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“NECESSARY TO THE SECURITY OF A FREE STATE”

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INTRODUCTION

“A well regulated Militia, being necessary to the security of a free State,” the Second Amendment says, “the right of the people to keep and bear Arms, shall not be infringed.” But what did the Framing generation understand “free State” to mean?<sup>1</sup>

Some say it meant a “state of the union, free from federal oppression.” As one D.C. Circuit judge put it, “The Amendment was drafted in response

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Some of the old sources cited by this Article spell authors’ names in unusual ways. To make it easier for readers to find the sources in electronic databases, each citation uses the name from the work’s title page.

<sup>1</sup> My discussion here focuses on the “original public meaning” of the constitutional text—what it meant in the legal language of the era, and therefore how it was likely understood by those who ratified the provision in the state legislatures as well as those who voted for it in Congress and drafted it in Congress. I am not focusing on the original *intent* of particular drafters, which might not have been captured in the officially adopted text or known to the ratifiers. *See, e.g.*, Crawford v. Washington, 541 U.S. 36, 60 (2004) (focusing on the original public meaning of the Confrontation Clause, not its drafters’ unexpressed original intent); Atwater v. City of Lago Vista, 532 U.S. 318, 339 (2001) (likewise as to the Fourth Amendment); Alexander Hamilton, Final Version of an Opinion on the Constitutionality of an Act to Establish a Bank (Feb. 23, 1791), in 8 THE PAPERS OF ALEXANDER HAMILTON 97, 111 (Harold C. Syrett ed., 1965) (endorsing the original public meaning approach); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION 3, 37–47 (Amy Gutmann ed., 1997) (likewise); *see also* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION 89–117 (2004) (discussing the original public meaning approach and its originalist rivals, and explaining why original public meaning is the better view); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 725 (1988) (same).

to the perceived threat to the ‘free[dom]’ of the ‘State[s]’ posed by a national standing army controlled by the federal government.”<sup>2</sup> Or as a lawyer for one leading pro-gun-control group wrote, “Presumably, the term ‘free State’ is a reference to the states as entities of governmental authority. Moreover, the reference to the ‘security’ of a free State must have something to do with the need to defend the state as an entity of government.”<sup>3</sup>

This reading would tend to support the states’ rights view,<sup>4</sup> and is probably among the strongest intuitive foundations for the view—after all, “State” appears right there in the text, seemingly referring to each state’s needs and interests. The reading would suggest the right might cover only those whom each state explicitly chose as its defensive force, perhaps a state-selected National Guard.<sup>5</sup> And it would suggest the Amendment doesn’t apply outside states, for instance in the District of Columbia: “‘the District of Columbia is not a state within the meaning of the Second Amendment and therefore the Second Amendment’s reach does not extend to it.’”<sup>6</sup>

<sup>2</sup> Parker v. District of Columbia, 478 F.3d 370, 406 (D.C. Cir. 2007) (Henderson, J., dissenting) (alteration in original).

<sup>3</sup> Dennis A. Henigan, *Arms, Anarchy and the Second Amendment*, 26 VAL. U. L. REV. 107, 112 (1991); see also H. Richard Uviller & William G. Merkel, *The Second Amendment in Context: The Case of the Vanishing Predicate*, 76 CHL.-KENT L. REV. 403, 499 (2000) (“Most significantly, the Select Committee substituted ‘State’ for ‘country’ as the referent of the ‘best security’ clause, so that the proposed amendment now addressed more directly antifederal solicitude for state security.”); *id.* at 509 (“When the militia was labeled the best security of a free ‘country,’ it seemed to have an exclusively national purpose, but when redefined as the best security of a free ‘State,’ its local purpose was clearly preserved.”).

<sup>4</sup> I say “tend” and “suggest” advisedly: I do not claim that adopting the “state of the union, free from federal oppression” view of “free State” requires one to adopt the collective rights theory of the Second Amendment, or that adopting the “free country, free of despotism” view requires one to adopt the individual rights theory. My claim is only that one interpretation of “free State” lends extra weight to one theory, and the other lends extra weight to the other theory.

<sup>5</sup> See, e.g., Seegars v. Ashcroft, 297 F. Supp. 2d 201, 229 (D.D.C. 2004) (“Anti-Federalist Elbridge Gerry explained that changing the language to ‘necessary to the security of a free State’ emphasized the primacy of the state militia over the federal standing army: ‘A well-regulated militia being the best security of a free state, admitted an idea that a standing army was a secondary one.’” (quoting *Silveira v. Lockyer*, 312 F.3d 1052, 1071 (9th Cir. 2002))), *aff’d in part, rev’d in part on procedural grounds sub nom. Seegars v. Gonzales*, 396 F.3d 1248 (D.C. Cir. 2005); David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 MICH. L. REV. 588, 610 (2000) (taking the same view).

<sup>6</sup> Parker, 478 F.3d at 402 (Henderson, J., dissenting) (quoting *Seegars*, 297 F. Supp. 2d at 239); see also *id.* at 406 (elaborating on this); *Sandidge v. United States*, 520 A.2d 1057, 1059 (D.C. 1987) (Nebeker, J., concurring) (“This amendment is to ensure ‘the security of a free State.’ State militias were essential to that end—hence, the amendment. Nothing suggests that the founders were concerned about ‘free territories,’ ‘free protectorates’ or

But if "free State" was understood to mean "free country, free of despotism," that would tend to support the individual rights view of the Amendment. "[T]he right of the people" would then more easily be read as referring to a right of the people as free individuals, even if a right justified partly by public interests, much as "the right of the people" is understood in the First and Fourth Amendments. The right would cover people regardless of whether they were selected for a state-chosen defensive force, since the right would not be focused on preserving the states' independence. And it would apply to all Americans, in states or in D.C.<sup>7</sup>

We see a similar controversy about the change from James Madison's original proposal, which spoke of "security of a free country,"<sup>8</sup> to the final "security of a free State." Some assume the change was a deliberate substantive shift towards a states' rights provision,<sup>9</sup> and point in support to the

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a 'free Seat of Government of the United States.'").

7 See *Parker*, 478 F.3d at 396 (concluding that "free State" means "a free country" and not "an actual political unit of the United States, such as New York, etc."); AKHIL REED AMAR, *THE BILL OF RIGHTS* 47, 49 (1998) (treating "free State" as reflecting a "structural concern with democratic self-government"); 3 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 1890, at 746 (Boston, Hilliard, Gray, & Co. 1833) ("The militia is the natural defence of a *free country* against sudden foreign invasions, domestic insurrections, and domestic usurpations of power by rulers. It is against sound policy for a *free people* to keep up large military establishments and standing armies in time of peace, both from the enormous expenses, with which they are attended, and the facile means, which they afford to ambitious and unprincipled rulers, to subvert the government, or trample upon the rights of the people. The right of the citizens to keep and bear arms has justly been considered, as the palladium of the *liberties of a republic*; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them." (emphases added)); 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) ("A free state' and 'a free country' meant, in eighteenth century usage, a free society."); David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359, 1405–06, 1408 (treating "free State" as referring to a "not-enslaved body politic" and citing the 1828 Noah Webster dictionary for support); William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236, 1244 (1994) (reasoning that the Second Amendment's "reference to the security of a 'free State'" is "not a reference to the security of THE STATE"); see also Nicholas J. Johnson, *Principles and Passions: The Intersection of Abortion and Gun Rights*, 50 RUTGERS L. REV. 97, 125 (1997) (endorsing Van Alstyne's view); Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 473 (1995) (likewise).

8 1 ANNALS OF CONG. 434 (Joseph Gales ed., 1834) ("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 . . .").

9 See, e.g., *Parker*, 478 F.3d at 405 n.10 (Henderson, J., dissenting); *Silveira*, 312 F.3d at 1071 ("Our reading of the term 'militia' as referring to a state military force is also supported by the fact that in the amendment's first clause the militia is described as 'necessary to the security of a free State.' This choice of language was far from accidental: Madison's

Constitution's general use of "state" to mean state of the union (except where "foreign State" is used to mean "foreign country").<sup>10</sup> Others assume the change was purely stylistic,<sup>11</sup> and thus did not reflect a shift to a states' rights view;<sup>12</sup> they sometimes point for evidence to the absence of recorded controversy about the change.<sup>13</sup>

This Article makes a simple claim: there's no need to assume. There is ample evidence about the original meaning of the term "free state." "Free state" was used often in Framing-era and pre-Framing writings, especially those writings that are known to have influenced the Framers: Blackstone's *Commentaries*,<sup>14</sup> Montesquieu's *Spirit of Laws*,<sup>15</sup> Hume's essays,<sup>16</sup> Trenchard and Gordon's *Cato's Letters*,<sup>17</sup> and works by over half the authors on Donald Lutz's list of thirty-six authors most cited by American political writers from 1760 to 1805.<sup>18</sup> It was also used by many leading American writers, including John Adams in 1787, James Madison in 1785,

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first draft of the amendment stated that a well-regulated militia was 'the best security of a free country.');

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, 32 (1989); Uviller & Merkel, *supra* note 3, at 499; Yassky, *supra* note 5, at 610; Garry Wills, *To Keep and Bear Arms*, N.Y. REV. BOOKS, Sept. 21, 1995, at 62, 63.

10 See *Parker*, 478 F.3d at 405 (Henderson, J., dissenting) ("In fact, the Constitution uses 'State' or 'States' 119 times apart from the Second Amendment and in 116 of the 119, the term unambiguously refers to the States of the Union. Accepted statutory construction directs that we give 'State' the same meaning throughout the Constitution." (footnote and citation omitted)).

11 Cf., e.g., *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 363 (1999) (concluding that a change to the Census Clause from its original draft version was purely stylistic rather than substantive); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 799 n.4 (1978) (same as to the Free Speech/Press Clause).

12 See, e.g., *Van Alstyne*, *supra* note 7, at 1244 n.21.

13 See, e.g., *Parker*, 478 F.3d at 396 ("[I]t is not credible to conclude that a profound shift was intended in the change from 'country' to 'State,' particularly as there was no subsequent comment on the change.").

14 See *infra* Parts I, II.

15 See *infra* Part III. Blackstone and Montesquieu were nearly tied for the position of political thinkers most cited by American political writings from 1760 to 1805, judging by Donald Lutz's comprehensive dataset. Donald S. Lutz, *The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought*, 78 AM. POL. SCI. REV. 189, 193–94 (1984). The two were precisely tied during the 1780s and 1790s put together, and Blackstone was a firm second to Montesquieu's first during the 1780s. *Id.* at 193 tbl.2. "There can be no question that the framers and many of their contemporaries were familiar . . . with the great works of such luminaries as Locke, Hobbes, Montesquieu, Hume, and Blackstone." JACK N. RAKOVE, ORIGINAL MEANINGS 18 (1996).

16 See *infra* Part IV.

17 See *infra* Part V.

18 See Lutz, *supra* note 15, at 194; *infra* Part VI.

and the Continental Congress in 1774.<sup>19</sup>

Those sources, which surprisingly have not been canvassed by the Second Amendment literature,<sup>20</sup> give us a clear sense of what the phrase "free state" meant at the time. In eighteenth-century political discourse, "free state" was a commonly used political term of art, meaning "free country," which is to say the opposite of a despotism.

Political theory of the era often divided the world into despotisms and free states (either republics or constitutional monarchies). Free states had certain properties as a result of their being free, and were susceptible to certain threats of reverting to despotism. To remain a free state, the free state had to take these threats into account, and to structure its institutions in a particular way.

"State" simply meant country; and "free" almost always meant free from despotism, rather than from some other country, and never from some larger entity in a federal structure. That is how the phrase was used in the sources that the Framers read. And there is no reason to think that the Framers departed from this well-established meaning, and used the phrase to mean something different from what it meant to Blackstone, Montesquieu, the Continental Congress, Madison, Adams, or others.

Even given this finding, of course, many important arguments about the Second Amendment remain. But when we consider those arguments, we should recognize that the phrase "a free State" was not understood as having to do with states' rights as such. Rather, it referred to preserving the liberty of the new country that the Constitution was establishing.

