numerous widely-circulated articles in favor of the new Constitution proposed in 1787 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 emphasizing both agriculture and manufacturing.³

¹ See BENJAMIN J. SHIPMAN, HANDBOOK OF COMMON LAW PLEADING 25, 418 (3d ed. 1923).

² 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.

³ See, e.g., HAROLD HUTCHESON, TENCH COXE: A STUDY IN AMERICAN ECONOMIC DEVELOPMENT 196-97 (1938). As this Article discusses, his economic vision included what proved to be a very successful effort to develop the nascent American firearms industry. See

Coxe is known to political historians for his role in the election of 1800, during which he wrote articles charging President Adams with being sympathetic to monarchy.⁴ To legal historians, Coxe is known best for his federalist writings in 1787-1788, in favor of the new Constitution.⁵ The Supreme Court has quoted these writings approvingly⁶ and Coxe has been recognized as one of 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 those of James Madison, Alexander Hamilton, and John 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.⁷

Coxe also is central to the ongoing 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 now is called the “Standard Model” of the Second Amendment—the interpretation that the Amendment guarantees the right of individual Americans to own and carry firearms.⁸ In the

infra notes 162-68 and accompanying text.

⁴ See JACOB E. COOKE, TENCH COXE AND THE EARLY REPUBLIC 286-88 (1978).

⁵ See *id.* at 109-31; e.g., “A Freeman” (Tench Coxe), *Essays I-III*, in FRIENDS OF THE CONSTITUTION: WRITINGS OF THE “OTHER” FEDERALISTS 1787-1788, at 88-101 (Colleen A. Sheehan & Gary L. McDowell eds., 1998) [hereinafter FRIENDS OF THE CONSTITUTION]; “An American Citizen” (Tench Coxe), *An Examination of the Constitution of the United States*, in FRIENDS OF THE CONSTITUTION, *supra*, at 459-76.

⁶ See, e.g., *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 629-30 (1997) (Thomas, J., dissenting) (citing Coxe’s Annapolis Convention analysis of the barriers to interstate trade); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 273 n.24 (1985) (Brennan, J., dissenting); *Nixon v. Fitzgerald*, 457 U.S. 731, 773 n.14 (1982) (White, J., dissenting) (citing a Coxe article on presidential immunity).

⁷ See generally FRIENDS OF THE CONSTITUTION, *supra* note 5 (presenting a representative collection of writings by Coxe, Dickinson, Webster, and others explaining and supporting the Constitution). Coxe’s papers are available to the public on microfilm. See LUCY FISHER WEST, GUIDE TO THE MICROFILM OF THE PAPERS OF TENCH COXE IN THE COXE FAMILY PAPERS AT THE HISTORICAL SOCIETY OF PENNSYLVANIA Reels 113-14 (1977) [hereinafter PAPERS OF TENCH COXE] (providing guidance through the extensive collection of papers).

⁸ See Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 463 (1995).

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

Standard Model literature, Coxe is discussed frequently,⁹ while critics of the Standard Model never acknowledge his existence or address his writings.¹⁰ But even in the

those regarded as still open, are all generally agreed upon. This is certainly the case with regard to Second Amendment scholarship.

Id.

⁹ The following articles that mention Coxe comprise about a third of the total of "Standard Model" articles published since 1980: Clayton E. Cramer & David B. Kopel, *Shall Issue: The New Wave of Concealed Handgun Laws*, 63 TENN. L. REV. 679 (1995); Anthony J. Dennis, *Clearing the Smoke from the Right to Bear Arms and the Second Amendment*, 29 AKRON L. REV. 57 (1995); 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 U. L. REV. 177, 207 n.128 (1982); Frank Espohl, *The Right to Carry Concealed Weapons for Self-defense*, 22 S. ILL. U. L.J. 151 (1997); Stephen P. Halbrook, *Encroachments of the Crown on the Liberty of the Subject: Pre-Revolutionary Origins of the Second Amendment*, 15 U. DAYTON L. REV. 91, 121 (1989); 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. VA. L. REV. 1 (1993); Stephen P. Halbrook, *Second-Class Citizenship and the Second Amendment in the District of Columbia*, 5 GEO. MASON U. CIV. RTS. L.J. 105, 123 (1995); Stephen P. Halbrook, *The Jurisprudence of the Second and Fourteenth Amendments*, 4 GEO. MASON L. REV. 1 (1981); Stephen P. Halbrook, *The Right of the People or the Power of the State: Bearing Arms, Arming Militias, and the Second Amendment*, 26 VAL. U. L. REV. 131, 140 (1991); 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, *What the Framers Intended: A Linguistic Analysis of the Right to "Bear Arms,"* 49 L. & CONTEMP. PROBS. 151, 155-56 (1986) [hereinafter Halbrook, *What the Framers Intended*]; David Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, 9 HARV. J.L. & PUB. POL'Y 559, 609-10 (1986); Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204 (1983); David B. Kopel, *Lethal Laws*, 15 N.Y.L. SCH. J. INT'L. & COMP. L. 355 (1995) (book review); Thomas B. 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); L.A. Powe, Jr., *Guns, Words, and the Constitutional Interpretation*, 38 WM. & MARY L. REV. 1311, 1354-55 (1997); Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 467-68 (1995); Robert Shalhope, *The Armed Citizen in the Early Republic*, 49 LAW & CONTEMP. PROBS. 125 (1986); Thomas J. Walsh, *The Limits and Possibilities of Gun Control*, 23 CAP. U. L. REV. 639 (1994).

For a complete list of articles in the last decade adopting or contesting the Standard Model, see David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359, 1362 n.1 (1998).

¹⁰ See, e.g., George Anastaplo, *Amendments to the Constitution of the United States*, 23 LOY. U. CHI. L.J. 631 (1992); Carl T. Bogus, *Race, Riots, and Guns*, 66 S. CAL. L. REV. 1365 (1993); Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. DAVIS L. REV. 309 (1998); Keith A. Ehrman & Dennis A. Henigan, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?*, 15 U. DAYTON L. REV. 5 (1989);

Standard Model literature, the focus has been almost exclusively on Coxe's writings in 1787 to 1789, 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 widely-shared consensus among legal scholars who have written on the Second Amendment, the competing "states' 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 "had no real meaning."¹¹ Garry Wills first advanced this view in a *New York Review of Books* article in which he asserted that James Madison, author of the Second Amendment, had pulled a hoax on the entire nation: despite what Madison's contemporaries thought, the Second and Third Amendments have no content.¹² In a letter to the editor, Glenn Harlan Reynolds quoted the most contemporaneous known exposition of the Second Amendment—a newspaper article written by Tench Coxe just days after Madison introduced the Bill of Rights in Congress.¹³ Coxe described the Second Amendment as an individual right; Madison wrote Coxe a letter praising

Samuel Fields, *Guns, Crime and the Negligent Gun Owner*, 10 N. KY. L. REV. (1982); Dennis A. Henigan, *Arms, Anarchy and the Second Amendment*, 26 VAL. U. L. REV. 107 (1991); Andrew D. Herz, *Gun Crazy: Constitutional False Consciousness and the Dereliction of Dialogic Responsibility*, 75 B.U. L. REV. 57 (1995); John Dwight Ingram & Alison Ann Ray, *The Right (?) To Keep and Bear Arms*, 27 N.M. L. REV. 491 (1997); Michael J. Palmiotto, *The Misconception of the American Citizen's Right to Keep and Bear Arms*, 4 J. FIREARMS & PUB. POL'Y 85 (1992); Warren Spannaus, *State Firearms Regulation and the Second Amendment*, 6 HAMLINE L. REV. 383 (1983). The above list comprises virtually all of the anti-individual law review articles written about the Second Amendment since 1980. *But see* David C. Williams, *The Militia Movement and Second Amendment Revolution: Conjuring with the People*, 81 CORNELL L. REV. 879, 906 (1996) (citing Coxe for the proposition that the Founders intended the militia to be universal). Williams argues that because the government has failed to promote civic virtue through a universal militia, the Second Amendment right to bear arms has vanished. *See* David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551 (1991); David C. Williams, *The Unitary Second Amendment*, 73 N.Y.U. L. REV. 822 (1998). For a critique of Williams's argument, see Eugene Volokh, *The Amazing Vanishing Second Amendment*, 73 N.Y.U. L. REV. 831 (1998).

¹¹ Gary Wills, *Why We Have No Right to Bear Arms*, N.Y. REV. BOOKS, Sept. 21, 1995, at 62.

¹² *See id.* at 72.

¹³ *See* Glenn Harlan Reynolds et al., *To Keep and Bear Arms: An Exchange*, N.Y. REV. BOOKS, Nov. 16, 1995, at 61, 62 (quoting "A Pennsylvanian" (Tench Coxe), FED. GAZETTE (Phila.), June 18, 1789, reprinted in THE ORIGIN OF THE SECOND AMENDMENT: A DOCUMENTARY HISTORY OF THE BILL OF RIGHTS IN COMMENTARIES ON LIBERTY, FREE GOVERNMENT AND AN ARMED POPULACE, 1787-1792, at 670-72 (David E. Young ed., 1995) [hereinafter THE ORIGIN OF THE SECOND AMENDMENT]).

Coxe's article.¹⁴ Wills replied angrily that just because Madison wrote Coxe a nice letter approving Coxe's article "does not mean that [Madison] agreed with it."¹⁵ 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 be less than forthright in his personal correspondence.

Thus, as Wills acknowledged implicitly, to accept Coxe's view is to accept the Standard Model. Wills was not right to dismiss Coxe so curtly. Tench Coxe certainly was not in the first-tier of historical importance with his friends James Madison and Thomas Jefferson; but the *Dictionary of American Biography* does conclude that Coxe "was a handsome, winning person, capable and versatile, high in the second rank of men of his day."¹⁶

The evidence for the Standard Model of the Second Amendment is overwhelming even without a consideration of Coxe. For example, there is no writing from 1787 to 1793 that states either the "states' rights" or the "nihilist" thesis.¹⁷ All legal scholarship dating from the creation of the Second Amendment and extending through the first decades of the twentieth century considered the Second Amendment to guarantee an individual right.¹⁸ Furthermore, the Supreme Court repeatedly has treated the Second Amendment as guaranteeing an individual right, and never as anything else.¹⁹

Still, Tench Coxe is important. No one in the early republic wrote more about the right to arms than did Coxe. Second Amendment topics discussed by Coxe include the nature of a "well regulated militia," the meaning of a "free state," the

¹⁴ See Letter from James Madison to Tench Coxe (June 24, 1789), reprinted in 12 THE PAPERS OF JAMES MADISON 257 (Robert A. Rutland et al. eds., 1977) [hereinafter MADISON PAPERS]; *infra* notes 103-107 and accompanying text.

¹⁵ See Reynolds et al., *supra* note 13, at 64. Wills then called Reynolds's use of Coxe "plain false." *Id.* Wills's 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." PHILA. GAZETTE, Dec. 9, 1800, quoted in COOKE, *supra* note 3, at 381.

¹⁶ 2 DICTIONARY OF AMERICAN BIOGRAPHY 488 (Allen Johnson ed., 1928).

¹⁷ See generally THE ORIGIN OF THE SECOND AMENDMENT, *supra* note 13 (including newspapers, pamphlets, records of public bodies, and other documents from the ratification period).

¹⁸ See Kopel, *The Second Amendment in the Nineteenth Century*, *supra* note 9.

¹⁹ See ALAN KORWIN & DAVID B. KOPEL, SUPREME COURT GUN CASES (forthcoming 1999); see also David B. Kopel, *Communitarians, Neorepublicans, and Guns: Assessing the Case for Firearms Prohibition*, 56 MD. L. REV. 438, 525-41 (1997) (discussing Supreme Court cases involving the Second Amendment).

constitution of “the people,” the penumbras of “keep” and “bear,” and the “arms” protected from infringement.²⁰

This Article is divided into four Parts, each of which corresponds to major developments in the republic’s early history and to Coxe’s attention to the right to keep and bear arms. Part I discusses Tench Coxe’s emergence as a leading proponent of the Constitution. After tirelessly defending the proposed new government from anti-federalist criticism, he championed the Bill of Rights, including the Second Amendment. Part II considers Coxe’s service in the Treasury Department of Presidents Washington and Adams, and concludes by highlighting Coxe’s heralding of the Jeffersonian banner against President Adams in the 1800 election and his chastising of Adams for his alleged neglect of the militia.

Part III explores Coxe’s role in arming the populace in order to avoid standing armies. As 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 undertook a thorough analysis of the American economy, including the role of the burgeoning gun manufacturers. Finally, Part IV reveals the aging warrior’s effort to defeat the election of another Adams as president. Writing against the candidacy of John Quincy Adams, Coxe provided his most comprehensive exposition of the protection of the right to keep and bear arms accorded individuals in republics and of the infringement of this right by 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 that continually held a leading role in public affairs. His great-grandfather Daniel Coxe was a physician to Charles II and to Queen Anne.²¹ Although Daniel Coxe never left England, he served nominally as Governor of New Jersey by purchase of land, and bought other large tracts of land throughout America.²² He attempted to settle a colony of Huguenots in Virginia, but failed.²³ Daniel Coxe’s son, also named Daniel Coxe, served as a colonel in the British Army stationed in North America.²⁴ He settled in Pennsylvania and served,

²⁰ See PAPERS OF TENCH COXE, *supra* note 7.

²¹ See 4 DICTIONARY OF AMERICAN BIOGRAPHY 484-85 (Alan Johnson & Dumas Malone eds., 1930).

²² See *id.* at 485.

²³ See *id.* The Huguenots, having been disarmed by the French government, were being oppressed through the quartering of standing armies in their homes. Many of them were attempting to emigrate.

²⁴ See *id.*

first, on the colony's Supreme Court, later, as Speaker of the Assembly and, still later, on the New Jersey Supreme Court.²⁵ Daniel Coxe was, as his grandson would be, a strong advocate of American unity. In 1722, he wrote a book proposing that an assembly of delegates from each state and a national executive could unite the American colonies.²⁶

Tench Coxe's maternal grandfather was Tench Francis, "the undisputed leader of the Pennsylvania bar of his time,"²⁷ whose eloquence earned him the appointment of attorney general of Pennsylvania in 1741.²⁸ One of Tench Coxe's uncles (by marriage) was Chief Justice Edward Shippen of the Pennsylvania Supreme Court.²⁹ Coxe's cousin Tench Tilghman 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.³⁰ Through the Tilghmans, Tench Coxe was related to one of the leading families in Maryland and Pennsylvania, composed of outstanding lawyers who also served as militia officers and in the Continental Army.³¹

Tench Coxe was the twenty-year-old son of a merchant residing in Philadelphia, Pennsylvania when the War for Independence broke out in 1775.³² Coxe's company carried on a thriving business with Loyalists and the British army when the British occupied Philadelphia³³—a business which would have been impossible if the British military commanders had decided not to allow it.

There is no indication that young Tench Coxe played any role in the Pennsylvania Constitutional Convention of 1776, during which delegates adopted a State Declaration of Rights stating: "That the people have a right to bear arms for the defence of themselves and the state"³⁴ The Constitution also provided that "[t]he freemen of this commonwealth and their sons shall be trained and armed for its defence"³⁵ and that "[t]he inhabitants of this state shall have liberty to fowl and hunt" in unenclosed lands.³⁶

After radical Patriots took power, Coxe left Philadelphia for a few months only

²⁵ See *id.*

²⁶ See DANIEL COXE, A DESCRIPTION OF THE ENGLISH PROVINCE OF CAROLANA, BY THE SPANIARDS CALL'D FLORIDA, AND BY THE FRENCH LA LOUISIANE (London, Oliver Payne 1722); 4 DICTIONARY OF AMERICAN BIOGRAPHY, *supra* note 21, at 485.

²⁷ *Id.* at 583-84.

²⁸ See *id.* at 584.

²⁹ See *id.* One of the Chief Justice's daughters, Margaret, married Benedict Arnold. See 17 DICTIONARY OF AMERICAN BIOGRAPHY 116 (Dumas Malone ed., 1935).

³⁰ See 18 DICTIONARY OF AMERICAN BIOGRAPHY 545 (Dumas Malone ed., 1935).

³¹ See *id.*

³² See 4 DICTIONARY OF AMERICAN BIOGRAPHY, *supra* note 21, at 488-89.

³³ See COOKE, *supra* note 4, at 16-32.

³⁴ PA. CONST. of 1776, art. I, § 13.

³⁵ *Id.* art. II, § 5.

³⁶ *Id.* art. III, § 43.

to return when British General Howe occupied the city in September 1777.³⁷ Coxe remained in Philadelphia after the British departed in 1778, and some Patriots credibly accused him of having Royalist sympathies and of having served briefly in the British army.³⁸ Although Coxe's trading successes during the period of British occupation lent considerable support to the charges, nothing came of the allegations, and the Revolution ended before Coxe became active in politics.³⁹ The Pennsylvania militia records of 1780, 1787, and 1788 listed Coxe as a militia private.⁴⁰

Whatever Coxe's attitude during the first part of the Revolution in Pennsylvania, the events of the Revolution seem eventually to have influenced Coxe's political philosophy on the issue of men and arms, because 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.⁴¹

When occupying Philadelphia in 1778, British General Howe had disarmed the population.⁴² As reported in Philadelphia newspapers, General Gage had done the

³⁷ See COOKE, *supra* note 4, at 21-26.

³⁸ Coxe's uncle by marriage, Chief Justice Edward Shippen, was a "moderate Loyalist." 17 DICTIONARY OF AMERICAN BIOGRAPHY, *supra* note 29, at 116. Coxe's cousin-once-removed, Benedict Arnold, was a Patriot general and then a traitor. See 1 DICTIONARY OF AMERICAN BIOGRAPHY 362-67 (Allen Johnson ed., 1928).

³⁹ See HUTCHESON, *supra* note 3, at 4-10.

⁴⁰ See *id.* at 8.

⁴¹ See PA. CONST. of 1776, art. I, § 13; *id.* at art. II, § 5; art. 3, § 43; see also generally Edward Dumbauld, 1 AM. J. LEG. HIST. 229 (1957) (noting that Pennsylvania protected a right to arms along with a right to hunt and fish because Pennsylvania usually was careful to preserve English constitutional precedent). Coxe's criticisms of John Quincy Adams, see *infra* notes 171-203 and accompanying text, 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 appropriated 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 forces

Remarks on the Resolve, PA. EVENING POST, Nov. 5, 1776, at 2.

⁴² 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

same to the citizens of Boston in 1775.⁴³ Although it is not known how Coxe reacted to the disarmament at the time, his later writings are aligned closely with the political

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*, at 20 (1979).

⁴³ Philadelphia's *Pennsylvania Evening Post* reported that 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 . . ." PA. EVENING POST, May 11, 1775, at 3. 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 "[t]he Governor and gentlemen of Boston have agreed to open the town, on condition of the inhabitants delivering up their arms to the Selectmen." PA. EVENING POST, May 2, 1775, at 2. The writer added: "The Governor engages to protect the lives and property of such as choose to stay. Those who choose to quit the town, to go where they please . . ." *Id.* After collecting the arms, Gage refused to allow the people to leave Boston. A writer reported from New London:

By the post, who left the head quarters at Roxbury, last Monday three 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.

PA. EVENING POST, May 20, 1775, at 3.

Meanwhile, British troops began plundering houses in Boston; and Gage proclaimed martial law, ordering the Patriots to lay down their arms. *See* PA. EVENING POST, May 25, 1775, at 2; PA. EVENING POST, 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, waving all that may be said of your hypocrisy, cruelty, villany, 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!*, PA. EVENING POST, June 27, 1775, at 1.

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," PA. EVENING POST, June 27, 1775, at 2.

philosophy of vehement opposition to firearms confiscation that Patriots of the time expressed in Philadelphia.

B. *Before the Constitutional Convention*

When the Revolution ended, Coxe formed the international merchant firm of Coxe & Frazier⁴⁴ and began to take an interest in political reform. In addition to playing a leading role in the Philadelphia Society for Alleviating the Miseries of Public Prisons,⁴⁵ Coxe served as secretary of the Pennsylvania Society for Promoting the Abolition of Slavery,⁴⁶ of which Benjamin Franklin was president.⁴⁷ In 1786, Coxe represented Pennsylvania by serving 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.⁴⁸ Coxe also was appointed to represent Pennsylvania in the Continental Congress.⁴⁹

Firearms were among the many commodities dealt in for many years by the firm of Coxe & Frazier. A sample of business records from 1786 illustrates the

⁴⁴ See COOKE, *supra* note 4, at 62-70.

⁴⁵ The society was the "first effective reform organization of its kind in the country." *Id.* at 92.

⁴⁶ See *id.* "The bulk of the society's paperwork was handled by Coxe, who more than any other individual deserved credit for the accomplishments of the group." *Id.* at 93. Among the group's accomplishments 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 so severely constricting slavery in Pennsylvania as to put it on the road to ultimate extinction. See *id.*

⁴⁷ See *id.* Franklin also happened to be a very strong militia enthusiast. As a member of the Pennsylvania Assembly, Franklin wrote the Militia Act of 1755. See *An Act for the Better Ordering and Regulating Such as are Willing and Desirous to be United for Military Purposes in Pennsylvania* (1755), reprinted in 3 THE WORKS OF BENJAMIN FRANKLIN 78 (Jared Sparks ed., Boston, Hilliard, Gray, & Co. 1837) [hereinafter THE WORKS OF BENJAMIN FRANKLIN]. While the Assembly considered the bill, Franklin wrote a lengthy article touting the militia, which Franklin later credited for having made possible the bill's passage. See Benjamin Franklin, *A Dialogue Between X, Y, & Z, Concerning the Present State of Affairs in Pennsylvania*, reprinted in 3 THE WORKS OF BENJAMIN FRANKLIN, *supra*, at 84. After the Royal Governor vetoed a militia bill in 1764, Franklin wrote a scathing criticism of the governor's rationale. See "Veritas" (Benjamin Franklin), *Remarks on a Particular Militia Bill Rejected by the Proprietor's Deputy, or Governor*, Sept. 28, 1764, reprinted in 4 THE WORKS OF BENJAMIN FRANKLIN, *supra*, at 95.

⁴⁸ See HUTCHESON, *supra* note 3, at 10-14; COOKE, *supra* note 4, at 96. In 1997, Justice Thomas cited Coxe's Annapolis convention analysis of the barriers to interstate trade. See *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 629-30 (1997) (Thomas, J., dissenting).

⁴⁹ See HUTCHESON, *supra* note 3, at 15-16.

company's involvement in the firearms businesses, and also reflects politico-military conditions at that time. Several New York militia companies lacked sufficient muskets of a common bore, and ordered two hundred stands from the firm.⁵⁰ The State of Georgia ordered five hundred 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"⁵¹ 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 [Shays's Rebellion] has 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"⁵² Like most others in the arms business, Coxe made arms for private purchase (the firearms sold in Massachusetts), for state militias (Georgia), and for local militia groups (New York).

In the summer of 1787, while the constitutional convention met in Philadelphia, Coxe presented a paper urging industrial development to the Society for Political Enquiries at the house of Benjamin Franklin.⁵³ The paper presaged the major role Coxe would play in the Jefferson and Madison administrations by promoting an early version of American industrial policy.⁵⁴ Among the articles that he promoted for domestic manufacture were gunpowder and ironworks.⁵⁵ While the convention was meeting, Coxe delivered a major address about the need for government to promote invention. Madison probably knew of Coxe's remarks, as Madison soon after proposed to the Constitutional Convention that Congress should have authority to encourage discoveries through premiums and provisions.⁵⁶

⁵⁰ Letter from Richard Warick to Capt. John Stagg (Nov. 13, 1786), in PAPERS OF TENCH COXE, *supra* note 2, 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 (New York, S. Converse 9th ed. 1996) (1828).

Two decades later, Coxe, as the federal government's purveyor of public supplies, would make a major effort to standardize militia firearms.