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<sup>19</sup> See *infra* Part VII.

<sup>20</sup> To check whether these sources had been covered in law review articles or opinions, I searched in the Westlaw JLR and ALLCASES databases for key excerpts from six of the seven quotes I refer to in the Blackstone sections: "in free states, the profession of a soldier"; "be more guarded against in a free state"; "hence have many free states"; "original contract of every free state"; "free states the trouble expense"; and "in a free state every man who is supposed a free agent." This yielded three articles and one case quoting at least one of the passages; none of these items mentioned the Second Amendment.

The seventh quote is the better-known "liberty of the press is, indeed, essential to the nature of a free state," which appears in eighty-six articles and forty-seven cases. But only three of these items mention the Second Amendment; only one, Halbrook, *supra* note 7, at 123–24, draws the connection between the quote and the Second Amendment; and even this work, written by a leading Second Amendment scholar, doesn't say anything about any of the other sources that use "free state" the same way. Nor have any of the cases or other sources that I've read connected the Blackstone uses of "free state"—or any other uses I cite—to the "free State" in the Second Amendment.

I. BLACKSTONE ON THE MILITIA AND A “FREE STATE” AS A “LAND OF LIBERTY”

Let us begin with Blackstone’s *Commentaries on the Laws of England*, which deeply influenced Framing-era American thinking.<sup>21</sup> The *Commentaries* contained a chapter on “the military and the maritime states,”<sup>22</sup> which is to say on soldiers and seamen. (“State” in these terms was roughly synonymous with “estate” in the sense of “[a] class, order, rank in a community or nation”;<sup>23</sup> Blackstone divided Englishmen into the clergy, “the civil state” or civilian laypeople, “the military state” or soldiers, and “the maritime state” or seamen.) Here is how the chapter begins:

The military state includes the whole of the soldiery, or such persons as are peculiarly appointed among the rest of the people for the safeguard and defence of the realm.

In a land of liberty it is extremely dangerous to make a distinct order of the profession of arms. In *absolute monarchies* this is necessary for the safety of the prince, and arises from the main principle of their constitution, which is that of governing by fear; but in *free states* the profession of a soldier, taken singly and merely as a profession, is justly an object of jealousy. In these no man should take up arms, but with a view to defend his country and its laws: he puts not off the citizen when he enters the camp; but it is because he is a citizen, and would wish to continue so, that he makes himself for a while a soldier. The laws therefore and constitution of these kingdoms know no such state as that of a perpetual standing soldier, bred up to no other profession than that of war; and it was not till the reign of Henry VII, that the kings of England had so much as a guard about their persons.<sup>24</sup>

What can we gather from this? First, Blackstone, publishing in 1765, was talking about countries (with his example being England), not the states of a federal union.

Second, “free state” meant a country that was “free” in the sense of being “a land of liberty” rather than an “absolute monarch[y],”<sup>25</sup> not in the

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21 See, e.g., Lutz, *supra* note 15, at 193–94 (reporting that Blackstone and Montesquieu were nearly tied for being the most-cited political writers in American writings from 1760 to 1805); see also *United States v. Wood*, 299 U.S. 123, 138 (1936) (noting that Blackstone’s *Commentaries* were “generally regarded [by the Framing generation] as the most satisfactory exposition of the common law of England”); *Schick v. United States*, 195 U.S. 65, 69 (1904) (same); JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW* 257 (1950) (noting that “Blackstone was already a classic tradition of the bar in the United States” by the time that St. George Tucker’s 1803 American edition came out).

22 WILLIAM BLACKSTONE, 1 *COMMENTARIES* \*408–22.

23 5 *OXFORD ENGLISH DICTIONARY* 407 (2d ed. 1989).

24 BLACKSTONE, *supra* note 22, at \*408 (emphases added).

25 *Id.*

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sense of being independent of domination by some other country or confederation.

Third, Blackstone was writing about free states with an eye towards what keeps a state free, in the sense of protecting its citizens' liberty. This concern about what it takes to preserve freedom in a state, and keep it from becoming despotic, was a frequent refrain in 1700s political theory, including in the Framers' writings.

Fourth, Blackstone was writing about something near the theme of the Militia Clause of the Second Amendment: what military structure was necessary to the security of a free state. His answer was that the soldier as armed citizen—to 1700s English and American writers, the soldier as a participant in the militia, rather than the soldier as member of a standing army—is what is needed to avoid the “danger[.]”<sup>26</sup> of despotism.

“It seems universally agreed by all historians,” Blackstone writes a few paragraphs later, “that king Alfred first settled a national militia in this kingdom, and by his prudent discipline made all the subjects of his dominion soldiers: but we are unfortunately left in the dark as to the particulars of this his so celebrated regulation.”<sup>27</sup> Free state; militia; regulation. If one wanted a brief summary of Blackstone's position, “a well-regulated militia is necessary to the security of a free state [meaning nondespotic country]” would probably do nicely.

Blackstone goes on to discuss the history of how England's military might was commanded from the Norman Conquest on, including a paragraph further discussing the “militia” and its “regulations,” and another condemning the standing army and martial law. He then continues:

To prevent the executive power from being able to oppress, says baron Montesquieu, it is requisite that the armies with which it is intrusted should consist of the people, and have the same spirit with the people; as was the case at Rome, till Marius new-modelled the legions by enlisting the rabble of Italy, and laid the foundation of all the *military tyranny* that ensued. Nothing, then, according to these principles, ought to be more guarded against in a *free state*, than making the military power, when such a one is necessary to be kept on foot, a body too distinct from the people. Like ours, it should wholly be composed of natural subjects; it ought only to be enlisted for a short and limited time; the soldiers also should live intermixed with the people; no separate camp, no barracks, no inland fortresses, should be allowed. And perhaps it might be still better if, by dismissing a stated number, and enlisting others at every renewal of their term, a circulation could be kept up between the army and the people, and the citizen and the soldier be

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26 *Id.*

27 *Id.* at \*409.

more intimately connected together.<sup>28</sup>

Again, we see the need to “guard[] against [the professional soldier] in a free state”<sup>29</sup>—and to instead rely on the citizen-soldier—in order “[t]o prevent the executive power from being able to oppress.”<sup>30</sup> (The concern about the professional soldiers being drawn exclusively from “rabble” is unegalitarian by modern standards, but it is irrelevant to what the phrase “free state” meant at the time.)

Blackstone then goes on to argue that during peacetime, military discipline should not be too repressive:

[T]he greater the general liberty is which any state enjoys, the more cautious has it usually been in introducing slavery in any particular order or profession. These men, as baron Montesquieu observes, seeing the liberty which others possess, and which they themselves are excluded from, are apt (like eunuchs in the eastern seraglios) to live in a state of perpetual envy and hatred towards the rest of the community, and indulge a malignant pleasure in contributing to destroy those privileges to which they can never be admitted.

Hence have many *free states*, by departing from this rule, been endangered by the revolt of their slaves; while in *absolute and despotic governments*, where no real liberty exists, and consequently no invidious comparisons can be formed, such incidents are extremely rare. Two precautions are therefore advised to be observed in all prudent and free governments: 1. To prevent the introduction of slavery at all: or, 2. If it be already introduced, not to entrust those slaves with arms; who will then find themselves an overmatch for the freemen. Much less ought the soldiery to be an exception to the people in general, and the only state of servitude in the nation.<sup>31</sup>

Again, “free state” is used to mean free country, as distinguished from “absolute and despotic governments.” And again, the question is how freedom in a country is to be preserved from despotism, here the despotism that would flow from a military coup rather than from royal power. Free states are seen as subject to special risks, to be avoided in this instance by avoiding excessive oppression of the military.

## II. BLACKSTONE AND A “FREE STATE” MORE BROADLY

Similar references to “free state” as meaning a “land of liberty,” and expressing a concern about how that liberty is to be preserved, also appear elsewhere in Blackstone. Thus, for instance, Blackstone refers to what is

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28 *Id.* at \*414 (emphases added).

29 *Id.*

30 *Id.*

31 *Id.* at \*416–17 (emphases and paragraph break added).



good for free states in discussing the liberty of the press: "The liberty of the press is indeed essential to the nature of a free state" (though in Blackstone's view only prior restraints violated the liberty).<sup>32</sup> The Massachusetts Bill of Rights of 1780 echoes this, in providing that "[t]he liberty of the press is essential to the security of freedom in a state: it ought not, therefore, to be restrained in this commonwealth"<sup>33</sup>—"[a] free state" corresponds to "freedom in a state," not to the independence of a state from foreign oppression.

Likewise, Blackstone refers to the nature of free states in discussing the value of popular government: "In a free state, every man, who is supposed a free agent, ought to be, in some measure, his own governor . . ."<sup>34</sup> He refers to it in praising what he characterizes as the calming force of the established Church of England:

[I]n matters of external polity and of private right, [the Church of England clergy] derive all their title from the civil magistrate; they look up to the king as their head, to the parliament as their law-giver, and pride themselves in nothing so justly, as in being true members of the church, emphatically *by law* established. Whereas the principles of those who differ from them, as well in one extreme as the other, are equally and totally destructive of those ties and obligations by which all society is kept together; equally encroaching on those rights, which reason and the original contract of every *free state* in the universe have vested in the sovereign power; and equally aiming at a distinct independent supremacy of their own, where spiritual men and spiritual causes are concerned.<sup>35</sup>

And Blackstone explains how the nature of a free state may also be reason to suffer some inconvenience stemming from this freedom:

In Turkey, . . . where little regard is shewn to the lives or fortunes of the subject, all causes are quickly decided: the basha, on a summary hearing, orders which party he pleases to be bastinadoed, and then sends them about their business. But in free states the trouble, expense, and delays of judicial proceedings are the price that every subject pays for his liberty . . .<sup>36</sup>

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<sup>32</sup> 4 *id.* at \*151.

<sup>33</sup> MASS. CONST. of 1780, pt. I, art. XVI, *reprinted in* 3 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 1888, 1892 (Francis Newton Thorpe ed., 1909) [hereinafter FEDERAL AND STATE CONSTITUTIONS]; *see also* N.H. CONST. of 1784, pt. I, art. XXII, *reprinted in* 4 FEDERAL AND STATE CONSTITUTIONS, *supra*, at 2453, 2456 (nearly identical to the Massachusetts provision).

<sup>34</sup> 1 BLACKSTONE, *supra* note 22, at \*158.

<sup>35</sup> 4 *id.* at \*104 (second emphasis added).

<sup>36</sup> 3 *id.* at \*423–24 (citing Montesquieu).

Again, “state” means “country,” and “free” means “governed in a way that avoids despotism.”

### III. MONTESQUIEU’S *THE SPIRIT OF LAWS*

“If there was one man read and reacted to by American political writers of all factions during all the stages of the founding era, it was probably . . . Montesquieu.”<sup>37</sup> The Continental Congress’ *Letter to the Inhabitants of the Province of Quebec* referred to “the immortal *Montesquieu*”;<sup>38</sup> the *Federalist Papers* cited him by name in four separate numbers,<sup>39</sup> calling him “the celebrated Montesquieu” in two.<sup>40</sup> Blackstone was cited in only two numbers, Hume in one, Locke in none.<sup>41</sup>

Montesquieu also used “free state” regularly. Here are the passages from his most famous work, *The Spirit of Laws*,<sup>42</sup> in which the phrase “état libre” or “états libres” appears in the original.<sup>43</sup> (Because Montesquieu was such a notable figure, I searched the original text, and thus found one passage that a simple search for “free state” would not have.) All come from Book XI, “On Constitutions”—the part that seems to have been especially influential among the colonists<sup>44</sup>—with the first coming from one of the chapters on liberty and the remaining ones from the chapters on the English Constitution:

37 Lutz, *supra* note 15, at 190.

38 LETTER TO THE INHABITANTS OF THE PROVINCE OF QUEBEC (Philadelphia, Fleury Me-splet 1774), *reprinted in* 1 JOURNALS OF THE CONTINENTAL CONGRESS 105, 110 (Worthing-ton Chauncey Ford ed., Gov’t Printing Office 1904) (1774).

39 THE FEDERALIST NOS. 9, 78, at 52–53, 56, 523 n.\* (Alexander Hamilton), NOS. 43, 47, at 292, 324–26, 328 (James Madison) (Jacob E. Cooke ed., 1961).

40 *Id.* No. 78, at 523 n.\* (Alexander Hamilton); *id.* No. 47, at 324 (James Madison).

41 *Id.* NOS. 69, 84, at 467 n.\*, 577 n.\* (Alexander Hamilton) (citing Blackstone); *id.* NO. 85, at 594 n.\* (Alexander Hamilton) (citing Hume).

42 BARON DE MONTESQUIEU, *THE SPIRIT OF LAWS* (Thomas Nugent trans., London, J. Nourse & P. Vaillant 1750) (translating BARON DE MONTESQUIEU, *DE L’ESPRIT DES LOIX* (Geneva, Barrillot & Fils 1749); *see also* PAUL MERRILL SPURLIN, *MONTESQUIEU IN AMER-ICA 1760–1801*, at 50 (1940) (noting that in late 1700s America, *The Spirit of Laws* was the most advertised of Montesquieu’s works).

43 Similar uses of “free state” to mean “nondespotically governed country” appear in Montesquieu’s other works. *See* M. DE MONTESQUIEU, *PERSIAN LETTERS* 208 (Flloyd trans., London, Bernard Lintot 1775); BARON DE MONTESQUIEU, *REFLECTIONS ON THE CAUSES OF THE RISE AND FALL OF THE ROMAN EMPIRE* 46, 94, 97, 127 (Glasgow, Robert Urie 4th ed. 1758). *Persian Letters* was a work of fiction, but a “celebrated” one, SPURLIN, *supra* note 42, at 2, and one that was quoted in political contexts, *id.* at 74.

44 *See* SPURLIN, *supra* note 42, at 133 (“An analysis of the citations to the *Spirit of Laws* presented in this chapter shows that there were approximately three times as many refer-ences to Book XI as all other references combined. And out of some twenty-five refer-ences to Book XI, eighteen were to the chapter on the Constitution of England.”).

Democratic and aristocratic *states* are not necessarily *free*. Political liberty is to be met with only in moderate governments: yet even in these it is not always met with. It is there only when there is no abuse of power . . . .<sup>45</sup>

As in a *free state*, every man who is supposed a free agent, ought to be his own governor; so the legislative power should reside in the whole body of the people.<sup>46</sup>

The body of the nobility ought to be hereditary. In the first place it is so in its own nature; and in the next there must be a considerable interest to preserve its prerogatives; prerogatives that in themselves are obnoxious to popular envy, and of course in a *free state* are always in danger.<sup>47</sup>

But if the legislative power in a *free state* has no right to stay the executive, it has a right and ought to have the means of examining in what manner its laws have been executed . . . .<sup>48</sup>

The [nobles] are always obnoxious to popular envy; and were they to be judged by the people, they might be in danger from their judges, and would moreover be deprived of the privilege which the meanest subject is possessed of in a *free state*, of being tried by their peers.<sup>49</sup>

Again, we see "free state" meaning "free country," in the sense of free from despotism, not of outside rule.

#### IV. HUME'S ESSAYS

We see the same in essays by David Hume, who is #4 on Lutz's list<sup>50</sup> (behind Montesquieu, Blackstone, and Locke), and who is widely believed to have influenced Madison in particular.<sup>51</sup> Hume's *That Politics May Be*

45 1 MONTESQUIEU, THE SPIRIT OF LAWS, *supra* note 42, at 214 (emphases added) (translating 1 MONTESQUIEU, DE L'ESPRIT DES LOIX, *supra* note 42, at 240).

46 *Id.* at 219 (emphasis added) (translating 1 MONTESQUIEU, DE L'ESPRIT DES LOIX, *supra* note 42, at 247).

47 *Id.* at 222 (emphasis added) (translating 1 MONTESQUIEU, DE L'ESPRIT DES LOIX, *supra* note 42, at 250).

48 1 BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 231 (Thomas Nugent trans., London, J. Nourse & P. Vaillant 4th ed. 1766) (emphasis added) (translating 1 MONTESQUIEU, DE L'ESPRIT DES LOIX, *supra* note 42, at 253). The 1750 edition translates the phrase as "free government." 1 MONTESQUIEU, THE SPIRIT OF LAWS, *supra* note 42, at 225.

49 1 MONTESQUIEU, THE SPIRIT OF LAWS, *supra* note 42, at 226 (emphasis added) (translating 1 MONTESQUIEU, DE L'ESPRIT DES LOIX, *supra* note 42, at 254).

50 Lutz, *supra* note 15, at 194.

51 For sources discussing Hume's influence on the Framers, see FORREST McDONALD, NOVUS ORDO SECLORUM 162–65, 188–90, 234–35 (1985); WILLIAM LEE MILLER, THE BUSINESS OF MAY NEXT 53–60 (1992); EDMUND S. MORGAN, INVENTING THE PEOPLE 268 (1988); PAUL A. RAHE, REPUBLICS ANCIENT AND MODERN 586–88, 614, 660, 672 (1992); Douglass Adair, "That Politics May Be Reduced to a Science": David Hume, James Madison, and the Tenth Federalist, 20 HUNTINGTON LIBR. Q. 343, 343–60 (1957); Jack N.

*Reduc'd to a Science*<sup>52</sup> uses “free state” four times; I emphasize both the term itself and the term, if any, from which Hume is distinguishing free states:

When a *monarch* extends his dominions by conquest, he soon learns to consider his old and his new subjects as on the same footing; because, in reality, all his subjects are to him the same, except the few friends and favourites, with whom he is personally acquainted. He does not, therefore, make any distinction betwixt them in his general laws; and, at the same time, is no less careful to prevent all particular acts of oppression on the one as well as on the other. But a *free state* necessarily makes a great distinction, and must always do so, till men learn to love their neighbours as well as themselves. The conquerors, in such a government, are all legislators, and will be sure to contrive matters, by restrictions of trade, and by taxes, as to draw some private, as well as public, advantage from their conquests. Provincial governors have also a better chance in a *republic*, to escape with their plunder, by means of bribery or interest; and their fellow-citizens, who find their own state to be enriched by the spoils of their subject-provinces, will be the more inclined to tolerate such abuses. Not to mention, that 'tis a necessary precaution in a *free state* to change the governors frequently; which obliges these temporary tyrants to be more expeditious and rapacious, that they may accumulate sufficient wealth before they give place to their successors.<sup>53</sup>

The provinces of *absolute monarchies* are always better treated than those of *free states*.<sup>54</sup>

[T]yrannical government enervates the courage of men, and renders them indifferent concerning the fortunes of their sovereign . . . . Legislators, therefore, should not trust the future government of a state entirely to chance, but ought to provide a system of laws to regulate the administration of public affairs to the latest posterity. . . . [Historical examples omitted.] Here, then, is a sufficient inducement to maintain,

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Rakove, *The Madisonian Moment*, 55 U. CHI. L. REV. 473, 477 (1988). For the particular influence of Hume's essays, see RICHARD HOFSTADTER, THE IDEA OF A PARTY SYSTEM 24–25 (1969) (noting, in the discussion of attitude towards parties, that Madison owed “a very substantial direct debt to Hume's essays,” and earlier noting “the view—which in America could be called Madisonian, in England Humean—that though parties are indeed evil, their existence is an unavoidable by-product of a free state”); MCDONALD, *supra*, at 188–90; MILLER, *supra*, at 53–60; Rakove, *supra*, at 477.

52 DAVID HUME, *That Politics May Be Reduc'd to a Science*, in ESSAYS, MORAL AND POLITICAL 20 (London, A. Millar 3d ed. 1748).

53 *Id.* at 25–26 (emphases added, other emphasis omitted; indentation added, here and in some block quotes below). I have tried to make the Hume and *Cato's Letters* excerpts more readable by generally changing uppercase words to lowercase except when uppercase is required by modern convention.

54 *Id.* at 27–28 (emphases added).

with the utmost zeal, in every *free state*, those forms and institutions by which liberty is secured, the public good consulted, and the avarice or ambition of particular men restrained and punished.<sup>55</sup>

Likewise in *Of the Rise and Progress of the Arts and Sciences*,<sup>56</sup> a passage that originally spoke of the “Advantages of Republics”<sup>57</sup> was revised in 1772—four years before Hume’s death—to “the advantages of free states”:

Here then are the advantages of *free states*. Though a republic should be barbarous, it necessarily, by an infallible operation, gives rise to Law, even before mankind have made any considerable advances in the other sciences. From law arises security: From security curiosity: And from curiosity knowledge. The latter steps of this progress may be more accidental; but the former are altogether necessary. A republic without laws can never have any duration. On the contrary, in a *monarchical government*, law arises not necessarily from the forms of government.<sup>58</sup>

Later in the same essay, a passage that originally spoke of “free governments”<sup>59</sup> was revised in 1772 to read: “That though the only proper Nursery of these noble plants be a *free state*; yet may they be transplanted into *any government*; and that a republic is most favourable to the growth of the sciences, a civilized monarchy to that of the polite arts.”<sup>60</sup> And, later in the same essay: “From these Causes proceed *civiliz’d Monarchies*, where the Arts of Government, first invented in *free States*, are preserv’d, to the mutual Advantage and Security of Sovereign and Subject.”<sup>61</sup>

Finally, in *Of Commerce*, Hume uses “free states” to refer to the “ancient republics,” and explains how those republics’ experience offers lim-

55 *Id.* at 29–32 (emphases added, paragraph breaks deleted).

56 DAVID HUME, *Of the Rise and Progress of the Arts and Sciences*, in *ESSAYS, MORAL AND POLITICAL*, *supra* note 52, at 156.

57 *Id.* at 165.

58 1 DAVID HUME, *The Rise and Progress of the Arts and Sciences*, in *ESSAYS AND TREATISES ON SEVERAL SUBJECTS* 109, 116–17 (London, T. Cadell 1772) (emphasses added) [hereinafter HUME’S *ESSAYS* 1772]; 1 DAVID HUME, *The Rise and Progress of the Arts and Sciences*, in *ESSAYS AND TREATISES ON SEVERAL SUBJECTS* 115, 122–23 (London, T. Cadell 1777) (emphasses added) [hereinafter HUME’S *ESSAYS* 1777]; 1 DAVID HUME, *The Rise and Progress of the Arts and Sciences*, in *ESSAYS AND TREATISES ON SEVERAL SUBJECTS* 115, 122–23 (London, T. Cadell 1784) (emphasses added) [hereinafter HUME’S *ESSAYS* 1784].

59 HUME, *supra* note 56, at 172.

60 HUME, *The Rise and Progress of the Arts and Sciences*, in HUME’S *ESSAYS* 1772, *supra* note 58, at 109, 122 (emphasis of entire sentence removed, emphases of specific phrases added); *see also* HUME, *The Rise and Progress of the Arts and Sciences*, in HUME’S *ESSAYS* 1777, *supra* note 58, at 115, 128; HUME, *The Rise and Progress of the Arts and Sciences*, in HUME’S *ESSAYS* 1784, *supra* note 58, at 115, 128.

61 HUME, *supra* note 56, at 174 (emphases added).

ited value to “sovereigns” trying to organize states along “their own interest . . . [rather] than the happiness of their subjects”:

Here therefore seems to be a kind of opposition betwixt the greatness of the state and the happiness of the subjects. A state is never greater than when all its superfluous hands are employ’d in the service of the public. The ease and convenience of private persons require, that these hands should be employ’d in their service. The one can never be satisfied, but at the expence of the other. As the ambition of the sovereign must entrench on the luxury of individuals; so the luxury of individuals must diminish the force, and check the ambition of the sovereign. . . .