⁵¹ Letter from Robert Hazlehurst to Harrison and Nichols (Nov. 14, 1786), in PAPERS OF TENCH COXE, *supra* note 7, Reel 49, at 569.

⁵² Letter from Clarke and Nightingale to Coxe and Fraizer (Nov. 16, 1786), in PAPERS OF TENCH COXE, *supra* note 7, Reel 49, at 581.

⁵³ See TENCH COXE, AN ENQUIRY INTO THE PRINCIPLES ON WHICH A COMMERCIAL SYSTEM FOR THE UNITED STATES SHOULD BE FOUNDED (Phila., Robert Aitken 1787).

⁵⁴ See *infra* notes 147-246 and accompanying text.

⁵⁵ See *supra* note 54.

⁵⁶ See Edward C. Walterschied, *To Promote Science and Useful Arts: The Background and Origin of the Intellectual Property Clause of the United States Constitution*, 2 J. INTEL.

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.⁵⁷ He 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"⁵⁸ 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."⁵⁹ Madison promised to see that the articles were republished in Virginia and kept his promise.⁶⁰

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.⁶¹ Justice White described Coxe's essays as "the first major defense of the Constitution published in the United States."⁶² Coxe's biographer Jacob Cooke elaborated upon the importance of Coxe's writings: "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."⁶³

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; many recognize Tench Coxe—along with writers such as James

PROP. L., 1, 39-40 (1994).

⁵⁷ See 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 128 (M. Jensen ed., 1976) [hereinafter DOCUMENTARY HISTORY]. The convention ended on September 17, 1787.

⁵⁸ Letter from Tench Coxe to James Madison (Sept. 27, 1787), reprinted in 13 DOCUMENTARY HISTORY, *supra* note 57, at 251. See also *An American Citizen I & II*, PHILA. INDEP. GAZETTEER, Sept. 26, 28, 1787.

⁵⁹ Letter from James Madison to Tench Coxe (Oct. 1, 1787), reprinted in 13 DOCUMENTARY HISTORY, *supra* note 57, at 251.

⁶⁰ See COOKE, *supra* note 4, at 113.

⁶¹ *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 273 n.24 (1985) (Brennan, J., dissenting).

⁶² *Nixon v. Fitzgerald*, 457 U.S. 731, 773 n.14 (1982) (White, J., dissenting). Another Supreme Court case in which Coxe figured—although as a character rather than a source of authority—involved his wife's inheritance from her father. See *M'Ilvaine v. Coxe's Lessee*, 8 U.S. (4 Cranch) 207 (1804), *argued* 6 U.S. (2 Cranch) 280 (1802).

⁶³ COOKE, *supra* note 4, at 111.

Wilson, John Dickinson, Noah Webster, and others—as a leading defender of the Constitution, one of the influential “other” Federalists who played a major role in shaping the debate over the Constitution.⁶⁴ Indeed, even Garry Wills admits that Tench Coxe “coordinated the efforts at ratification, establishing a network of communications with federalists everywhere.”⁶⁵ Thus, it is not surprising that Coxe has been discussed and cited many times by legal historians—including scholars as diverse as Michael McConnell⁶⁶ and Herbert Hovenkamp⁶⁷—regarding the original understanding of the Constitution.

In the fourth of a series of essays defending the Constitution, 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.’*”⁶⁸ Hence, the new Constitution did not need a declaration of rights any more than the Articles of Confederation did: “*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.*”⁶⁹ 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*

⁶⁴ See FRIENDS OF THE CONSTITUTION, *supra* note 5, at xiii-xvi, 88.

⁶⁵ GARRY WILLS, THE FEDERALIST PAPERS BY ALEXANDER HAMILTON, JAMES MADISON, AND JOHN JAY viii (1982).

⁶⁶ See Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1443 (1990) (noting that Coxe wrote, consistently with Madison, that “[m]ere toleration is a doctrine exploded by our general constitution” (quoting Philip B. Kurland, *The Origins of the Religious Clauses of the Constitution*, 27 WM. & MARY L. REV. 839, 857 (1986) (quoting TENCH COXE, A VIEW OF THE UNITED STATES OF AMERICA 103-04 (Phila. 1794)))); Michael W. McConnell, *Tradition and Constitutionalism Before the Constitution*, 98 U. ILL. L. REV. 17, 195 (1998).

⁶⁷ See Herbert Hovenkamp, *Judicial Restraint and Constitutional Federalism: The Supreme Court’s Lopez and Seminole Tribe Decisions*, 96 COLUM. L. REV. 2213, 2235 (1996). For some recent cites to Coxe, see Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1804, 1808 (1996); Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 U.C.L.A. L. REV. 1297, 1320 n.95 (1998).

⁶⁸ *An American Citizen IV*, PHILA. INDEP. GAZETTEER, Oct. 21, 1787, reprinted in 13 DOCUMENTARY HISTORY, *supra* note 57, at 431, 433.

⁶⁹ *Id.* at 434.

the regular troops, and will generally be sufficient to *over-awe them*⁷⁰ Coxe wrote Madison of this installment:

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.⁷¹

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."⁷² The installment was published widely,⁷³ and the series circulated as a vital part of the national debate.⁷⁴

The argument that the militia would be sufficient to over-awe a standing army was persuasive in Pennsylvania,⁷⁵ the first state to call a convention. But anti-

⁷⁰ *Id.* at 435. It is interesting that the copy of the original 1787 edition of *An Examination of the Constitution* in the Jefferson Collection at the 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 during the War of 1812.

The first three installments of *An Examination of the Constitution of the United States* appeared in the *Philadelphia Independent Gazetteer*, on September 26, 28, and 29, 1788. Around October 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. See FRIENDS OF THE CONSTITUTION, *supra* note 5, at 459.

⁷¹ Letter from Tench Coxe to James Madison (Oct. 21, 1787), *reprinted in* 13 DOCUMENTARY HISTORY, *supra* note 57, at 437.

⁷² Letter from James Madison to Tench Coxe (Oct. 26, 1787), *reprinted in* 13 DOCUMENTARY HISTORY, *supra* note 57, at 437. Madison also praised Coxe's address, "To the Inhabitants of the Western Counties of Pennsylvania," for presenting arguments "as well timed as they are judicious." HUTCHESON, *supra* note 3, at 74 (quoting Letter from James Madison to Tench Coxe (July 30, 1788), *reprinted in* 11 MADISON PAPERS, *supra* note 14, at 210).

⁷³ See 13 DOCUMENTARY HISTORY, *supra* note 57, at 431.

⁷⁴ See 2 DOCUMENTARY HISTORY, *supra* note 57, at 5; Letter from James Madison to Tench Coxe (Jan. 3, 1788), *reprinted in* 10 MADISON PAPERS, *supra* note 14, at 349 (noting that Coxe's writings republished in Virginia "had a very valuable effect").

⁷⁵ Coxe was by no means the only Pennsylvania federalist to make this argument. See, e.g., NOAH WEBSTER, AN EXAMINATION INTO THE LEADING PRINCIPLES OF THE FEDERAL CONSTITUTION (Oct. 16, 1787), *reprinted in* PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE, 1787-1788, at 56 (Paul L. Ford ed., Da Capo Press 1968) (1888) [hereinafter PAMPHLETS].

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

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."⁷⁶ 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: "[I]n 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."⁷⁷

The Pennsylvania Convention adopted the Constitution in mid-December of 1787, but not without strong opposition.⁷⁸ A large number of delegates had opposed the new Constitution, especially if it were not to contain a bill of rights. The anti-federalist delegates explained their reasoning in *The Dissent of the Minority of the Convention*.⁷⁹ 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 individuals⁸⁰

constitute a force superior to any band of regular troops that can be, on any pretence, raised in the United States.

Id.; see *Foreign Spectator*, PHILA. INDEP. GAZETTEER, Sept. 21, 1787, reprinted in 2 DOCUMENTARY HISTORY, *supra* note 57, at 384 (Microform Supp.) (arguing that "even the power of a veteran army could not subdue a patriotic militia ten times its number"). See also *A Supplement to the Essay on Federal Sentiments*, PHILA. INDEP. GAZETTEER, Oct. 23, 1787, reprinted in 2 DOCUMENTARY HISTORY, *supra* note 57, at 801 (Microform Supp.) ("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 . . .").

⁷⁶ 2 DOCUMENTARY HISTORY, *supra* note 57, at 509.

⁷⁷ *Id.* at 336.

⁷⁸ See *id.* at 22 (noting that the delegates to the Pennsylvania Convention ratified the Constitution on December 12, 1787, by a vote of 46 to 23).

⁷⁹ See *id.* at 617-40.

⁸⁰ *Id.* at 623-24. Criticizing the author of the minority report from the Pennsylvania ratifying convention for the federal Constitution, Gary Wills claims that the report's author erred by placing militia rights and hunting rights in the same proposed amendment. See Wills, *supra* note 14. But the Pennsylvania minority was, in fact, properly combining militias and hunting into a unitary arms guarantee, just as the 1776 Pennsylvania State Constitution had done. See *supra* notes 34-36 and accompanying text. Perhaps it is Wills, and not the Pennsylvania Founders, who is in error.

Coxe immediately set out to refute the objections of the convention minority. Under a pen-name, "Philanthropos," Coxe pointed out that 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 exceptionable footing; but none of these are even mentioned by [G]overnor Randolph, [M]r. Mason or [M]r. Gerry.⁸¹

Coxe further contended, in another article, that the minority's fear of the federal standing army was ridiculous, as was the minority's fear that 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.⁸² 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 birthright 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 *foederal or state governments*, but where I trust in God it will ever remain, *in the hands of the people*.⁸³

⁸¹ "Philanthropos" (Tench Coxe), *To The People of the United States*, PA. GAZETTE, Jan. 16, 1788, reprinted in 15 DOCUMENTARY HISTORY, *supra* note 5, at 391-93.

⁸² 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* (London 1656), reprinted in THE POLITICAL WORKS OF JAMES HARRINGTON 170 (J.G.A. Pocock ed., 1977).

⁸³ "A Pennsylvanian" (Tench Coxe), *To The People of the United States*, PA. GAZETTE, Feb. 20, 1788, at 2, reprinted in 2 DOCUMENTARY HISTORY, *supra* note 57, at 1778-80 (Microform Supp.). Other installments are in PA. GAZETTE, Feb. 6, 13, 27, 1788.

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."⁸⁴ It is possible that Coxe influenced the writers of *The Federalist*, because Madison and Hamilton had read and disseminated his publications before composing their own, and there is some similarity among them in treatment of subject matter.⁸⁵ 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 own rights and those of their fellow-citizens."⁸⁶

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. 46*.⁸⁷ 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."⁸⁸ Madison lauded "the advantage of being armed, which the Americans possess over the people of almost every other nation."⁸⁹ 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.⁹⁰

⁸⁴ See COOKE, *supra* note 4, at 118.

⁸⁵ *The Federalist Papers* were first published in New York City newspapers between October 27, 1787 and April 2, 1788. See 13 DOCUMENTARY HISTORY, *supra* note 57, at 490.

⁸⁶ THE FEDERALIST NO. 29, at 179 (Alexander Hamilton) (Isaac Kramnick ed., 1987). "Little more can reasonably be aimed at, with respect to the people at large, than to have them properly armed and equipped . . ." *Id.* at 178-79.

⁸⁷ Letter from James Madison to Tench Coxe (Jan. 30, 1788), *reprinted in* 10 MADISON PAPERS, *supra* note 14, at 445.

What goes by name of consolidation in Pena. is I suspect at the bottom of the opposition to the New Govt. almost every where; and I am glad to find you engaged in developing the subject. I inclose some papers [*The Federalist Nos. 45 and 46*] in which it has been taken up here, that if any hints are contained in them, they may be pursued in your enquiry.

Id.

⁸⁸ THE FEDERALIST NO. 46, *supra* note 86, at 301 (James Madison).

⁸⁹ *Id.* 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." *Id.* Cf. WEBSTER, *supra* note 75 (noting that most people in Europe are disarmed, thereby allowing standing armies to rule).