’Tis natural on this occasion to ask, whether *sovereigns* may not return to the maxims of antient policy and consult their own interest, in this respect, more than the happiness of their subjects? I answer, that it appears to me almost impossible; and that because antient policy was violent, and contrary to the more natural and usual course of things. . . . [T]he *Roman* and other antient republics . . . were *free states*; they were small ones; and the age being martial, all the neighbouring states were continually in arms. Freedom naturally begets public spirit, especially in small states; and this public spirit, this *amor patriae*, must increase, when the public is almost in continual alarm, and men are oblig’d, every moment, to expose themselves to the greatest dangers for its defence.<sup>62</sup>

#### V. CATO’S LETTERS

Consider also *Cato’s Letters*,<sup>63</sup> written by John Trenchard and Thomas Gordon in the 1710s (#7 on Lutz’s list<sup>64</sup>). “In America, where they were republished entire or in part again and again, ‘quoted in every colonial newspaper from Boston to Savannah,’ and referred to repeatedly in the pamphlet literature, the writings of Trenchard and Gordon ranked with the treatises of Locke as the most authoritative statement of the nature of political liberty and above Locke as an exposition of the social sources of the threats it faced.”<sup>65</sup>

62 DAVID HUME, *Of Commerce*, in POLITICAL DISCOURSES 1, 6, 8–9 (Edinburgh, R. Fleming 1752) (first and third emphases added).

63 JOHN TRENCHARD & THOMAS GORDON, CATO’S LETTERS (London, T. Woodward et al. 5th ed. 1748).

64 Lutz, *supra* note 15, at 194.

65 BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 36 (1967) (quoting ELIZABETH CHRISTINE COOK, LITERARY INFLUENCES IN COLONIAL NEWSPAPERS 1704–1750, at 81 (1912)); see also DAVID S. BOGEN, BULWARK OF LIBERTY 17 (1984) (“*Cato’s Letters* were among the most familiar essays printed in America.”); COOK, *supra*, at 81 (“*Cato’s Letters* . . . must have had no small share in bringing about that amazing unity of political feeling which we find by 1760 in civilizations so fundamentally opposed as those of Charleston and Boston.”); LEONARD W. LEVY, EMERGENCE OF A FREE PRESS 113

"*Cato's Letters* rather than Locke's *Civil Government* was the most popular, quotable, esteemed source of political ideas in the colonial period."<sup>66</sup> Benjamin Franklin in 1749 urged "that English grammar be taught by reading Tillotson, Addison, Pope, Algernon Sidney, [and] *Cato's Letters*."<sup>67</sup>

*Cato's Letters* uses the phrase "free state" forty times, every time to mean a "nondespotically governed country." I give the first five excerpts here, and the remainder in the Appendix; I italicize both "free state" and, if present, the term from which free states are being distinguished (usually something like "tyrant," "arbitrary prince," "absolute prince," or just "prince"):

Every *arbitrary prince* in the world exercises [this extraordinary power to protect the state against extraordinary threats through extraordinary measures]; and every *free state* in the world has an undoubted right to exercise it, though they have never delegated their power to particular magistrates to exercise it for them.<sup>68</sup>

The good of the governed being the sole end of government, they must be the greatest and best governors, who make their people great and happy; and they the worst, who make their people little, wicked, and miserable. Power in a *free state*, is a trust committed by all to one or a few, to watch for the security, and pursue the interest, of all: and, when that security is not sought, nor that interest obtained, we know what opinion the people will have of their governors.<sup>69</sup>

And because passion and opinion are so nearly related, and have such force upon each other, *arbitrary courts* and crafty churchmen have ever endeavoured to force, or frighten, or deceive the people into an uniformity of thoughts, especially of religious thoughts. A thing tyrannical and impossible! And yet a whole people do often, through ignorance or fear, seem of one mind; and but seem: for, if they come to explain, they would find their ideas differ widely, though their words agree. Whereas in a well-governed *free state*, diversity of speculations is so far from clogging the publick good, that it evidently promotes the same; all men being equally engaged in the defence of that, by which all men are indifferently protected. So that to attempt to reduce all men to one standard of thinking, is absurd in philosophy, impious in religion, and fac-

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(1985) (endorsing the "quoted in every colonial newspaper from Boston to Savannah" passage).

66 CLINTON ROSSITER, *SEEDTIME OF THE REPUBLIC* 141 (1953).

67 COOK, *supra* note 65, at 59. When early eighteenth-century American journalists "needed a topic on sudden notice, . . . [s]ometimes [they] revamped a famous treatise, and in case [they] were writing on liberty, [they] would be likely to use *Cato's Letters*." *Id.* at 89 (pointing to noted Philadelphia journalist Andrew Bradford as an example).

68 1 TRENCHARD & GORDON, *supra* note 63, at 73 (emphases and indentation added).

69 *Id.* at 184 (emphasis added).

tion in the state.<sup>70</sup>

[I]n slavish countries the people must either throw off their cruel and destroying government, and set up another in its room, or in some ages the race of mankind there will be extinct. Indeed, if it had not been for *free states*, that have repaired and prevented in many places the mischiefs done by *tyrants*, the earth had been long since a desert, as the finest countries in it are at this day by that means.<sup>71</sup>

Sometimes, indeed, trade, like a phantom, has made a faint appearance at an arbitrary court, but disappeared again at the first approach of the morning light: she is the portion of *free states*, is married to liberty, and ever flies the foul and polluted embraces of a *tyrant*.<sup>72</sup>

#### VI. "FREE STATE" IN OTHER LEADING SOURCES

So Blackstone, Montesquieu, Hume, and Trenchard & Gordon give us a sense of what "free state" meant in eighteenth-century political theory. Other authors widely relied on by eighteenth-century Americans used "free state" pretty much the same way. Some used it solely to mean "republic"; Ephraim Chambers' 1728 *Cyclopædia, or, An Universal Dictionary of Arts and Sciences* gives evidence of this meaning, defining "free state" as "a Republick govern'd by Magistrates elected by the *free* Suffrages of the Inhabitants."<sup>73</sup> Others took a broader view, using "free state" to mean a republic or a constitutional monarchy; Montesquieu and Blackstone used the term this way. But either definition referred to nondespotically governed countries.

Consider the works of the historians and political theorists who appear on Lutz's list, in addition to Montesquieu (#1), Blackstone (#2), Hume (#4), and *Cato's Letters* (#7).<sup>74</sup> "Free state" appears in over half those sources, and almost always means "nondespotically governed country": Plutarch (#5),<sup>75</sup> de Lolme (#8),<sup>76</sup> Pufendorf (#9),<sup>77</sup> Cicero (#11),<sup>78</sup> Hobbes

<sup>70</sup> 2 *id.* at 48 (emphases added).

<sup>71</sup> *Id.* at 261–62 (emphases added).

<sup>72</sup> *Id.* at 275 (indentation added).

<sup>73</sup> 1 EPHRAIM CHAMBERS, *CYCLOPÆDIA, OR, AN UNIVERSAL DICTIONARY OF ARTS AND SCIENCES* 94 (London, James & John Knapton et al. 1728).

<sup>74</sup> Lutz, *supra* note 15, at 194.

<sup>75</sup> PLUTARCH, A DISCOURSE CONCERNING SOCRATES'S DÆMON (trans. Creech), *reprinted in* 2 PLUTARCH'S MORALS 377, 393 (London, Tho. Braddyll 4th ed. 1704); PLUTARCH, THE LIFE OF PERICLES, *reprinted in* 2 PLUTARCH'S LIVES 99, 125 (John Dryden trans., London, J. & R. Tonson & S. Draper 1749); PLUTARCH, THE LIFE OF PHOCION, *reprinted in* 6 PLUTARCH'S LIVES, *supra*, at 185, 212; PLUTARCH, THE LIFE OF ROMULUS, *reprinted in* 1 PLUTARCH'S LIVES, *supra*, at 91, 124; PLUTARCH, OF THE THREE SORTS OF GOVERNMENT, MONARCHY, DEMOCRACY, AND OLIGARCHY (trans. R. Smith), *reprinted in* 5 PLUTARCH'S MORALS, *supra*, at 366, 368.



(#12),<sup>79</sup> William Robertson (#13),<sup>80</sup> Grotius (#14),<sup>81</sup> Rousseau (#15),<sup>82</sup> Bolingbroke (#16),<sup>83</sup> Bacon (#17),<sup>84</sup> Price (#18),<sup>85</sup> Livy (#20),<sup>86</sup> Milton

76 J.L. DE LOLME, *THE CONSTITUTION OF ENGLAND* 91, 135 n.a, 138 n.a, 154, 169, 195, 207, 315, 335, 360, 400 (London, T. Spilsbury 1775).

77 BARON PUFENDORF, *THE LAW OF NATURE AND NATIONS* 213, 478, 641, 650, 653, 667, 672–73, 685, 690, 814 (Basil Kennet trans., London, J. & J. Bonwicke et al. 5th ed. 1749); BARON PUFENDORF, *A VIEW OF THE PRINCIPLES OF THE LUTHERAN CHURCHES* 25 (Theophilus Dorrington trans., London, John Wyat 1714); SAMUEL PUFFENDORF, *THE WHOLE DUTY OF MAN ACCORDING TO THE LAW OF NATURE* 224 (Andrew Tooke trans., London, R. Gosling 5th ed. 1735). Pufendorf also once uses “free state” in the sense of “free condition” (“free State of Paternal Authority”), which is not relevant to this Article. SAMUEL PUFFENDORF, *THE COMPLEAT HISTORY OF SWEDEN, FROM ITS ORIGIN TO THIS TIME* 3 (London, J. Brudenell 1702).

78 CICERO, *Argument of the Oration for C. Rabirius*, in 3 *THE ORATIONS OF CICERO* 110, 121 (William Guthrie trans., London, T. Waller 2d ed. 1752); M.T. CICERO, *HIS PARADOXES*, reprinted in *HIS OFFICES* 332, 336 (William Guthrie trans., London, T. Waller 1755); M.T. CICERO, *THE MORAL DUTIES OF MANKIND*, reprinted in *HIS OFFICES*, *supra*, at 89, 101, 163; CICERO, *ON THE COMPLETE ORATOR* 152 (George Barnes trans., London, J. Rivington, B. Tovey & J. Pote 1762); CICERO, *Oration XII for T. Annius Milo*, in *SELECT ORATIONS* 435, 445, 501 (London, George Keith 1771); CICERO, *Oration XVI: The Second Against M. Antony*, in *SELECT ORATIONS*, *supra*, at 579, 665; *see also* M.T. CICERO, *CATO MAJOR* 135 n.93 (James Logan trans., Philadelphia, Benjamin Franklin 1744) (noting, in the annotations, that “Athens was a free State, under an Archon chosen by the People, and the Government popular”).

79 THOMAS HOBBS, *BEHEMOTH* (1682), reprinted in *THE MORAL AND POLITICAL WORKS OF THOMAS HOBBS OF MALMESBURY* 488, 568, 585 (London, n. pub. 1750).

80 1 WILLIAM ROBERTSON, *THE HISTORY OF THE REIGN OF THE EMPEROR CHARLES V* 211 (London, W. Strahan et al. 1774) [hereinafter ROBERTSON 1774]; 3 *id.* at 4, 402; 1 WILLIAM ROBERTSON, *THE HISTORY OF THE REIGN OF THE EMPEROR CHARLES V* 346 (London, W. & W. Strahan 1769).

81 HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE* 66, 360, 370 (London, W. Innys et al. 1738) [hereinafter GROTIUS 1738]; 3 H. GROTIUS, *OF THE RIGHTS OF WAR AND PEACE* 109 (London, D. Brown, T. Ward & W. Meares 1715) [hereinafter GROTIUS 1715] (the term translated as “free State” here is translated as “Republic” in the 1738 translation).

82 2 JEAN-JACQUES ROUSSEAU, *THE CONFESSIONS OF J.J. ROUSSEAU* 388 (London, G.G.J. & J. Robinson & J. Bew 1790); JOHN JAMES ROUSSEAU, *A DISCOURSE UPON THE ORIGIN AND FOUNDATION OF THE INEQUALITY AMONG MANKIND*, at xi, 166 (London, R. & J. Dodsley 1761); JEAN-JACQUES ROUSSEAU, *JULIA* (1761), reprinted in 3 *THE WORKS OF J.J. ROUSSEAU* 1, 108 (Edinburgh, J. Bell, J. Dickson & C. Elliot 1773); JEAN-JACQUES ROUSSEAU, *LETTERS WRITTEN FROM THE MOUNTAINS* (1764), reprinted in 9 *THE WORKS OF J.J. ROUSSEAU*, *supra*, at 7, 140 n.\*, 232; JEAN-JACQUES ROUSSEAU, *A TREATISE ON THE SOCIAL COMPACT* (1762), reprinted in 10 *THE WORKS OF J.J. ROUSSEAU*, *supra*, at 6, 99, 333 n.\*.

83 HENRY ST. JOHN BOLINGBROKE, *OF THE CONSTITUTION OF GREAT-BRITAIN*, reprinted in *A COLLECTION OF POLITICAL TRACTS* 251, 256 (London, T. Davies 1769); HENRY ST. JOHN BOLINGBROKE, *A DISSERTATION ON PARTIES*, reprinted in 2 *THE WORKS OF THE LATE RIGHT HONORABLE HENRY ST. JOHN, LORD VISCOUNT BOLINGBROKE* 29, 123 (London, David Mallet 1777) [hereinafter *WORKS OF BOLINGBROKE*]; HENRY ST. JOHN BOLINGBROKE, *Letter VII: A Sketch of the State and History of Europe*, in 2 *WORKS OF BOLINGBROKE*, *supra*, at 382, 401; HENRY ST. JOHN BOLINGBROKE, *REMARKS ON THE HISTORY OF ENGLAND*

(#22),<sup>87</sup> Tacitus (#23),<sup>88</sup> Abbé Raynal (#26),<sup>89</sup> Abbé de Mably (#27),<sup>90</sup> Machiavelli (#28),<sup>91</sup> Voltaire (#31),<sup>92</sup> Sidney (#33),<sup>93</sup> Somers (#34),<sup>94</sup> and

(1730), *reprinted in* 1 WORKS OF BOLINGBROKE, *supra*, at 271, 309.

84 FRANCIS BACON, THE CIVIL CHARACTER OF JULIUS CAESAR (1691), *reprinted in* 1 THE PHILOSOPHICAL WORKS OF FRANCIS BACON 310, 312 (Peter Shaw trans., London, J.J. & P. Knapton et al. 1733).

85 RICHARD PRICE, ADDITIONAL OBSERVATIONS ON THE NATURE AND VALUE OF CIVIL LIBERTY, AND THE WAR WITH AMERICA 6, 8, 9, 10, 20, 41, 49, 151 (London, T. Cadell 1777); RICHARD PRICE, OBSERVATIONS ON THE IMPORTANCE OF THE AMERICAN REVOLUTION 16, 68 (London, n. pub. 1784); RICHARD PRICE, OBSERVATIONS ON THE NATURE OF CIVIL LIBERTY, THE PRINCIPLES OF GOVERNMENT, AND THE JUSTICE AND POLICY OF THE WAR WITH AMERICA 8, 16, 21, 22, 24, 89 (Dublin, W. Kidd 8th ed. 1776).

86 1 TITUS LIVIUS, THE ROMAN HISTORY 138, 234, 319 (London, James Bettenham 1744); 2 *id.* at 180, 213, 214, 229; 4 *id.* at 162, 485; 5 *id.* at 248, 351; 6 *id.* at 63 (twice), 143, 195, 353, 457.

87 JOHN MILTON, A DEFENCE OF THE PEOPLE OF ENGLAND (1650), *reprinted in* 1 A COMPLETE COLLECTION OF THE HISTORICAL, POLITICAL, AND MISCELLANEOUS WORKS OF JOHN MILTON 445, 448, 449, 507, 510 (London, A. Millar 1738) [hereinafter WORKS OF JOHN MILTON]; JOHN MILTON, THE HISTORY OF BRITAIN, THAT PART ESPECIALLY, NOW CALLED ENGLAND (1670), *reprinted in* 2 WORKS OF JOHN MILTON, *supra*, at 1, 14; JOHN MILTON, THE READY AND EASY WAY TO ESTABLISH A FREE COMMONWEALTH (1660), *reprinted in* 1 WORKS OF JOHN MILTON, *supra*, at 587, 595.

88 1 TACITUS, THE ANNALS, *reprinted in* THE WORKS OF TACITUS 1, 2, 5 (Thomas Gordon trans., London, T. & T. Longman et al. 3d ed. 1753). I omit the many references to “free state” in the “political discourses upon [Tacitus]” included within this edition. These discourses were written by Gordon (who also cowrote Trenchard and Gordon’s *Cato’s Letters*), and likewise use “free state” to mean “republic.”

89 ABBÉ RAYNAL, A PHILOSOPHICAL AND POLITICAL HISTORY OF THE BRITISH SETTLEMENTS AND TRADE IN NORTH AMERICA 297 (Edinburgh, C. Denovan 1779); 1 ABBÉ RAYNAL, A PHILOSOPHICAL AND POLITICAL HISTORY OF THE SETTLEMENTS AND TRADE OF THE EUROPEANS IN THE EAST AND WEST INDIES 300, 445 (J. Justamond trans., London, T. Cadell 2d ed. 1776) [hereinafter RAYNAL, EAST AND WEST INDIES]; 2 *id.* at 198; 3 *id.* at 404; 5 *id.* at 390, 432, 447, 467; ABBÉ RAYNAL, THE REVOLUTION OF AMERICA 100 (J. Johnston trans., Edinburgh, J. Johnston 1782). Raynal was writing in part after the creation of the United States, but it is clear from the context that he was referring to states generally, not to States of the Union in particular.

90 ABBÉ DE MABLY, OBSERVATIONS ON THE GOVERNMENT AND LAWS OF THE UNITED STATES OF AMERICA 75, 76 (London, J.F.R. & Co. 1784). As with Raynal, Mably was writing after the creation of the United States, but it is clear from the context that he was referring to states generally, not to States of the Union in particular.

91 NICHOLAS MACHIAVEL, THE ART OF WAR (1521), *reprinted in* 4 THE WORKS OF NICHOLAS MACHIAVEL 1, 282 (Ellis Farnsworth trans., London, T. Davies et al. 2d ed. 1775); NICHOLAS MACHIAVEL, THE HISTORY OF FLORENCE, *reprinted in* 1 THE WORKS OF NICHOLAS MACHIAVEL, *supra*, at 1, 261; 2 *id.* at 124; NICHOLAS MACHIAVEL, POLITICAL DISCOURSES UNDER THE FIRST DECAD OF LIVY [hereinafter MACHIAVEL, POLITICAL DISCOURSES], *reprinted in* 3 THE WORKS OF NICHOLAS MACHIAVEL, *supra*, at 1, 35, 68, 120, 142, 177, 215, 222, 285, 286, 347, 380; NICHOLAS MACHIAVEL, THE PRINCE (1515), *reprinted in* 2 THE WORKS OF NICHOLAS MACHIAVEL, *supra*, at 187, 219, 220; NICHOLAS MACHIAVEL, A SKETCH OF THE CONSTITUTION AND AFFAIRS OF GERMANY, *reprinted in* 2 THE

Harrington (#35).<sup>95</sup> Some examples:

- "they were Free States, and not under a Monarchy" (Bacon);<sup>96</sup>
- "he prefers the absolute monarchy of Augustus to the free state of the Roman commonwealth" (Bolingbroke);<sup>97</sup>
- "he [Caesar] brought a free state to a habit of slavery" (Cicero);<sup>98</sup>
- "These, however, are only local advantages [of the French *Parlemens*], and relative to the nature of the French Government, which is an uncontroled Monarchy, with considerable remains of Aristocracy. But in a free State, such a powerful Body of Men . . . would, as will be presently shown, be productive of very dangerous political consequences . . ." (de Lolme);<sup>99</sup>

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WORKS OF NICHOLAS MACHIAVEL, *supra*, at 513, 515. A 1720 edition of Machiavelli's work includes other uses of "free state" or "free states" as a translation for terms that the 1775 edition translated as "Free Towns," "Liberty," "free governments," "Commonwealth," "free people," "States that have the full enjoyment of liberty," and "Republican Government." See NICHOLAS MACHIAVEL, THE DISCOURSES OF NICHOLAS MACHIAVEL, UPON THE FIRST DECADE OF TITUS LIVIUS, *reprinted in* THE WORKS OF THE FAMOUS NICHOLAS MACHIAVEL, CITIZEN AND SECRETARY OF FLORENCE 267, 290, 299, 329, 335, 337, 393 (London, A. Churchill et al. 3d ed. 1720); NICHOLAS MACHIAVEL, THE STATE OF GERMANY, IN AN ABRIDGEMENT, *reprinted in* THE WORKS OF THE FAMOUS NICHOLAS MACHIAVEL, CITIZEN AND SECRETARY OF FLORENCE, *supra*, at 265, 266, 267.

92 VOLTAIRE, ADDITIONS TO THE ESSAY ON GENERAL HISTORY, *reprinted in* 22 THE WORKS OF M. DE VOLTAIRE 1, 166 (T. Francklin et al. trans., London, S. Crowder et al. 1780); VOLTAIRE, ANCIENT AND MODERN HISTORY, *reprinted in* 8 THE WORKS OF M. DE VOLTAIRE 1, 24 (T. Francklin et al. trans., London, S. Crowder et al. 1779); VOLTAIRE, THE HISTORY OF CHARLES XII, KING OF SWEDEN, *reprinted in* 11 THE WORKS OF M. DE VOLTAIRE 1, 58 (T. Francklin et al. trans., London, S. Crowder et al. 1779); VOLTAIRE, THE TALES OF WILLIAM VADÉ, *reprinted in* 35 THE WORKS OF M. DE VOLTAIRE 11, 39 (T. Smollett et al. trans., London, J. Newbery et al. 1765).

93 ALGERNON SIDNEY, DISCOURSES CONCERNING GOVERNMENT 215, 226 (London, A. Millar 3d ed. 1751).

94 JOHN SOMERS, JURA POPULI ANGLICANI 29 (London, n. pub. 1701).

95 JAMES HARRINGTON, THE ART OF LAWGIVING, *reprinted in* THE OCEANA AND OTHER WORKS OF JAMES HARRINGTON 359, 428 (London, T. Beckett et al. 1771) [hereinafter THE OCEANA AND OTHER WORKS]; JAMES HARRINGTON, THE COMMONWEALTH OF OCEANA (1656), *reprinted in* THE OCEANA AND OTHER WORKS, *supra*, 31, 193; JAMES HARRINGTON, The Humble Petition of Divers Well Affected Persons (July 6, 1659) [hereinafter HARRINGTON, Humble Petition], *in* THE OCEANA AND OTHER WORKS, *supra*, at 508, 569, 572, 577, 578; JAMES HARRINGTON, THE PREROGATIVE OF POPULAR GOVERNMENT (1658), *reprinted in* THE OCEANA AND OTHER WORKS, *supra*, at 214, 353.

96 FRANCIS BACON, Speeches on Moral Occasions: Against Duelling, *in* 1 THE PHILOSOPHICAL WORKS OF FRANCIS BACON, *supra* note 84, at 393, 396.

97 BOLINGBROKE, REMARKS ON THE HISTORY OF ENGLAND, *supra* note 83, at 309.

98 CICERO, Oration XVI: The Second Against M. Antony, *supra* note 78, at 579, 655 (one of Cicero's famous Philippics against Marc Antony).

99 DE LOLME, *supra* note 76, at 135 n.a. The notes in the 1775 edition of de Lolme's are the author's own. See, e.g., *id.* at 35 n.a.