⁹⁰ Other Coxe writings in this period were published in newspapers in other states. For example, Madison distributed Coxe's "An American," *Address to the Members of the Convention of Virginia*, PA. GAZETTE, May 21, 28, 1788, in 3 AMERICAN MUSEUM 426-33,

Among the advantages Coxe saw in the new Constitution was the fact that ex post facto laws “are exploded by the new system.”⁹¹ 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 that 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.”⁹²

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 each state would train its own militia and choose the officers for its militia.⁹³

544-48 (1788), in Virginia. See COOKE, *supra* note 4, at 121 & n.34. Anonymous Coxe articles also appeared in the *Federal Gazette* during 1788 to 1790. See *id.*

It is not known whether Coxe was “Philodemos,” who wrote: “Every free man has a right to the use of the press, so he has to the use of his arms.” PA. GAZETTE, May 7, 1788, reprinted in 2 DOCUMENTARY HISTORY, *supra* note 57, at 2579 (Microform Supp.). 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*, PA. GAZETTE, Aug. 6, 1788, at 2.

In a society in which “Gun-Smiths” marched in the July 4th parade, see PA. GAZETTE, July 9, 1788, at 3, the benefits of firearms in the hands of the public were undisputed. In one of the same issues in which “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.” PA. GAZETTE, Feb. 27, 1788, at 3.

⁹¹ TENCH COXE, AN EXAMINATION OF THE CONSTITUTION FOR THE UNITED STATES OF AMERICA 18-19, in PAMPHLETS, *supra* note 75, at 147-48.

⁹² *Id.*

⁹³ See “A Freeman” (Tench Coxe), *To the Minority of the Convention of Pennsylvania*, PA. GAZETTE, Jan. 23, 1788, reprinted in FRIENDS OF THE CONSTITUTION, *supra* note 5, at 92; “A Freeman” (Tench Coxe), *To the Minority of the Convention of Pennsylvania*, PA. GAZETTE (Phila.), Jan. 30, 1788, reprinted in FRIENDS OF THE CONSTITUTION, *supra* note 5, at 93. See also “An American Citizen” (Tench Coxe), *An Examination of the Constitution of the United States* (Phila., Hall & Sellers 1788), reprinted in FRIENDS OF THE CONSTITUTION, *supra* note 5, at 475 (noting that states, not the federal government, would

D. *The Bill of Rights*

Federalists cited the existing guarantees for personal rights in the state constitutions,⁹⁴ the presence of an armed populace,⁹⁵ and the lack of a granted power in the proposed Constitution to infringe upon individual liberties⁹⁶ 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.⁹⁷

In 1788 Coxe served as one of Pennsylvania's last delegates to the Continental Congress, which held its final session early the following year.⁹⁸ In the meantime, the requisite nine states ratified the Constitution.⁹⁹ As a compromise with the Constitution's opponents, who agreed not to oppose the Constitution further, many federalists reversed their opposition to a bill of rights in order to entice the remaining states to ratify. On June 8, 1789, in the newly formed U.S. House of Representatives, James Madison proposed a bill of rights that 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.¹⁰⁰

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.¹⁰¹ In this capacity, he

control the appointment of various important posts, including "Officers of the Militia").

⁹⁴ See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 340-42 (M. Farrand ed., 1911) (describing Roger Sherman's opposition to a bill of rights at its initial proposition by George Mason).

⁹⁵ See STEPHEN P. HALBROOK, *THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT* 68 (1984).

⁹⁶ See, e.g., James Wilson, State House Speech (Oct. 6, 1787), in 2 DOCUMENTARY HISTORY, *supra* note 57, at 168 (arguing that, because Congress lacked an enumerated power to regulate the press, a proposed amendment guaranteeing freedom of the press would be superfluous).

⁹⁷ See "An American Citizen" (Tench Coxe), *Thoughts on the Subject of Amendments*, PA. GAZETTE, Dec. 3, 10, 24, 31, 1788.

⁹⁸ See COOKE, *supra* note 4, at 126-28.

⁹⁹ See THE ORIGIN OF THE SECOND AMENDMENT, *supra* note 13, at xl-xlii.

¹⁰⁰ 1 ANNALS OF CONG. 434 (Joseph Gales ed., 1834). As adopted, the following 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." U.S. CONST. amend II. 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 7, Reel 114, at 38.

¹⁰¹ See COOKE, *supra* note 4, at 132-33.

helped shape the Judiciary Act of 1789, which created the lower federal courts; legislation regarding the President's power to remove his appointees; and the patent bill.¹⁰²

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*.¹⁰³ 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 shall 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.¹⁰⁴

Coxe sent a copy of his essay to Madison along with a letter of the same date.¹⁰⁵ 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]."¹⁰⁶ Madison added approvingly 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."¹⁰⁷

Madison apparently saw Coxe's defense of the amendments in the *New York Packet* the day before he wrote to Coxe.¹⁰⁸ The Coxe article also was displayed prominently on the first page of the July 4th celebration issue of the *Massachusetts Centinel*,¹⁰⁹ and was no doubt reprinted elsewhere. Just as Coxe had written energetically for the proposed Constitution, he now wrote with the same vigor for the proposed Bill of Rights.¹¹⁰

¹⁰² *Id.* at 137-39, 150-51.

¹⁰³ See "A Pennsylvanian" (Tench Coxe), *Remarks on the First Part of the Amendments to the Federal Constitution*, FED. GAZETTE (Phila.), June 18, 1789, reprinted in THE ORIGIN OF THE SECOND AMENDMENT, *supra* note 13, at 670-72.

¹⁰⁴ *Id.* The amendments had been published in the issue of June 16, 1789. See FED. GAZETTE (Phila.), June 16, 1789, at 2. The first page of newspapers of the time normally was reserved for advertisements and official notices.

¹⁰⁵ See Letter from Tench Coxe to James Madison (June 18, 1789), reprinted in 12 MADISON PAPERS, *supra* note 14, at 239-40.

¹⁰⁶ Letter from James Madison to Tench Coxe (June 24, 1789), reprinted in 12 MADISON PAPERS, *supra* note 14, at 257.

¹⁰⁷ *Id.*

¹⁰⁸ See N. Y. PACKET, June 23, 1789, at 2.

¹⁰⁹ MASS. CENTINEL, July 4, 1789, at 1.

¹¹⁰ Coxe thereby reversed his early stand that there was no need to list rights which

II. COXE'S SERVICE IN THE WASHINGTON AND ADAMS ADMINISTRATIONS AND THE ELECTION OF 1800

In 1790, Treasury Secretary Alexander Hamilton appointed Coxe as the Assistant Secretary of the Treasury, making him Hamilton's second in command. Two years later, and at Coxe's request, Hamilton made Coxé the Commissioner of the Revenue.¹¹¹

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

Congress had no power to infringe:

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.

"A Pennsylvanian" (Tench Coxe), *Remarks on the Second Part of the Amendments*, FED. GAZETTE (Phila.), June 30, 1789, at 2, *reprinted in* THE ORIGIN OF THE SECOND AMENDMENT, *supra* note 13, at 674-76. As adopted, the Ninth Amendment to the 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 in the above newspapers reveals agreement with Coxe's analysis 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." "One of the People," *On a Bill of Rights*, FED. GAZETTE (Phila.), July 2, 1789, *reprinted in* THE ORIGIN OF THE SECOND AMENDMENT, *supra* note 13, at 676-78.

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."

Id. 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 . . . *everything else* which he has not committed to the care of those servants." *Id.*

¹¹¹ See COOKE, *supra* note 4, at 242. As Commissioner of the Revenue, Coxe received what appeared to be an attempted bribe regarding the construction of a lighthouse off of Cape Hatteras in North Carolina. See COOKE, *supra* note 4, at 294-95. Coxe promptly reported the attempted bribe to Attorney General Ingersoll, and the case eventually made its way to the United States Supreme Court. See *United States v. Worrall*, 2 U.S. 384 (1798) (discussing venue for federal crimes). At the time Coxe rejected the bribe, he was "financially pressed" by the need to support his large family, as Coxe would be for most of the rest of his life. See HUTCHESON, *supra* note 3, at 41.

Pennsylvania.¹¹² 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 (because 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.¹¹³

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.¹¹⁴ 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 that had been duly created through proper constitutional methods.¹¹⁵ 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. Today, when federal taxes are much 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 tyranny.

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*.¹¹⁶ The book was a leading work of the time on commerce, industry, and agriculture,¹¹⁷ 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

¹¹² See COOKE, *supra* note 4, at 242-44.

¹¹³ Coxe made his views known in a forcefully worded letter to Hugh Henry Brackenridge, a prominent author in western Pennsylvania (and a future chief justice of the Pennsylvania Supreme Court). See 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).

¹¹⁴ See Henigan, *supra* note 10, at 110 ("[The Standard Model] amounts to the startling assertion of a generalized constitutional right of all citizens to engage in armed insurrection against their government.").

¹¹⁵ See COOKE, *supra* note 4, at 244 (noting Coxe's support for the principle of obedience to the law during the uprising).

¹¹⁶ 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* (Augustus M. Kelley ed., Bookseller 1965) (1794).

¹¹⁷ See COOKE, *supra* note 4, at 212-14.

the United States.¹¹⁸ He also observed that “*Manufactures of iron* form a very increasing and useful branch . . . [including] *arms* of various kinds.”¹¹⁹ He noted: “The Indian War and the renewal of our militia system has greatly revived the manufacture of arms.”¹²⁰ Coxe argued that gunpowder already was being manufactured in several places more cheaply than it could be imported.¹²¹ “The *manufacture of gunpowder* has advanced with the greatest rapidity to the point of desire in regard both to quantity and quality.”¹²² In an economic analysis written in 1789, Coxe urged moderate protection for a variety of essential domestic industries, including firearms and gunpowder,¹²³ but the industries apparently were improving without need for much protection.¹²⁴

¹¹⁸ See HUTCHESON, *supra* note 3, 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, technology historian Leo Marx ranks Coxe as one of the greatest American political economists for daring to challenge “the whole body of respectable economic theory,” which claimed that America never could become an important manufacturing nation. LEO MARX, *MACHINE IN THE GARDEN: TECHNOLOGY AND THE PASTORAL IDEAL IN AMERICA* 153 (1967). 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. *See id.* at 153-63.

¹¹⁹ COXE, *supra* note 116, at 272.

¹²⁰ *Id.* at 273.

¹²¹ *See id.* at 278.

¹²² *Id.*

¹²³ See TENCH COXE, *OBSERVATIONS ON THE AGRICULTURE, MANUFACTURES, AND COMMERCE OF THE UNITED STATES IN A LETTER TO A MEMBER OF CONGRESS* 32-33 (N.Y., Francis Childs & John Swaine 1789), *cited in* HUTCHESON, *supra* note 3, at 94.

¹²⁴ *See* COXE, *supra* note 116, at 334 (“We have actually almost ceased to import . . . gunpowder . . .”). Coxe’s book is loaded with economic data. Between October 1, 1790 and September 30, 1791, the United States exported 160 dozen muskets and 25,854 pounds of gunpowder. *See 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. *See id.* at 415-16. In the 1792-1793 fiscal year, the United States exported 1,286 quarter casks of gun powder. *See 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 until May 22, 1795, thereafter 10%; lead and musket ball, free for the same time as gunpowder, thereafter 1¢ per pound; muskets and fire locks [“fire lock” is an alternative term for “matchlock,” a type of long gun in which the shooter ignites 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%. *See 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 to the vast tracts of unsettled

Coxe's growing alignment with Thomas Jefferson and other Republicans led to his dismissal from office by President John Adams in 1797.¹²⁵ Coxe then plunged into political activity supportive of the Republican cause,¹²⁶ adherents of which claimed to be suffering repression under the Sedition Act within a year.¹²⁷

Coxe closely associated himself with the Philadelphia *Aurora*, the leading Jeffersonian newspaper of the time.¹²⁸ 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.¹²⁹ In retaliation, a mob of "federal savages" attacked and beat *Aurora* editor William Duane.¹³⁰ As a 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."¹³¹

The same issue of the *Aurora* which included this report, also included an article signed by Tench Coxe and an urgent appeal by "Mentor" addressed "To the Republican Citizens of Pennsylvania."¹³² 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

forest land in the United States, Coxe suggested that they could be cleared speedily and settled by persons making, among other products, "gun-stocks and other military implements for the sea and land service." *Id.* at 450.