- “Moreover, the Examples of other Nations, who for many Ages lived happily under an arbitrary Government, may have influenced some. The Cities under Eumenes, says Livy, would not have changed their Condition with any free State whatever” (Grotius);<sup>100</sup>
- “[the] true form of a democracy or free state consisteth especially in this, that as to lawgiving, the wisdom of the nation propose, and the interest of the nation resolve” (Harrington);<sup>101</sup>
- “[the pro-Commonwealth emissaries] suddenly concluded, without Power from the General, upon these Articles; That the King be excluded [and] a Free State settled” (Hobbes);<sup>102</sup>
- “that which chiefly raised their indignation against him, was his boisterious inflexible temper, and the surname of Imperiosus, (imperious or lordly) a title intolerable in a free state” (Livy);<sup>103</sup>
- “whoever converts a free State into a Tyranny, and does not cut off such men as Brutus; or a tyrannical Government into a free State, and does not rid himself of such men as his Sons, will not be able to support himself long” (Machiavelli);<sup>104</sup>
- “he introduced a Monarchical government into a Free State by force of Arms” (Milton);<sup>105</sup>
- “Democracy, which is a popular, or, as we term it, a free State” (Plutarch);<sup>106</sup>
- “which must influence more or less in a despotic as well as free state” (Price);<sup>107</sup>
- “Ambassadors of free States ought to yield Precedence to all Crowned Heads, and Sovereign Princes” (Pufendorf);<sup>108</sup>
- “a kind of secret conspiracy [may therefore be perceived] between all monarchies, to destroy, or insensibly to sap the foundations of all

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100 GROTIIUS 1738, *supra* note 81, at 65–66.

101 HARRINGTON, Humble Petition, *supra* note 95, at 577.

102 HOBBS, *supra* note 79, at 585.

103 2 LIVIUS, *supra* note 86, at 229.

104 MACHIAVEL, POLITICAL DISCOURSES, *supra* note 91, at 347–48. Machiavelli is referring to the Brutus who led the overthrow of the last king of Rome, and was credited with being the father of the Republic. 1 LIVY, HISTORY OF ROME 205–09 (B.O. Foster trans., Harvard Univ. Press 1919). Brutus was said to have then executed his sons for trying to overthrow the Republic and reinstate a kingdom. *Id.* at 230–35.

105 MILTON, A DEFENCE OF THE PEOPLE OF ENGLAND, *supra* note 87, at 507.

106 PLUTARCH, OF THE THREE SORTS OF GOVERNMENT, MONARCHY, DEMOCRACY, AND OLIGARCHY, *supra* note 75, at 368.

107 PRICE, ADDITIONAL OBSERVATIONS ON THE NATURE AND VALUE OF CIVIL LIBERTY, AND THE WAR WITH AMERICA, *supra* note 85, at 151.

108 PUFENDORF, THE LAW OF NATURE AND NATIONS, *supra* note 77, at 814 (emphasis omitted).

free states” (Raynal);<sup>109</sup>

- “His temper haughty, insolent, and overbearing to such a degree as would hardly have been tolerated in one born to reign, was altogether insupportable in the citizen of a free state” (Robertson);<sup>110</sup>
- “the more plainly we perceive the difference in this respect between a monarchical and a free state” (Rousseau);<sup>111</sup>
- “I cannot think him in earnest, when he exaggerates [Sulla’s] cruelties, as a proof, that the mischiefs suffered under free states are more universal, than under kings and tyrants: for there never was a tyrant in the world, if [Sulla] was not one” (Sidney);<sup>112</sup>
- “Some may call it [Tyrranick Slavery], when in a free State, where the whole Legislative only has a Power to set down what Punishment shall be inflicted on the several Transgressions that are committed, a Part of it assumes a Power to inflict one of the severest Punishments” (Somers);<sup>113</sup>
- “How few were then living who had seen the ancient free state” (referring to the pre-emperor Roman Republic) (Tacitus);<sup>114</sup>
- “The arbitrary principles which he [King Charles XII of Sweden] had sucked in with his mother’s milk, made him forget that Sweden had formerly been a free state, and that, in ancient times, the management of public affairs was conducted by the king and senate, in conjunction” (Voltaire).<sup>115</sup>

For works originally written in languages other than English—Montesquieu, Plutarch, Pufendorf, Cicero, Grotius, Rousseau, some of Bacon, Livy, Tacitus, Raynal, Mably, Machiavelli, Voltaire, and Rapin<sup>116</sup>—I refer to the translations. The translations are what the Framers would predominantly have read; they would have influenced the Framers’ understanding of the meaning of the English term “free state”; and they themselves are evidence of the preexisting English understanding of the term. Notably, “free state” is sometimes used as a translation for the Latin “*republicam*,”<sup>117</sup> the Latin “*libera republica*,”<sup>118</sup> the Latin “*liberam*” (used to

109 4 RAYNAL, *EAST AND WEST INDIES*, *supra* note 89, at 445.

110 3 ROBERTSON 1774, *supra* note 80, at 402.

111 ROUSSEAU, *A TREATISE ON THE SOCIAL COMPACT*, *supra* note 82, at 99.

112 SIDNEY, *supra* note 93, at 209.

113 SOMERS, *supra* note 94, at 29.

114 1 TACITUS, *supra* note 88, at 5.

115 VOLTAIRE, *THE HISTORY OF CHARLES XII, KING OF SWEDEN*, *supra* note 92, at 58–59.

116 Though de Lolme’s work was originally published in French, the translation into English is likely substantially his own. See E-mail from Prof. David Lieberman, editor of the forthcoming 2007 edition of de Lolme’s *History of England*, to author (Apr. 26, 2007, 14:53 PST) (on file with author).

117 *Compare, e.g.*, 1 TACITUS, *supra* note 88, at 5, with 1 C. CORNELII TACITI, *OPERA* 7

refer to Rome as a republic that sought to avoid a return to monarchy),<sup>119</sup> the Latin “liberae ciuitati” (used to refer to the Roman republic),<sup>120</sup> the Italian “le republiche,”<sup>121</sup> and the Greek “δημοκρατίαν” (*demokratian*, meaning democracy or republic),<sup>122</sup> including in translations by Thomas Gordon (coauthor of *Cato’s Letters*), leading Restoration poet John Dryden, and prominent eighteenth century translator Peter Shaw.<sup>123</sup>

In my searches through all the works of Lutz’s top thirty-six authors, I found only one use of “free state” to refer to an independent absolute monarchy or some other independent authoritarian state: in one translation of Voltaire’s *The Age of Louis XIV*, which labels Parma, Modena, Genoa, and Lucca as “free states”—Lucca and Genoa were republics, but Modena and Parma were absolutist duchies.<sup>124</sup> (The original does not use “état libre,”<sup>125</sup> the phrase that is rendered “free state” in translations of Montesquieu,<sup>126</sup> and another translation renders the original “liberté”<sup>127</sup> as “notwithstanding their boasted liberty”<sup>128</sup> rather than “notwithstanding that they were free states.”<sup>129</sup>)

I found only six other uses of “free state” that stressed the independent nature of a republic or constitutional monarchy (Carthage, Holland, Ge-

(Warrington, Gul. Eyres 1781).

118 Compare BACON, *supra* note 84, at 312, with FRANCISCI BACONI, IMAGO CIVILIS JULII CAESARIS, *reprinted in* 2 OPERA OMNIA 386, 387 (London, R. Gosling 1730) (“liberae reipublicae”); 3 GROTIUS 1715, *supra* note 81, at 109, with HUGO GROTIUS, DE IVRE BELLI AC PACIS LIBRI TRES 479 (photo. reprint 1995) (1646).

119 Compare 1 LIVIUS, *supra* note 86, at 138, with 1 LIVY, *supra* note 104, at 268.

120 Compare 1 LIVIUS, *supra* note 86, at 234, with 2 LIVY, *supra* note 104, at 30.

121 Compare MACHIAVEL, POLITICAL DISCOURSES, *supra* note 91, at 142, with NICCOLÒ MACHIAVELLI, SOPRA LA PRIMA DECA DI TITO LIVIO, *reprinted in* OPERE DI NICCOLÒ MACHIAVELLI 123, 200 (Ugo Mursia ed., 8th ed. 1983).

122 Compare PLUTARCH, THE LIFE OF PERICLES, *supra* note 75, at 125, with PLUTARCH, PLUTARCH’S LIFE OF PERICLES 31 (London, MacMillan & Co. 1894).

123 See Marie Boas Hall, *Shaw, Peter*, in 12 DICTIONARY OF SCIENTIFIC BIOGRAPHY 365, 365–66 (1970).

124 See 2 VOLTAIRE, THE AGE OF LOUIS XIV 74 (R. Griffith trans., London, Fielding & Walker 1780) (“[The Emperor] imposed a tax of one hundred and fifty thousand pistols upon Tuscany; forty thousand upon the Dutchy of Mantua; and Parma, Modena, Lucca, and Genoa, notwithstanding they were free states, were included in these impositions.”); see also Geoffrey Symcox, *The Political World of the Absolutist State in the Seventeenth and Eighteenth Centuries*, in EARLY MODERN ITALY 1555–1796, at 104, 104 (John A. Marino ed., 2002) (noting that Genoa and Lucca were republics).

125 See 2 VOLTAIRE, LE SIECLE DE LOUIS XIV 152 (Edinburg, Hamilton, Balfour & Neill 1752).

126 See, e.g., *supra* notes 45–49.

127 2 VOLTAIRE, *supra* note 125, at 152.

128 1 VOLTAIRE, THE AGE OF LEWIS XIV 358 (London, R. Dodsley 2d ed. 1752).

129 2 VOLTAIRE, *supra* note 124, at 74.

neva, and Greek popularly governed states) rather than its nondespotic nature: once in a personal letter from Montesquieu to an acquaintance<sup>130</sup> (Montesquieu's letters were published, but apparently had little influence in America<sup>131</sup>); once in Hume's *History of England*;<sup>132</sup> once in Livy,<sup>133</sup> twice

130 Letter XVI from M. de Montesquieu to Abbé de Guasco, in 4 THE COMPLETE WORKS OF M. DE MONTESQUIEU 25, 25 (London, T. Evans & W. Davis 1777) ("[Carthage] continued to be a free state [after the Second Punic War], and entirely independent."). Carthage was indeed an independent republic until its destruction in the Third Punic War, H.H. Scullard, *Carthage*, in 2 GREECE & ROME 98, 103 (1955), though Montesquieu seems to be stressing its independence and not its being a republic. Another letter, Letter XLVI from M. de Montesquieu to L'Abbé de Guasco (1753), in 4 THE COMPLETE WORKS OF M. DE MONTESQUIEU, *supra*, at 84, uses "in a free state" to mean "having free time," and thus sheds no light on the topic of this Article. See *id.* at 85 ("If you continue in a free state, I advise you to persevere in prosecuting the enterprise you mentioned to me [writing a work on The Spirit of Ecclesiastical Laws]"); see also Letter from M. de Montesquieu to L'Abbé de Guasco (1753), in LETTRES DE MONSIEUR DE MONTESQUIEU À DIVERS AMIS D'ITALIE 189, 191 (London, n. pub. 1767) ("si vous continuez d'être libre").

131 Spurlin's *Montesquieu in America* mentions that the book in which they were collected (*Lettres Familières*) appeared in the catalog of Philadelphia's Loganian library by 1828, and likely appeared in a private library before 1801. SPURLIN, *supra* note 42, at 62 n.52, 63 n.56. The index to Spurlin's work includes no further mention of the book. *Id.* at 291.