In 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 "[t]he 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.

¹²⁵ See COOKE, *supra* note 4, at 293-308. 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. See *id.* at 365-70; see also *Holland Land Co. v. Coxe*, 4 U.S. (4 Dall.) 170 (1803) (discussing the legality of land claims rejected by Coxe in his capacity as secretary).

¹²⁶ See COOKE, *supra* note 4, at 338-39.

¹²⁷ See *id.* at 344-47.

¹²⁸ See *id.* at 344-45, see generally RICHARD N. ROSENFELD, *AMERICAN AURORA: A DEMOCRATIC-REPUBLICAN RETURNS: THE SUPPRESSED HISTORY OF OUR NATION'S BEGINNINGS AND THE HEROIC NEWSPAPER THAT TRIED TO REPORT IT* (1998).

¹²⁹ See *AURORA* (Phila.), May 21, 1799, at 2.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* at 2.

Do you wish to preserve your rights? Arm yourselves—Do you desire to secure your dwellings? Arm yourselves—Do you wish your wives and daughters protected? Arm yourselves—Do you wish to be defended against assassins or the *Bully Rocks* of faction? Arm yourselves—Do you desire 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 vine and his own fig-tree and have no one to make him afraid. . . .

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.¹³³

Subsequent issues of the *Aurora* charged that newspaper offices were being attacked around the country wherever Federalists were losing elections.¹³⁴ The paper portrayed the riot, the attack on Duane, and President Adams's dismissal of Tench Coxe as elements of a Federalist conspiracy to institute monarchy.¹³⁵ Finally, the Adams administration had Duane arrested for seditious libel for publishing a letter Adams (while Vice President) wrote to Coxe which admitted British influence in the government.¹³⁶ Duane was vindicated, and the Federalists were embarrassed, when he offered to produce the authentic letter.¹³⁷

The Alien and Sedition Acts and other Federalist transgressions were not the only aspects of the administration of John Adams that the Republicans attacked in the election campaign of 1800. Tench Coxe and other supporters of Jefferson emphasized that the monarchical tendencies of Adams also were 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 substantiation of a hired army, and of *rich armed townsmen and partymen*, under *the cloak of volunteers*, for the general constitutional militia."¹³⁸ Coxe devoted an entire section of the lengthy article to the topic of "[v]olunteers, liable to be passed through the Strainers of party, substituted for the constitutional Militia."¹³⁹ 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

¹³³ "Mentor," AURORA (Phila.), May 21, 1799, at 2. A lengthy account of the Federalist riot was printed in the *Aurora*, May 24, 1799, at 2.

¹³⁴ See AURORA (Phila.), May 27, 1799, at 2; AURORA (Phila.), June 29, 1799, at 2 (discussing the danger of a standing army to free press).

¹³⁵ See AURORA (Phila.), June 21, 1799, at 2.

¹³⁶ See AURORA (Phila.), June 24, 1799.

¹³⁷ See Tench Coxe, *To the Public*, AURORA (Phila.), Oct. 6, 1800, at 2.

¹³⁸ AURORA (Phila.), Sept. 6, 1800, at 2.

¹³⁹ *Id.*

number of Volunteer Corps.”¹⁴⁰ The subsequent Act of March 1799 limited the number of authorized volunteers to 75,000; still too large a number for Coxe.¹⁴¹

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, accouterments, and cannon could be applied at the discretion of the Executive, to the equipment of those Volunteer Corps.”¹⁴² Thus, the constitutional militia of all the armed people would be superseded 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.¹⁴³

Coxe enunciated similar sentiments in further articles,¹⁴⁴ and in a major series sought to demonstrate the alleged support of John Adams for a hereditary president.¹⁴⁵ While Coxe’s analysis correctly stated the American preference for an

¹⁴⁰ *Id.*

¹⁴¹ *See id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *See, e.g.,* Coxe et al., *To the Republican Citizens of the State of Pennsylvania*, AURORA (Phila.), Sept. 27, 1800, at 2 (“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.”); Tench Coxe, *Address to the Citizens of the County of Lancaster*, AURORA (Phila.), Sept. 18, 1800, at 3 (warning against the dangers of an army and a monarchy).

Coxe could have been the author, or at least agreed with the sentiments of an article signed “FACT” and entitled *The Touchstone, No. II*, AURORA (Phila.), 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 mean of defence, 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 the French.

Id. The same author continued to report 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.” *Id.* In other nations, mercenaries conjoin “the people (when unarmed and undisciplined) to kick the Beam.” *Id.* In other words, mercenaries have an advantage over unarmed citizens. The purse, the executive, and the sword “require a well regulated militia to counterbalance and check them.” *Id.* *See also* Tench Coxe, *Address to the Citizens of the County of Lancaster*, AURORA (Phila.), Sept. 18, 1800, at 3 (echoing these arguments).

¹⁴⁵ *See* “A Constitutionalist” (Tench Coxe), *The Friends of the Constitution to the People*

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.¹⁴⁶

III. ARMING THE MILITIA: COXE IN THE JEFFERSON AND MADISON ADMINISTRATIONS

Coxe had first met Thomas Jefferson in 1790, when introduced by Benjamin Rush.¹⁴⁷ Thereafter, Coxe served as an unofficial economic advisor to Jefferson, and helped the secretary of state prepare reports to Congress about America's international commerce.¹⁴⁸ Having written so assiduously on behalf of Jefferson in the 1800 election, Coxe began angling for a position in the Jefferson administration.¹⁴⁹ But Coxe did not succeed until 1803, when President Jefferson—at the recommendation of Secretary of Treasury Albert Gallatin, himself a former arms manufacturer¹⁵⁰—appointed Coxe as purveyor of public supplies.¹⁵¹

of the United States, Nos. 1-7, AURORA (Phila.), Sept. 19, 21, 22, 24, 25, 29, 30, 1800.

¹⁴⁶ Coxe failed to address Adams's defense of the right to have and use arms for resistance to oppression and for individual self-defense. Compare Tench Coxe, *The Friends of the Constitution to the People of the United States*, AURORA (Phila.), Sept. 21, 1800, at 2, with 3 JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA 471-75 (Boston, Freeman 1983) (1787-1788). In *A 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; 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. See *id.*

¹⁴⁷ See COOKE, *supra* note 4, at 158. Coxe met Rush through their mutual work in the Pennsylvania anti-slavery society. See *id.* at 92-93.

¹⁴⁸ See HUTCHESON, *supra* note 3, at 28-29.

¹⁴⁹ While Jefferson was at first inclined to give Coxe a job, the presumptuous tone of Coxe's office-seeking letters alienated Jefferson. See *id.* at 392-99. Although the two men resumed a professional relationship when Coxe joined the Jefferson administration, the relationship remained cool. See *id.* at 458.

¹⁵⁰ See HENRY J. KAUFFMAN, THE PENNSYLVANIA-KENTUCKY RIFLE 82 (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.” Letter from Albert Gallatin to Alexander Addison (Oct. 7, 1789) (on file with the New York Historical Society), quoted in HALBROOK, *supra* note 95, at 225 n.169.

¹⁵¹ Coxe's appointment was ironic. As Alexander Hamilton's Commissioner of Revenue,

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 1812.¹⁵²

Aside from political considerations of gratitude for Coxe's work in opposition to 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.¹⁵³ Halving the size of the standing army and arming the militias were important objectives of the Jefferson administration.¹⁵⁴

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 nearly had 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 threat¹⁵⁵—a threat that materialized in 1812.¹⁵⁶

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 support strongly 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. *See COOKE, supra* note 4, 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 grandfather); although Francis had built a distinguished record of public service, *see supra* notes 27-28 and accompanying text, he was past his prime, and unable to organize the purveyor's office efficiently. *See COOKE, supra* note 4, at 413.

¹⁵² *See COOKE, supra* note 4, at 404-87.

¹⁵³ *See id.* at 405.

¹⁵⁴ *See id.* at 415.

¹⁵⁵ *See id.* at 413-31.

¹⁵⁶ President Madison was just as ardent as his predecessor in wanting an armed militia. In Madison's First Inaugural Address, he 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." James Madison, First Inaugural Address (Mar. 4, 1809), in JAMES MADISON, 1751-1836, at 37 (Ian Elliot ed., 1969). In his Second Annual Message to Congress, Madison 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.

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

The arming of the militia was the subject of an opinion Coxe included in a letter written to President Jefferson in January 1807.¹⁵⁷ Coxe began by reviewing the militarization of Europe which stemmed from the struggle by hierarchies and aristocracies against revolutionary, late Napoleonic, France.¹⁵⁸ The republican principles that threatened European powers originated in America:

In the long course of stupendous events from the time of the meeting of the *notables* in 1788¹⁵⁹ 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 victors.¹⁶⁰

It was "an immense collection of powerful military despotisms, covering the face of the transatlantic world" that threatened the infant states in America.¹⁶¹ 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 believed 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.¹⁶²

James Madison, Second Annual Message to Congress (Dec. 5, 1810), in JAMES MADISON, 1751-1836, *supra*, at 56.

¹⁵⁷ See Letter from Tench Coxe to Thomas Jefferson (Jan. 1807), *reprinted in* JEFFERSON PAPERS (on file in the Library of Congress).

¹⁵⁸ See *id.*

¹⁵⁹ The Assembly of the Notables in Paris in May 1788 was one of the failed efforts at reform that led to the French Revolution.

¹⁶⁰ Letter from Tench Coxe to Thomas Jefferson (Jan. 1807), *reprinted in* JEFFERSON PAPERS, *supra* note 157, at 2-3.

¹⁶¹ *Id.* at 3.

¹⁶² *Id.* at 4.

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.”¹⁶³ 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.¹⁶⁴

Jefferson thanked Coxe for his useful ideas: “Your idea of providing as many arms as we have fighting men is undoubtedly a sound one.”¹⁶⁵ It was a matter that should be impressed upon the Congress, which moved slowly, Jefferson thought.

[Only] the session before last I proposed to them . . . that every man should receive a stand of arms¹⁶⁶ 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 arsenals¹⁶⁷

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.”¹⁶⁸ In any event, the European governments were too busy fighting each other to invade republican America.¹⁶⁹

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.¹⁷⁰ A primary objection to a large fleet was that impressment might be resorted to:

¹⁶³ *Id.* at 5.

¹⁶⁴ *Id.* at 6.

¹⁶⁵ Letter from Thomas Jefferson to Tench Coxe (Mar. 17, 1807), in JEFFERSON PAPERS, *supra* note 157.

¹⁶⁶ “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 (New York, S. Converse 9th ed. 1996) (1828).

¹⁶⁷ Letter from Thomas Jefferson to Tench Coxe (Mar. 17, 1807), in JEFFERSON PAPERS, *supra* note 157.

¹⁶⁸ *Id.*

¹⁶⁹ *See id.*

¹⁷⁰ *See* TENCH COXE, THOUGHTS ON THE SUBJECT OF NAVAL POWER IN THE UNITED STATES OF AMERICA: AND ON CERTAIN MEANS OF ENCOURAGING AND PROTECTING THEIR COMMERCE AND MANUFACTURE (Phila. 1806).

Will the seamen of the United States 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, *[w]hether a standing naval establishment is not liable to a large proportion of the objections to a standing army . . .*¹⁷¹

The second part of the same work stressed the superiority of the armed people over standing establishments for defense consistent with freedom.¹⁷² 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.¹⁷³

Here Coxe sounded a theme that already had been stated strongly in the Pennsylvania Constitution¹⁷⁴ by Pennsylvania Patriots during the Revolution,¹⁷⁵ and in the minority report from the Pennsylvania ratifying convention:¹⁷⁶ 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.”¹⁷⁷ Coxe would develop the issue at much greater length later in his career, in his critiques of the British and French game laws.¹⁷⁸

¹⁷¹ *Id.* at 6.

¹⁷² *See id.*

¹⁷³ TENCH COXE, THOUGHTS ON THE SUBJECT OF NAVAL POWER IN THE UNITED STATES OF AMERICA: AND ON CERTAIN MEANS OF ENCOURAGING AND PROTECTING THEIR COMMERCE AND MANUFACTURE NO. II, at 1 (Phila. 1807). This also was published under pen-name “Pacificus” in the *Philadelphia Democratic Press* on May 29, 1807.

¹⁷⁴ *See supra* notes 34-36 and accompanying text.

¹⁷⁵ *See supra* notes 41-43 and accompanying text.

¹⁷⁶ *See supra* notes 79-80 and accompanying text.

¹⁷⁷ COXE, *supra* note 173, at 1.

¹⁷⁸ *See infra* notes 273-77, 284-95 and accompanying text.

Not only would the 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.¹⁷⁹

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."¹⁸⁰

B. *Coxe's Role in Arming the Militias*

In 1807 and 1808, Congress finally passed legislation to arm the militia, providing an annual 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."¹⁸¹ The arms were to be transmitted to the states for distribution to

¹⁷⁹ COXE, *supra* note 173, at 2. Nos. III-VI were printed in the Philadelphia *Democratic Press* on June 1, 3, 5, 8, 1807.

By the time of his 1807 articles on naval power, Coxe found, in a new periodical, an agreeable philosophical stance that 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.

John Binns, *To the Public*, DEMOCRATIC PRESS (Phila.), Mar. 30, 1807, at 1. See also *Defence of the Seaports*, DEMOCRATIC PRESS (Phila.), Apr. 3, 1807, at 3 (supporting the "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*, DEMOCRATIC PRESS (Phila.), June 8, 1807, at 2 (advocating that 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," DEMOCRATIC PRESS (Phila.), May 25, 1807, at 2 (describing boys hunting in New York, and a half-cocked firearm discharging, killing a fourteen-year-old boy).

¹⁸⁰ Letter from Thomas Jefferson to Tench Coxe (Sept. 21, 1807), in JEFFERSON PAPERS, *supra* note 157.

¹⁸¹ Act of Apr. 23, 1808, 2 Stat. 490 (1808).

their militias.¹⁸² The federal armories in Springfield, Massachusetts, and Harper's Ferry, Virginia were not capable of meeting the production demands of Congress.¹⁸³ In administering the program, Coxe contracted with and made monetary advances to private arms manufacturers.¹⁸⁴ This system of government patronage greatly advanced the development of small arms making from a handicraft to a modern industry, in part by promoting the development of interchangeable parts.¹⁸⁵

Today, critics of the Standard Model individual rights view of the Second Amendment sometimes point to government efforts to arm the militia, and argue that, because the government supplied some militia forces with arms, the right to keep and bear arms must not be a right of individuals.¹⁸⁶ 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 principle would still be true even if the government ordered the people to read certain books considered essential to public service.¹⁸⁷

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.¹⁸⁸ "Private arms" were firearms (or

¹⁸² See *id.*; Act of Feb. 24, 1807, 2 Stat. 419 (1807).

¹⁸³ See COOKE, *supra* note 4, at 430.

¹⁸⁴ See *id.*

¹⁸⁵ See FELICIA DEYRUP, ARMS MAKERS OF THE CONNECTICUT VALLEY 33-46 (Vera Brown Holmes & Hans Kohn eds., 1948); S. N. D. NORTH & RALPH NORTH, SIMEON NORTH: FIRST OFFICIAL PISTOL MAKER OF THE UNITED STATES 73-77 (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 JAMES E. HICKS, NOTES ON UNITED STATES ORDNANCE 29-39 (1940).

¹⁸⁶ See, e.g., Michael Bellesiles, *The Origins of Gun Culture in the United States, 1760-1865*, 83 J. AM. HIST. 425, 428-34, 454 (1996) (arguing that Madison formulated the Amendment as a political response to anti-federalists and attempted to deliver on his promise of a state-controlled militia supported by the federal government).

¹⁸⁷ For example, Americans today are required to read the IRS Form 1040 and associated documents, or to pay someone else to read it for them.

¹⁸⁸ While the proposed United States Constitution was 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 that the

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, which contained an inventory of the supply of arms (of all types) available for militia use.¹⁸⁹ The editor of the *Democratic Press* described the Return in these words:

Our stock of Public Arms are respectable but it is still 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 Character¹⁹⁰

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.”¹⁹¹ Public arms certainly could 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 to supply the militia fully might exceed the number of private arms brought to militia service. The donation of public arms, however, hardly negated the right to keep and bear “private arms.”

For 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.¹⁹² To defeat a standing army, a populace must be well armed:

Pennsylvania government might be attempting to prevent resistance to that government. See THE ORIGIN OF THE SECOND AMENDMENT, *supra* note 13, at 176, 191, 194, 200-01, 221, 226, 251, 286, 298, 334, 340 (reprinting letters and newspaper articles relating to the controversy from December 1787 to April 1788). For another discussion of public arms belonging to the government, see Minutes of the Executive Council of Georgia (May 28, 1784), *reprinted in* 2 THE REVOLUTIONARY RECORDS OF THE STATE OF GEORGIA 655 (Allen D. Candler ed., 1908) (ordering a private contractor to be paid for cleaning firearms, because, “the public arms, belonging to this State are much neglected, and, at present, in very bad order and condition”).

¹⁸⁹ See DEMOCRATIC PRESS (Phila.), Mar. 8, 1823, at 2.

¹⁹⁰ *Id.*

¹⁹¹ “A Pennsylvanian” (Tench Coxe), *Remarks on the First Part of the Amendments to the Federal Constitution*, FED. GAZETTE (Phila.), June 18, 1789, *reprinted in* THE ORIGIN OF THE SECOND AMENDMENT, *supra* note 13, at 670-72.

¹⁹² See HICKS, *supra* note 185, at 27-29.

*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.*¹⁹³

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.¹⁹⁴

Coxe proposed the sale of 10,000 muskets, rifles, pistols, and swords.¹⁹⁵ The Jeffersonian promotion of the firearms industry represented a return to the values of the Revolution, according to Coxe:

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.¹⁹⁶

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."¹⁹⁷ In his correspondence with manufacturers and inspectors, Coxe demonstrated great technical expertise in

¹⁹³ Letter from Tench Coxe to William Eustis (Nov. 28, 1809), *reprinted in* HICKS, *supra* note 185, at 27.

¹⁹⁴ *Id.*

¹⁹⁵ Letter from Tench Coxe to William Eustis (Mar. 3, 1810), *reprinted in* HICKS, *supra* note 185, at 28.

¹⁹⁶ Letter from Tench Coxe to William Eustis (Nov. 10, 1810), *reprinted in* HICKS, *supra* note 185, at 29. *But see* John Adams, Speech to Both Houses of Congress (Nov. 22, 1800), *in* 9 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 146 (Boston, Little, Brown & Co., Charles Francis Adams ed., 1854) (supporting the domestic manufacture of arms); COXE, *supra* note 116, at 120 (claiming that the American arms industry was healthy during the Washington administration).

¹⁹⁷ Tench Coxe, PURVEYOR'S OFFICE CIRCULAR, Dec. 9, 1808, *quoted in* AURORA (Phila.), Jan. 14, 1811, at 2.

the design and manufacture of muskets, rifles, pistols, and swords.¹⁹⁸ 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 of the militia and the rapidly expanding standing army as tensions with Great Britain increased. Despite working seven days and nights a week, he still had to bring in his adult sons as unpaid assistants.¹⁹⁹ In 1810, Coxe fired the inspector in charge of quality control for the arms being acquired.²⁰⁰ In a series of articles published in early 1811, Coxe's former Pennsylvania political associate, William Duane, charged that Purveyor Coxe had accepted large quantities of inferior firearms.²⁰¹ In his 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 should be put, than an enemy."²⁰² Coxe rejoined in the same issue, flatly denying the charges and noting that all arms were inspected prior to payment.²⁰³ Besides, the purveyor was not an inspector:

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 arms²⁰⁴

¹⁹⁸ See HICKS, *supra* note 185, at 17-39, 49-57, 88-106, 142.

¹⁹⁹ See COOKE, *supra* note 4, 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.

²⁰⁰ *See id.*

²⁰¹ *See id.* at 473. Duane and Coxe, having once been allies, had become bitter enemies as a result of a factional dispute in the Pennsylvania Republican party in 1804. *See id.* at 346-47. Duane's 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 (Phila., William Duane 1807) (proposing amendments to the Pennsylvania Constitution to ensure that militia officers would be chosen by militiamen); WILLIAM DUANE, *POLITICS FOR AMERICAN FARMERS* 8-10 (Phila., R.C. Weightman 1807) (condemning a large navy, and praising Coxe's essay on the subject).

²⁰² AURORA (Phila.), Jan. 14, 1811, at 2.

²⁰³ *See id.*

²⁰⁴ *Id.*

In subsequent installments, Duane relied on averments of the former inspector who was discharged for incompetence. Duane claimed that some rifle barrels lacked grooves (rifling), had grooves only six inches down the barrel, or had grooves that were too shallow.²⁰⁵ Some were made with unfit Dutch locks (firing systems), or had stocks filled with glue and sawdust.²⁰⁶ 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."²⁰⁷ Duane did not provide any further details.²⁰⁸

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."²⁰⁹ The muskets, rifles, and pistols in question were the equivalent of any manufactured in this country. Coxe stated that, thanks to the federal procurement program, the number of private armorers had increased ten-fold in just a few years.²¹⁰ Now, "[t]he rifle and pistol makers were constantly sending in arms," much to the purveyor's dismay.²¹¹ Coxe urged the appointment of a rifle inspector, "as there is not a pattern rifle, to govern the workmen as in the case of the pistol."²¹²

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."²¹³ Coxe's knowledge of firearms was from the perspective of a merchant, not an inspector, but he defended his discharge of the unqualified inspector.²¹⁴ The purveyor denied "the passing of *one* bad stand of arms or pair of pistols, by him."²¹⁵

In Coxe's third article, he answered the charge that the American muskets were adopted "to kill American soldiers" with the fact that not a single musket had been proven bad.²¹⁶ Further, "the present inspector in this department has given a recent opinion in favor of the American muskets."²¹⁷

²⁰⁵ See AURORA (Phila.), Jan. 16, 1811, at 2.

²⁰⁶ See *id.*

²⁰⁷ AURORA (Phila.), Jan. 18, 1811, at 2.

²⁰⁸ The fourth and final number is in AURORA (Phila.), Jan. 19, 1811, at 2. While some of his charges appeared to have been based on rumor, Duane's expertise on the subject of firearms is clear. See WILLIAM DUANE, A MILITARY DICTIONARY (Phila., William Duane 1810); WILLIAM DUANE, THE AMERICAN MILITARY LIBRARY (Phila., William Duane 1809).

²⁰⁹ Tench Coxe, *To the Public*, DEMOCRATIC PRESS (Phila.), Jan. 19, 1811, at 2.

²¹⁰ See *id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ Tench Coxe, *To the Public*, DEMOCRATIC PRESS (Phila.), Jan. 21, 1811, at 2.

²¹⁴ See *id.*

²¹⁵ *Id.*

²¹⁶ See Tench Coxe, *To the Public*, DEMOCRATIC PRESS (Phila.), Jan. 31, 1811.

²¹⁷ *Id.*

The fourth and final article of the series is filled with details about American pistol and rifle manufacture during that epoch.²¹⁸ The purveyor had encountered numerous problems in implementing the standardization of firearms among manufacturers.²¹⁹ In that article, Coxe listed some of the firearms makers from whom he had procured weapons;²²⁰ most of whom were prominent manufacturers who produced both for state militia contracts and for the private market.²²¹ While defending his record, Coxe admitted the need for both technological and inspection improvements.²²²

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 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.

Tench Coxe, *To the Public*, DEMOCRATIC PRESS (Phila.), Feb. 2, 1811, at 2.