132 See 5 DAVID HUME, THE HISTORY OF ENGLAND, FROM THE INVASION OF JULIUS CÆSAR TO THE REVOLUTION IN 1688, at 403 (London, A. Millar 1763) (speaking of a time when the Dutch were in revolt against the Spanish and stating that, "Spain refused to treat with the Dutch as a free state"). The Dutch were indeed an aristocratic republic at the time, but the context seems to suggest that "free" was referring to their independence from foreign rule and not to their internal organization. See *id.*

In two other instances, Hume's *History of England* uses "free state" to mean "non-despotically governed country," distinguishing "free states" from "[s]overeign princes," 7 *id.* at 254, and "princes," 8 *id.* at 202. In two more, the matter is ambiguous. One such reference appears on the page before a reference to "the Princes and free States of Europe." *Id.* In speaking of King Louis XIV's seizure of Strasbourg in 1684, the book refers to "[t]he important town of Strasbourg, an antient and a free state"; Strasbourg was independent, but had also been a republic for centuries. *Id.* at 201. The other passage speaks of how "[t]he Dutch ambassadors in their memorials expressed all the haughtiness and disdain, so natural to a free State, which had met with such unmerited ill usage." 7 *id.* at 522. Since this was in 1673, when the Dutch had long been independent, and since the passage discusses a war between several independent states, it seems unlikely that Hume is trying to stress the independence of the Dutch, but it is possible.

As I noted above, Hume's Essays consistently used "free state" to mean "non-despotically governed country." See *supra* Part IV.

133 See 6 LIVIUS, *supra* note 86, at 327 ("[King Eumenes of Pergamon] had laid all the states and most of the principal men of Greece under the strongest obligations, and governed his own kingdom with so much moderation, that none of the cities subject to him would have changed conditions with any of the free states.").

Grotius interprets this passage as referring to the states' being "free" in the sense of being governed nondespotically, writing—citing this passage—that,

in Pufendorf's work;<sup>134</sup> and once in Rapin de Thoyras (#36).<sup>135</sup> But these are the exceptions rather than the rule—seven uses of “free state” to refer to the independent aspect of countries (almost all of them nondespotically governed), compared to over 240 references to the nondespotic aspect of nondespotically governed countries, including in the most influential works of the era: Blackstone's *Commentaries*, Montesquieu's *Spirit of Laws*, Hume's *Essays*, and *Cato's Letters*.

Other sources that didn't make Lutz's list but were likely to have been read by the Framing generation likewise used “free state” to mean the opposite of despotism. For instance, “free state” was part of the official name of the short-lived English experiment with nonmonarchical government. The Rump Parliament's 1649 Act declaring the Commonwealth provided,

That the People of England, and of all the Dominions and Territories thereunto belonging, are and shall be, and are hereby Constituted, Made, Established, and Confirmed to be, a Commonwealth and Free-State; And shall from henceforth be Governed as a Commonwealth and Free-State, by the Supreme Authority of this Nation, The

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[T]he Examples of other Nations, who for many Ages lived happily under an arbitrary Government, may have influenced some. The Cities under Eumenes, says Livy, would not have changed their Condition with any free State whatever. And sometimes the Situation of publick Affairs is such, that the State seems to be undone without Remedy, unless the People submit to the absolute Government of a single Person . . .

GROTIUS 1738, *supra* note 81, at 65–66. Nonetheless, it's possible that Grotius misread Livy here, and that the passage refers instead to the states' being independent of outside rule.

134 See 1 BARON PUFFENDORF ET AL., AN INTRODUCTION TO THE HISTORY OF THE PRINCIPAL STATES OF EUROPE 406 (London, A. Wilde et al. 1764) (“But Matters were accommodated with this *Canton*, and [the Duke of Savoy] made a full and formal Renunciation of all Claim upon *Geneva* and acknowledged it to be a free State.”); PUFFENDORF, THE LAW OF NATURE AND NATIONS, *supra* note 77, at 685 (“Because, the League being made between free States, consider'd in that Capacity, whenever this Condition fails, the League must fail with it. . . . And, consequently, neither an unlawful Usurper, nor any foreign Enemy, shall have a Place in the Congress of Allies.”). Unlike other Pufendorf references that are translated as “free state,” the original second Pufendorf source does not say “*libera civitate*,” but merely says “*civitates*,” SAMUEL PUFFENDORF, 1 DE JURE NATURAE ET GENTIUM LIBRI OCTO 482 (photo. reprint 1934) (1688); the term “free” was added by the translator, PUFFENDORF, THE LAW OF NATURE AND NATIONS, *supra* note 77, at 478.

135 2 PAUL RAPIN DE THOYRAS, THE HISTORY OF ENGLAND 411 (Joseph Morgan trans., London, James Mechell 1733) (discussing how the Netherlands provinces would only negotiate with the King of Spain “on the foot of free states”). Rapin de Thoyras does use “free state” in the more common sense of nonmonarchical state, in describing the Commonwealth's declaration of “a free state and commonwealth, without a single person, Kingship, or house of lords,” 3 *id.* at 54, but here he appears to be closely paraphrasing the Act establishing the British Commonwealth, which itself used the term “free state.” See *infra* note 136 and accompanying text.



Representatives of the People in Parliament, and by such as they shall appoint and constitute as Officers and Ministers under them for the good of the People, and that without any King or House of Lords.<sup>136</sup>

Likewise, Marchamont Nedham titled his 1656 pro-Commonwealth tract *The Excellencie of a Free-State: or, The Right Constitution of a Commonwealth*,<sup>137</sup> John Adams’ 1797 edition of *A Defence of the Constitutions of Government of the United States of America* quotes the work by name, characterizes it as “a valuable morsel of antiquity well known in America, where it has many partisans,” and treats it as speaking generally of the same concept as is “intended by the words republic, *commonwealth*, and *popular state*.”<sup>138</sup> Roger Williams similarly wrote that “in a free State no Magistrate hath power over the bodies, goods, lands, liberties of a free people, but by their free consents.”<sup>139</sup>

This long history of the use of “free state” to mean a nondespotic country—dating at least as far back as 1579,<sup>140</sup> and into the 1790s—likely

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136 Act of May 19, 1649, 2 ACTS & ORDS. INTERREGNUM 122; *see also* A DECLARATION OF THE PARLIAMENT OF ENGLAND, EXPRESSING THE GROUNDS OF THEIR LATE PROCEEDINGS, AND OF SETTLING THE PRESENT GOVERNMENT IN THE WAY OF A FREE STATE (London, Edward Husband 1648), *reprinted in* 1 THE STRUGGLE FOR SOVEREIGNTY 369, 381 (Joyce Lee Malcolm ed., 1999) (declaring the grounds for reforming the government as a “free state” instead of “restoring tyranny”); *id.* at 388 (discussing “Parliament’s design and endeavor in the present change of Government, from Tyranny to a Free State”).

137 MARCHAMONT NEDHAM, *THE EXCELLENCIE OF A FREE-STATE: OR, THE RIGHT CONSTITUTION OF A COMMON-WEALTH* (London, n. pub. 1656).

138 3 JOHN ADAMS, *A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA* 213 (Philadelphia, William Cobbett 1797). Adams disagrees with Nedham, but his description of Nedham—and his willingness to spend several pages expressly responding to Nedham’s arguments—suggests that Nedham’s terminology was well-known to the Framing generation. *See id.* at 211–13. Nedham’s reputation is also evidenced by the fact that Josiah Quincy, Jr., John Adams’ cocounsel in the Boston Massacre case and a noted author of the Revolutionary Era, used Marchmont Nedham as a pen name. JOSIAH QUINCY, *MEMOIR OF THE LIFE OF JOSIAH QUINCY, JR.* 33, 150 (Boston, Cummings, Hilliard & Co. 1825).

139 ROGER WILLIAMS, *THE BLOODY TENENT OF PERSECUTION* (1644), *reprinted in* 3 THE COMPLETE WRITINGS OF ROGER WILLIAMS 1, 254 (Samuel L. Caldwell ed., 1963); *see also id.* at 297 (“So I also ask, since in every free State civill Magistrates have no more power but what the peoples of those States, Lands and Countries betrust them with, whether or no (by this meanes) it must not follow that Christ Iesus hath left with the Peoples and Nations of the World, his Spirituall Kingly power to grant commissions and send out Ministers to themselves, to preach, convert and baptize themselves?”(emphasis omitted)).

140 PLUTARKE, *THE LIVES OF THE NOBLE GRECIANS AND ROMANES* 297 (James Aymot & Thomas North trans., London, Thomas Vautroullier & John Wight 1579) (“Timoleon at the sute of the Citizens, made counsell halls, and places of iustice to be built there: and did by this meanes stablish a free state and popular government, and did suppressse all tyrannicall power.”); *see also* JEAN CALVIN, *THE SERMONS OF M. IOHN CALVIN VPON THE FIFTH BOOKE OF MOSES CALLED DEUTERONOMIE* 645 (Arthur Golding trans., London, Henry Middleton

made the term familiar to the Framing generation.<sup>141</sup> And the familiarity makes it unsurprising that the term sounded appealing, and that Madison's edit of "free country" into "free state" (the term used in the amendments proposed by the New York, North Carolina, Rhode Island, and Virginia ratifying conventions<sup>142</sup>) would be accepted with little comment.

#### VII. "FREE STATE" IN AMERICA AROUND THE REVOLUTION

"Free state" was used by Americans during the revolutionary era in the same sense I have described. The Journal of the Virginia House of Burgesses for April 1757 notes "[t]hat a well regulated Militia is the true and natural Defence of every free State,"<sup>143</sup> long before states in the sense of states of the union were contemplated. James Otis' *The Rights of the British Colonies Asserted and Proved* discusses "the first principles of law and justice, and the great barriers of a free state, and of the British constitution in particular."<sup>144</sup>

John Dickinson's *Letters from a Farmer in Pennsylvania* insists that "[t]axes in every free state have been, and ought to be, as exactly proportioned as is possible to the abilities of those who are to pay them," and that "every free state should incessantly watch, and instantly take alarm on any addition being made to the power exercised over them," giving examples from English history.<sup>145</sup> In 1767, the Massachusetts House of Representatives admonished Parliament that "[t]he Supreme legislative in every free State derives its power from the constitution, by the fundamental rules of which it is bounded and circumscribed."<sup>146</sup>

Likewise, the Continental Congress' *Letter to the Inhabitants of the Province of Quebec* urged the inhabitants of Quebec to note how

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1583) ("[I]t might be said [that] a free state is much better tha[n] to be vnder a Prince."); *id.* ("If a ma[n] shoulde co[m]pare a principality, or a free state of a Senate, or whatsoever els can be imagined for a co[m]monweale . . .").

141 See 2 QUENTIN SKINNER, *VISIONS OF POLITICS* 286–89, 298, 313–15 (2002) (discussing the link between the Commonwealth's declaration of the "free state," endorsed by Milton, and Roman traditions of liberty).

142 See THE COMPLETE BILL OF RIGHTS 181–83 (Neil H. Cogan ed., 1997).

143 JOURNAL OF THE HOUSE OF BURGESSES (Williamsburg, William Hunter 1757), reprinted in 8 JOURNALS OF THE HOUSE OF BURGESSES OF VIRGINIA 1752–1755, 1756–1758, at 413, 483 (H.R. McIlwaine ed., 1909).

144 JAMES OTIS, *THE RIGHTS OF THE BRITISH COLONIES ASSERTED AND PROVED* 55 (Boston, Edes & Gill 1764).

145 JOHN DICKINSON, *LETTERS FROM A FARMER IN PENNSYLVANIA, TO THE INHABITANTS OF THE BRITISH COLONIES* 80, 88 (Philadelphia, David Hall & William Sellers 3d ed. 1769) (emphasis omitted).

146 A Letter to Dennis deBerdt, Esq; Agent for the House of Representatives, Jan. 12, 1768, in JOURNAL OF THE HONOURABLE HOUSE OF REPRESENTATIVES 25, 25 (Boston, Green & Russell 1768).

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another late statute, made without your consent, has subjected you to the impositions of *Excise*, the horror of all free states; thus wresting your property from you by the most odious of taxes, and laying open to insolent tax-gatherers, houses, the scenes of domestic peace and comfort, and called the castles of English subjects in the books of their law.<sup>147</sup>

Whether or not we share the authors' dislike of excise taxes, it's clear they were speaking of "free state" not as a state of the union (the colonies were still colonies in common 1774 usage), or even as a country independent of outside domination: as of 1774, the Continental Congress had not yet resolved to break with England, and thus wasn't urging Quebec to do the same. Rather, the Continental Congress was speaking of "free state" as the opposite of a despotic one.