²¹⁸ See *id.*

²¹⁹ See *id.*

²²⁰ See *id.* He received: (1) "200 pistol barrels" by Joseph Henry; (2) "The pair of pistols from Mr. Shuler, near Quaker Town with *German* locks, said to be improved here"; (3) "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"; and (4) the Indian rifles of J. Guest and Dickert" In addition, he noted: "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 . . ."; and "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." See *id.*

²²¹ See NORM FLAYDERMAN, *GUIDE TO ANTIQUE AMERICAN FIREARMS AND THEIR VALUES* (2d ed. 1980). Joseph Henry Contract Type Flintlock Pistols were made in Philadelphia from 1807-1808 as contract pistols and for private sale. See *id.* at 298-99. The John Shuler Contract Flintlock Pistol was made in Liverpool, Pennsylvania during the same period. See *id.* at 301. Henry DeHuff, Abraham Henry, Peter Brong, and Jacob Dickert, all of Lancaster, sold muskets to the Commonwealth of Pennsylvania under a 1797 legislative act. See *id.* at 423-24. John Miles of Bordertown, N.J., and James Winner, Abraham Nippes, and John Steinman of Philadelphia produced the Model 1808 musket. See *id.* at 429. Miles also made various pistols in 58-64 caliber range in Philadelphia. See *id.* at 300. At times, John Guest of Lancaster made pistols using Sweitzer locks. See *id.* at 297, 301. For further information on DeHuff, A. Henry, Shuler, and J. Henry, see SAMUEL E. DYKE, *THOUGHTS ON THE AMERICAN FLINTLOCK PISTOL* 8, 20, 24 (1974). 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. See *id.* at 7.

²²² See DEMOCRATIC PRESS (Phila.), Feb. 2, 1811, at 2.

It will be admitted by those who are acquainted with arms, that the manufacture

Months passed without further public controversy, but at the end of 1811, Duane renewed "The Military Establishment" series.²²³ Duane insinuated that in America there were those who placed "a military force before its enemy with saw dust cartridges or balls too large for the calibre, or with *rifles without touchholes*,²²⁴ 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."²²⁵

Coxe retorted in early 1812 with a broadside *To the Public*, which was distributed in Congress.²²⁶ Coxe defended the particulars of the situation,²²⁷ and then

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.

Id.

²²³ See AURORA (Phila.), Dec. 21, 1811, at 2.

²²⁴ A "touch hole . . . in early guns, before invention of the various lock or firing systems, [was] 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 (1970).

²²⁵ AURORA (Phila.), Dec. 21, 1811, at 2. Duane also made charges about supposedly inadequate uniforms purchased, and the rejection of a quantity of swords manufactured by a Richmond workman named Winner. See *id.* In the December 23, 1811 issue of the *Aurora*, Duane claimed that the purveyor discouraged American arms manufacture, resulting in the best workmen removing themselves to South America. See AURORA (Phila.), Dec. 23, 1811, at 2. 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." *Id.*

²²⁶ See Tench Coxe, *To the Public*, Jan. 4, 1812, in PAPERS OF TENCH COXE, *supra* note 7, Reel 32, at 246-47.

²²⁷ See *id.* As to the swords, the purveyor "justly doubts the fitness of American steel," but in any case the swords were rejected by the inspector. *Id.* 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. *Id.* 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

Duane fired back.²²⁸ Although Coxe responded,²²⁹ 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.²³⁰

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."²³¹ The outbreak of the War of 1812 in June of that year, however, occasioned a military reorganization, giving Coxe's congressional opponents the opportunity to eliminate the office of purveyor of public supplies by replacing it with a quartermaster's department.²³²

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

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 in Philadelphia.²³³ Coxe eventually left this position for the larger salary of clerk of the Court of General Quarter Sessions for Philadelphia, a post he held until his retirement in 1818.²³⁴ 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.²³⁵

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.²³⁶ Under the topic "Defence," Coxe noted

Id.

²²⁸ See AURORA (Phila.), Jan. 14, 17, 18, 1812, at 1. Duane concentrated on buttons received by the purveyor which supposedly were unfit. See *id.*

²²⁹ See Tench Coxe, *To the Public*, DEMOCRATIC PRESS (Phila.), Jan. 18, 1812, at 2. Coxe once again appealed "[t]o the [p]ublic," reiterating that the arms mentioned by Duane had passed inspection by two government officers. See *id.* 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." *Id.*

²³⁰ See COOKE, *supra* note 4, at 470-75.

²³¹ Tench Coxe, *Broadside*, Jan. 27, 1812, in PAPERS OF TENCH COXE, *supra* note 7, Reel 32, at 248.

²³² See COOKE, *supra* note 4, at 475-79.

²³³ See *id.* at 486.

²³⁴ See *id.* at 487.

²³⁵ See *id.* at 497-98.

²³⁶ See TENCH COXE, *Digest of Manufactures*, reprinted in 2 AMERICAN STATE PAPERS (FINANCE) 666, 675-76 (Wash., Gales & Seaton 1832).

federal efforts both to restrain the export of arms²³⁷ and to encourage their domestic manufacture.²³⁸ In addition to the establishment of state and federal armories, contracts with monetary advances assisted the private manufacture of cannon, firearms, and swords.²³⁹ 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.”²⁴⁰ The tremendous progress in firearms and other military manufacture seemed to Coxe to be the greatest success story of American industry since 1775.²⁴¹

In another part of the *Statement*, Coxe analyzed technological developments in the manufacture of cannon and muskets:²⁴² “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.”²⁴³ That cannon were marketed to the citizens is an interesting revelation given Coxe’s prediction in 1787 that the armed populace would be more powerful than a standing army.²⁴⁴ 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.”²⁴⁵ 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 illustrated, indirectly, the wisdom of the Second Amendment’s protection of the possession of private arms as one means of arming the militia: A citizen buying a single firearm for his own use may be more likely to inspect the firearm in detail, and less likely to accept a poor quality firearm than a federal government inspector charged with inspecting hundreds of firearms. After all, the

²³⁷ See *id.* at 675.

²³⁸ See *id.*

²³⁹ See *id.*

²⁴⁰ *Id.* at 676.

²⁴¹ See *id.*

²⁴² See *id.* at 687.

²⁴³ *Id.*

²⁴⁴ See *supra* notes 68-72 and accompanying text. Whether cannon or other light artillery are within the scope of the “arms” whose private possession the Second Amendment protects is beyond the scope of this article. The published scholarship that examines the issue concludes that the Amendment, while protecting all (or almost all) types of firearms, does not protect artillery. See Halbrook, *What the Framers Intended*, *supra* note 9; Kates, *supra* note 9, at 258-61; Don B. Kates, Jr., *The Second Amendment: A Dialogue*, 49 L. & CONTEMP. PROBS. 148 (1986); Nelson Lund, *The Past and Future of the Individual’s Right to Arms*, 31 GA. L. REV. 1, 41-46 (1996). Cannon were not regulated until 1968, and individuals now may possess them legally if registered with the federal government. See Gun Control Act of 1968, P.L. 90-618, Title II, 82 Stat. 1213, 1227 (1968).

²⁴⁵ COXE, *supra* note 236, at 687.

inspector would not be using the firearms to defend his own life. The quality control advantage of citizens obtaining private arms individually may have outweighed the standardization advantages of mass procurement of public arms.²⁴⁶

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.²⁴⁷ Jefferson, who had found Coxe's self-promotion to be offensively blunt while he was President, 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.*'"²⁴⁸ Coxe also continued to write prolifically for public consumption, often on matters involving the right to bear arms.²⁴⁹ During his retirement years,

²⁴⁶ Of course, some citizens might not have paid attention to the quality of their firearm, and others might not have known 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.

²⁴⁷ Madison and Coxe corresponded about the American economy and politics; Madison also wrote to President Monroe urging an appointment for Coxe's son. See Letter from James Madison to Tench Coxe (Feb. 12, 1819), *reprinted in* 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON, 1816-1828, at 116 (Phila., R. Worthington 1865) [hereinafter WRITINGS OF MADISON]; Letter from James Madison to Tench Coxe (Mar. 20, 1820), *reprinted in* WRITINGS OF MADISON, *supra*, at 170; Letter from James Madison to Tench Coxe (Nov. 4, 1820), *reprinted in* WRITINGS OF MADISON, *supra*, at 184; Letter from James Madison to Tench Coxe (Feb. 21, 1823), *reprinted in* WRITINGS OF MADISON, *supra*, 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."); Letter from James Madison to Tench Coxe (Mar. 1, 1823), *reprinted in* WRITINGS OF MADISON, *supra*, 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.

Id.; Letter from James Madison to Tench Coxe (Oct. 12, 1823), *reprinted in* WRITINGS OF MADISON, *supra*, at 337; Letter of James Madison to Tench Coxe (Nov. 3, 1823), *reprinted in* WRITINGS OF MADISON, *supra*, at 341.

²⁴⁸ COOKE, *supra* note 4, at 521 (quoting Letter from Thomas Jefferson 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).

²⁴⁹ See COOKE, *supra* note 43, at 488-508.

Coxe was energized particularly by his opposition to the presidential ambitions of John Quincy Adams and by Adams's support of restrictive European laws regarding gun ownership for hunting.²⁵⁰ Coxe argued in detail that Adams's position undermined the entire right to keep and bear arms, and thereby threatened republican government.²⁵¹

Coxe's first retirement writing about firearms was *Considerations Respecting the Helots*²⁵² of the *United States, African and Indian*, under the pen-name "A Democratic Federalist."²⁵³ In the first installment, Coxe noted that Pennsylvania excluded free Blacks from "the right to enter militia and to partake of public arms," and that the states "deny them the use of the public arms."²⁵⁴ In contrast with the term "private arms," which Coxe used in discussing the Second Amendment when it was proposed in 1789,²⁵⁵ "public arms" meant arms supplied by and returnable to the state, such as the arms that Coxe had provided as purveyor of public supplies. In 1820, Pennsylvania did not prohibit free blacks from having private arms for personal use, but did prohibit them from using public arms which were issued to some members of the militia. While all free whites were militia members, public arms likely were issued either to those who could not afford them, or to groups that trained together and wished to have arms with a common bore.²⁵⁶

In some states, free Blacks were entitled only to private arms, while in others—particularly in the South where the rights of free Blacks gradually were constricted during the antebellum years—to neither private nor public arms.²⁵⁷ In the eighth installment of the series on the "Helots," 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."²⁵⁸

²⁵⁰ See *infra* notes 266-72.

²⁵¹ See *infra* notes 273-81, 284-97.

²⁵² A "helot" was "[a] member of a class of serfs in ancient Sparta, intermediate in status between slaves and citizens." 1 THE NEW SHORTER OXFORD ENGLISH DICTIONARY 1216 (3d ed. 1993).

²⁵³ "A Democratic Federalist" (Tench Coxe), *Considerations Respecting the Helots of the United States, African and Indian*, DEMOCRATIC PRESS (Phila.), Nov. 25, 1820, at 2.

²⁵⁴ *Id.*

²⁵⁵ See *supra* notes 103-04 and accompanying text.

²⁵⁶ See Letters from Tench Coxe, in HICKS, *supra* note 192, at 28, 31 (1940) (discussing the common bore and "public arms"). Firearms at that time were manufactured with many bore sizes and, consequently, bullets often were not interchangeable, a situation Coxe had sought to alleviate as purveyor of public supplies in respect to the public arms he obtained. See *id.*

²⁵⁷ See Clayton E. Cramer, *The Racist Roots of Gun Control*, 4 KAN J.L. & PUB. POL'Y 17 (1995).

²⁵⁸ DEMOCRATIC PRESS (Phila.), Dec. 25, 1820, at 2.

Abolitionist Coxe was quite accurate in recognizing the fears of opponents of civil rights for Blacks. In the *Dred Scott* case,²⁵⁹ Chief Justice Taney insisted in the majority opinion that free Blacks could not be citizens because, if they were, they would have “the full liberty of speech in public and in private upon all subjects which [a state’s] own citizens might speak; to hold public meetings upon political affairs, and to keep and carry arms wherever they went.”²⁶⁰

Coxe’s last writings on the subject of the armed populace were his most extensive. Penned in opposition to John Quincy Adams’s bid for election as president, Coxe’s final testament revived a 1791 debate between John Quincy Adams and Thomas Paine.²⁶¹ 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 dissolution of the monarchy in France in 1789 was centuries of weapons prohibitions.²⁶² In the 1791 bestseller, *The Rights of Man*,²⁶³ which appeared when state legislatures still were debating the Bill of Rights 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 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.²⁶⁴

²⁵⁹ *Scott v. Sanford*, 60 U.S. (19 How.) 393 (1856), *overruled by* U.S. CONST. amend. XIV.

²⁶⁰ *Id.* at 417.

²⁶¹ See COOKE, *supra* note 4, at 516-17.

²⁶² See LEE KENNETT & JAMES LA VERNE ANDERSON, *THE GUN IN AMERICA: THE ORIGINS OF A NATIONAL DILEMMA* 11-16 (1973) (summarizing legislation in France from 1500-1789 that disarmed commoners).

²⁶³ THOMAS PAINE, *THE RIGHTS OF MAN* (J.M. Dent & Sons, Ltd. 1958) (1791).

²⁶⁴ *Id.* at 27-28.

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 new French republic's abolition of the game laws 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 a 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?²⁶⁵

John Quincy Adams attacked Paine's work in his anonymous *Letters of Publicola*, which defended the Constitution of England, including that nation's right "to establish a Government in *hereditary succession*"²⁶⁶ and Parliament's right to enact game laws.²⁶⁷ Adams severely castigated Paine's defense of the French Constitution, which placed beyond legislative control "universal freedom of the chase."²⁶⁸ The letters originally were thought to have been penned by John Adams, who had defended the British Constitution in his *Defence of the Constitutions*²⁶⁹ and *Discourses on Davila*,²⁷⁰ the latter of which attacked the French Revolution.²⁷¹

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."²⁷² Tench Coxe cited all of the above writings of the Adams and others as reflective of dangerous monarchical tendencies, which John Quincy Adams would represent if elected president. Under the pen-name "Sidney," Coxe also wrote an 1823 series entitled *To the Friends of the Principles of the Constitution of the United States* in the *Philadelphia Democratic Press*.²⁷³ In

²⁶⁵ *Id.* at 52.

²⁶⁶ "Publicola" (John Quincy Adams), *Letters of Publicola II*, reprinted in 1 WRITINGS OF JOHN QUINCY ADAMS 70 (W.C. Ford ed., 1913).

²⁶⁷ See *id.* 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 United States to side with France.

²⁶⁸ *Id.* at 99-100, 109.

²⁶⁹ JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA (Boston, Freeman 1983) (1787).

²⁷⁰ JOHN ADAMS, DISCOURSES ON DAVILA: A SERIES OF PAPERS, ON POLITICAL HISTORY (Boston, Russell & Cutler 1805).

²⁷¹ See *id.*

²⁷² See John Quincy Adams, *To the Freeholders of Washington, Wythe, Grayson, Russell, Tuzewell, Lee and Scott Counties, Virginia*, RICHMOND ENQUIRER, Jan. 4, 1823, reprinted in 7 WRITINGS OF JOHN QUINCY ADAMS 337-38 (W.C. Ford ed., 1917).

²⁷³ DEMOCRATIC PRESS (Phila.), Jan. 16, 1823, at 2.

this series, Coxe criticized monarchical sympathizers in America, with particular reference to John Quincy Adams, including Adams's views about the deprivation of arms in France and England.²⁷⁴

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.²⁷⁵

Coxe noted that Thomas Paine, in *The Rights of Man*, 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."²⁷⁶ 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."²⁷⁷

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."²⁷⁸ Like the British dictator Oliver 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"²⁷⁹

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*.²⁸⁰

²⁷⁴ See *id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ DEMOCRATIC PRESS (Phila.), Jan. 23, 1823, at 2.

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.²⁸¹

British impressment of sailors, which to Coxe was "personal, though not hereditary, slavery," was the subject of Coxe's following article:²⁸² "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.²⁸³

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."²⁸⁴ Again, the thrust of the article was the manner in which the game laws disarmed the commoners in England and France.²⁸⁵ 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 man²⁸⁶

²⁸¹ *Id.*

²⁸² DEMOCRATIC PRESS (Phila.), Jan. 28, 1823, at 2.

²⁸³ *Id.*

²⁸⁴ See "Sherman" (Tench Coxe), Manuscript for "To the People of the United States," in PAPERS OF TENCH COXE, *supra* note 7, Reel 113, at 713. The article was No. IX of a series with this title apparently published in the *Democratic Press* or in the *Philadelphia Centinel* and *Mercantile Advertiser* in 1823 or, possibly, 1824. The authors could not locate the issue in which the article appeared. (The pen-name "Sherman" appears in the *Democratic Press*, Dec. 24, 1823.)

²⁸⁵ See *id.*

²⁸⁶ *Id.* at 715. Coxe was not entirely accurate here. The 1789 *Declaration of the Rights of Man and of the Citizen* said nothing about hunting or the right to arms. See *Declaration of the Rights of Man and of the Citizen* (1789), reprinted in THE GREAT DOCUMENTS OF

Coxe then analyzed the impact of England's 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.²⁸⁷

Coxe's belief that the game laws of England had been used to disarm the English populace was shared widely in America; statements to that effect can be found in the three leading constitutional law treatises of the antebellum era.²⁸⁸ That view, while influential, was wrong. Most Englishmen could not hunt legally, but they could own guns legally for non-hunting purposes such as personal defense and target shooting.²⁸⁹

WESTERN CIVILIZATION 192 (Milton Viorst ed., 1965). The 1789 *Decree to Abolish the Feudal System* said nothing about the right to arms but did establish comprehensively 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 the safety of the public

All hunting *capitaineries* [preserves], including the royal forests, and all hunting rights under whatever 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 the dismissal of such cases as are now pending.

Decree to Abolish the Feudal System (1789), *reprinted in* THE GREAT DOCUMENTS OF WESTERN CIVILIZATION, *supra*, at 186-87.

²⁸⁷ PAPERS OF TENCH COXE, *supra* note 7, Reel 113, at 715.

²⁸⁸ See WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 125-26 (Da Capo Press 1970) (2d ed. 1829); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 747 (Da Capo Press 1970) (1833); 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 (The Lawbook Exchange, Ltd. 1996) (1803).

²⁸⁹ HALBROOK, *supra* note 97, at 51-53; JOYCE LEE MALCOLM, THE RIGHT TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT 126-30 (1994).

As Blackstone recognized, the game laws, which were meant to disarm the people, originated as part of a system of slavery.²⁹⁰ “The *Rustics* or people of the country were every where in Europe forbidden by the German and Gothic invaders to carry arms.”²⁹¹ So too, the ancient Britons, beset by successive conquerors, were “made and continued disarmed Serfs, Villeins or Slaves.”²⁹²

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.

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 preventing and forbidding the legislatures to interfere with and to abrogate, that all important right of the citizens.²⁹³

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.”²⁹⁴ Thus, Adams’s opposition to Paine on the issue of game laws was tantamount to opposing 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.²⁹⁵

²⁹⁰ See TUCKER, *supra* note 288, at 414 n.3.

²⁹¹ PAPERS OF TENCH COXE, *supra* note 7, Reel 113, at 716.

²⁹² *Id.*

²⁹³ *Id.* at 717. 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.

²⁹⁴ *Id.*

²⁹⁵ *Id.* at 718-19.

As had been his practice since the Constitution was debated in 1787, Coxe sent copies of the "Sidney" articles, and possibly the "Sherman" series, to Madison, and also to Jefferson with explanatory letters. 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."²⁹⁶ 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."²⁹⁷ In the fall of 1823, Coxe was still sending his articles to Jefferson and Madison.²⁹⁸

Tench Coxe died on July 16, 1824, a few months before John Quincy Adams was elected president.²⁹⁹ He predeceased his old friend, Thomas Jefferson, and his old foe, John Adams, by two years.³⁰⁰ While John Quincy Adams was wrong in his underestimation of the pernicious effect of the European game laws, Coxe was wrong in his estimation of Adams, whose 1825-1829 presidency was untouched by any trace of monarchy.

Coxe's retirement writings provide further detail about the scope of the individual right which Coxe first had elucidated four decades earlier. The right was, of course, personal, for "His own firearms are the second and better right hand of every freeman."³⁰¹ 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

²⁹⁶ Letter from Tench Coxe to Thomas Jefferson and James Madison (Jan. 31, 1823), reprinted in MADISON PAPERS, *supra* note 14, at 5-6. 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 since a total failure (by power, numbers, arms[,] and combination) *there*, will endanger us and our system, *in the two Americas*." Letter from Tench Coxe to Thomas Jefferson and James Madison (Feb. 1, 1823), reprinted in MADISON PAPERS, *supra* note 14, 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.

²⁹⁷ Letter from James Madison to Tench Coxe (Mar. 1, 1823) (available in JAMES MADISON PAPERS (on file in the Library of Congress)).

²⁹⁸ Letter from Tench Coxe to James Madison (Oct. 3, 1823) (available in JAMES MADISON PAPERS, *supra* note 297); Letter from James Madison to Tench Coxe (Oct. 12, Nov. 3, 1823) (available in JAMES MADISON PAPERS, *supra* note 297).

²⁹⁹ See COOKE, *supra* note 4, at 523.

³⁰⁰ Adams and Jefferson both died on July 4, 1826, exactly fifty years after the Declaration of Independence.

³⁰¹ See PAPERS OF TENCH COXE, *supra* note 7, Reel 113, at 716.

defense in the home, personal defense in public, defense against tyranny, hunting, and so forth. The attempt then is 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 possession for other purposes is outside the scope of the Second Amendment. At the most extreme, the argument is that the Second Amendment only protects the right to keep and bear arms for militia service, which is said to include only the National Guard.³⁰² Therefore, only a National Guardsman has a right to keep and bear arms and, even then, only when ordered to do so. In a less extreme version, the Second Amendment only addresses personal defense.³⁰³ Thus, 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."³⁰⁴ To be deprived of arms is, in the long run, to be deprived of a meaningful role in the governance of the republic. 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 made exactly this point, as did each of the three major American constitutional treatise writers of antebellum America: Joseph Story,³⁰⁵ William Rawle,³⁰⁶ and St. George Tucker.³⁰⁷ 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'

³⁰² See Ehrlman & Henigan, *supra* note 10, at 57 ("[T]here is no substantial historical evidence for the claim that the second amendment guarantees an individual right to have arms for any purpose other than participation in a state-regulated militia.").

³⁰³ Cf. *Patsone v. Pennsylvania*, 232 U.S. 138, 143 (1914) (upholding a law depriving aliens of guns for hunting because the law did not affect arms for self-defense).

³⁰⁴ "Sidney" (Tench Coxe), *To the Friends of the Principles of the Constitution*, DEMOCRATIC PRESS (Phila.), Jan. 23, 1823, at 2.

³⁰⁵ See STORY, *supra* note 288, at 747.

³⁰⁶ See RAWLE, *supra* note 288, at 125-26.

³⁰⁷ See TUCKER, *supra* note 288, at 414 n.3.

position. Arguing that the armed populace could always over-awe 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 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.³⁰⁸ While John Quincy Adams and his father might have been wrong for defending the European game laws, neither Adams ever 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 is recognized today 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.³⁰⁹

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 could be injured by disarmament laws, by over-reliance on standing armies, and by game laws that prevented individuals from 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 summarized aptly by Coxe's words written in retirement: "His own firearms are the second and better right hand of every freeman"³¹⁰

³⁰⁸ See *supra* note 146 and accompanying text. In 1823, the same year Coxe attacked the 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. See WILLIAM H. SUMNER, AN INQUIRY INTO THE IMPORTANCE OF THE MILITIA TO A FREE COMMONWEALTH; IN A LETTER FROM WILLIAM H. SUMNER TO JOHN ADAMS WITH HIS ANSWER 69-70 (Boston, Cummings & Hilliard 1823).

³⁰⁹ Coxe was, of course, not the equal of the men for whom he worked—Hamilton, Jefferson, and Madison; his conduct at the start of the Revolution, his personality flaws and his partisanship ensured, despite his writing ability and his energy, that he would be in the second rank of the Founders, not the first.

³¹⁰ See PAPERS OF TENCH COXE, *supra* note 7, Reel 113, at 716.