Post-1776 American sources are less useful for resolving what "free state" meant to the Framers. With earlier sources, the timing alone categorically negates the possibility that they meant "states of the union free from federal intrusion." With later sources, one can't rely solely on the timing.<sup>148</sup>

Nonetheless, many important post-1776 sources do use "free state" in contexts where the phrase must mean "nondespotically governed country," not "independent state of the union." (I have seen no post-1776 sources in which the context makes the opposite meaning clear.) This is clearest when the sources are making general assertions about the political theory of liberty-preserving governments, and the truth or falsity of the assertions is unrelated to whether the state is part of a federal union.

Consider John Adams' 1797 edition of *A Defence of the Constitutions of Government of the United States of America*, in which he uses the term "free state" many times, for instance asserting that "there can be no constitutional liberty, no free state, no right constitution of a commonwealth, where the people are excluded from the government."<sup>149</sup> That's a statement about what it takes to assure a nondespotic country generally, not about what it takes to protect the states from the federal government.<sup>150</sup>

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147 LETTER TO THE INHABITANTS THE PROVINCE OF QUEBEC, *supra* note 38, at 109.

148 Likewise, references to "free and independent states," such as in the Declaration of Independence, are also less useful: they appear to suggest that states' being free and being independent are two separate matters, but they are not dispositive on that score. That's why it's valuable to look at the broader (and nearly unanimous) evidence of how "free state" was used in the sources the Framers read and cited.

149 3 ADAMS, *supra* note 138, at 361; *see also* 2 *id.* at 6; 3 *id.* at 167, 292, 397, 400–03, 406–07, 430.

150 Consider by analogy the Massachusetts and New Hampshire Constitutional provisions, which stated, "The liberty of the press is essential to the security of freedom in a state it ought not, therefore, to be restrained in this commonwealth," MASS. CONST. of 1780, pt. I,

It's hard to see how "free state" here could have meant simply an independent state of the union. Likewise, in the 1787 edition, Adams writes,

We often hear and read of free states, a free people, a free nation, a free country, a free kingdom, and even of free republics; and we understand, in general, what is intended, although every man may not be qualified to enter into philosophical disquisitions concerning the meaning of the word liberty, or to give a logical definition of it.

Our friend Dr. Price has distinguished very well, concerning physical, moral, religious, and civil liberty: and has defined the last to be "the power of a civil society to govern itself, by its own discretion, or by laws of its own making, by the majority, in a collective body, or by fair representation. In every free state, every man is his own legislator."<sup>151</sup>

Similarly, consider James Madison's famous 1785 *Memorial and Remonstrance Against Religious Assessments*, which begins:

To the Honorable the General Assembly of the Commonwealth of Virginia

A Memorial and Remonstrance [Against Religious Assessments]

We the subscribers, citizens of the said Commonwealth, having taken into serious consideration, a Bill printed by order of the last Session of General Assembly, entitled "A Bill establishing a provision for Teachers of the Christian Religion," and conceiving that the same if finally armed with the sanctions of a law, will be a dangerous abuse of power, are bound as faithful members of a free State to remonstrate against it, and to declare the reasons by which we are determined.<sup>152</sup>

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art. XVI, *reprinted in* 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 33, at 1888, 1892, and "The Liberty of the Press is essential to the security of freedom in a state; it ought, therefore, to be inviolably preserved," N.H. CONST. of 1784, pt. I, art. XXII, *reprinted in* 4 FEDERAL AND STATE CONSTITUTIONS, *supra* note 33, at 2453, 2456. These provisions, which seem to have been inspired by Blackstone, *see supra* text accompanying note 32, focused on what is needed to prevent despotism within countries generally, not what is needed to protect the states of Massachusetts or New Hampshire from the United States of America. Likewise, the evidence this Article gathers about the meaning of "free state" suggests that "necessary to the security of a free State" means "necessary to preserve freedom within a country generally," not "necessary to protect each state from the United States."

<sup>151</sup> JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA 122 (Philadelphia, Hall & Sellers 1787); *see also id.* at x (distinguishing "a free state," a category in which Adams would include a constitutional monarchy with representative institutions, from "monarchy," which Adams uses to refer to "simple," or absolute, "monarchy"). Adams was no fan of pure democracy, and saw it as tyrannical in its own way; he therefore used "free states" as an antonym both to "democracies," which he described as involving government "in the hands of the meanest rabble," and to "oligarchies"—in either context, the truly worthy people (those in "the middle state" between "the rich" and "the poor") are "overpowered." 3 ADAMS, *supra* note 138, at 167.

<sup>152</sup> James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), *in* 8 THE PAPERS OF JAMES MADISON 298, 298–99 (Robert A. Rutland et al. eds.,

Madison’s reference to “a free State” couldn’t have been a reference to Virginia as a state under the Articles of Confederation, since the question of assessments was unrelated to Virginia’s role as one of the United States. Assessments were a purely Virginia matter, which didn’t touch on Virginia’s rights or responsibilities with respect to other states. Nor could “a free State” have been a simple reference to Virginia as such, since Virginia was officially called a Commonwealth, and had been called that way twice in the preceding lines.<sup>153</sup>

Rather, Madison must have been speaking about the moral duty of citizens of nondespotic countries generally—a moral duty to remonstrate against abuses of power by their representatives—and not a moral duty belonging to citizens of American states specifically. Again, “free state” meant a nondespotically governed country.

Consider also the uses of “free state” in Framing-era state constitutions. Pennsylvania’s 1776 Constitution provided that “[t]he members of the house of representatives . . . shall [have various enumerated powers] and shall have all other powers necessary for the legislature of a free state or commonwealth.”<sup>154</sup> In English legal and constitutional history, “Commonwealth or Free-State” was noted for being the official title of England’s 1649–60 republican government;<sup>155</sup> the Pennsylvania constitution-writers therefore likely understood “free state or commonwealth” to mean “republic.”<sup>156</sup>

Likewise, the North Carolina Bill of Rights of 1776 provided that “perpetuities and monopolies are contrary to the genius of a free State, and ought not to be allowed.”<sup>157</sup> This text was adopted shortly after the Maryland Bill of Rights, which stated “[t]hat monopolies are odious, contrary to the spirit of a free government and the principles of commerce; and ought not to be suffered.”<sup>158</sup>

The North Carolina Bill of Rights was likely influenced by the Maryland Bill of Rights,<sup>159</sup> or, if it wasn’t, the two were likely influenced by a

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1973).

153 *Id.*

154 PENN. CONST. of 1776, plan of government, § 9, *reprinted in* 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 33, at 3081, 3084–85.

155 *See supra* note 136.

156 *Cf.* Noah Webster, *American Dictionary of the English Language* (1828) (defining “commonwealth” as “properly a free state; a popular or representative government; a republic; as the commonwealth of Massachusetts”).

157 N.C. CONST. of 1776, declaration of rights, art. XXIII, *reprinted in* 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 33, at 2787, 2788.

158 MD. CONST. of 1776, declaration of rights, art. XXXVIII, *reprinted in* 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 33, at 1686, 1690.

159 Earle H. Ketcham, *The Sources of the North Carolina Constitution of 1776*, 6 N.C.

common source. “[T]he genius of a free state” in North Carolina and “the spirit of a free government” in Maryland are thus likely synonyms, and both seem to refer to the nature of a country in which citizens enjoy freedom. Nothing in the condemnation of monopolies refers to the genius of a free state of the union only, as opposed to of free governments more generally.<sup>160</sup> Likewise, absence of monopolies is a matter of citizens’ liberty, not of state independence. Again, then, we see “free state” meaning “non-despotically governed country,” not “state independent of the federal government.”

#### VIII. IMPLICATIONS FOR THE ORIGINAL MEANING OF THE SECOND AMENDMENT

From the above evidence, we can draw some modest conclusions.

1. The phrase “necessary to the security of a free State” is not expressly referring to states of the union. Like the word “State” in the phrase “foreign State” in Article I, Section 9 and Article III, Section 2 of the Constitution, “State” in the Second Amendment means “country”—as in Blackstone’s “land of liberty,” a reference to countries generally and not to states of a federal union specifically.

This is the consistent way the phrase was used in the legal and political language of the 1700s. It is the way the phrase must have been understood in 1776, when the Virginia Declaration of Rights provided that, “a well-regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free State.”<sup>161</sup> There’s no reason to think that the meaning of the phrase suddenly changed from 1776 to 1788, when four ratifying conventions—including Virginia’s—proposed that the Federal Constitution be amended to specify “[t]hat the people have a right to keep and bear arms; that a well-regulated militia, composed of the body of the people trained to arms, is the proper, natural, and safe defence of a free state.”<sup>162</sup> Certainly Madison in 1785 and Adams in 1787 and

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HIST. REV. 215, 222, 224 (1929) (concluding that the Maryland Constitution “was evidently used to a considerable degree by the framers” of the North Carolina Constitution, and that some provisions were copied directly from the Maryland Constitution).

160 Another provision in the North Carolina Bill of Rights does expressly say “free government.” N.C. CONST. of 1776, declaration of rights, art. XXV, *reprinted in* 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 33, at 2787, 2788 (“The property of the soil, in a free government, being one of the essential rights of the collective body of the people, it is necessary, in order to avoid future disputes, that the limits of the State should be ascertained with precision.”). But for the reasons given in the text, I don’t think that “free state” and “free government” were understood as being different.

161 VA. CONST. of 1776, declaration of rights, § 13, *reprinted in* 7 FEDERAL AND STATE CONSTITUTIONS, *supra* note 33, at 3812, 3814.

162 THE COMPLETE BILL OF RIGHTS, *supra* note 142, at 181–82.

1797 used "free state" the way the pre-1776 sources used it.<sup>163</sup>

The change from "free country" in Madison's original draft of the Second Amendment to "free State" was thus stylistic, not substantive.<sup>164</sup> And Madison could easily have concurred in such a change because he had written "free state," meaning "free country," four years before in the *Memorial and Remonstrance*.<sup>165</sup>

2. "Free" in "free State" also means free of despotism, not free of another government. That is how "free state" was consistently used in the works the Framers read; and in those works—especially in Blackstone generally and his discussion of the militia in particular—talk of "free states" often revolved around the question of what is needed to keep the states free of despotism.<sup>166</sup>

Arguments that "[t]he Amendment was drafted in response to the perceived threat to the 'free[dom]' of the 'State[s]' posed by a national standing army controlled by the federal government"<sup>167</sup> are thus misguided. The threat consistently referred to in discussions of a "free state" was to the freedom of the nation's citizens, not to the independence of states in a federal union.<sup>168</sup>

3. There is thus little reason to interpret the Amendment as speaking of "state militias," or to interpret the leading Second Amendment case of *United States v. Miller*<sup>169</sup> as discussing the state militia<sup>170</sup> or the need to maintain the militia "to safeguard the individual States."<sup>171</sup> *Miller* never

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163 See *supra* notes 149–53 and accompanying text.

164 See *supra* notes 8–13 and accompanying text.

165 See *supra* notes 152–53 and accompanying text.

166 See *supra* Part I.

167 *Parker v. District of Columbia*, 478 F.3d 370, 406 (D.C. Cir. 2007) (Henderson, J., dissenting) (alteration in original).

168 "A free state," even in the sense of "a free country," could still theoretically refer to a state as well as to the United States, since the Framers might have seen both as countries. The theory would then be that the Second Amendment was seen as protecting the states as nondespotic (free) states, by making sure that the federal government could not disarm the people and thus could not facilitate the growth of a despotic government within a state. Yet this would be a strange reading: the Bill of Rights was an attempt to prevent *federal* abuse of power, not to prevent state abuse of power. See *Barron v. Mayor of Balt.*, 32 U.S. (7 Pet.) 243, 247–51 (1833).

169 307 U.S. 174 (1939).

170 See, e.g., *United States v. Oakes*, 564 F.2d 384, 387 (10th Cir. 1977) ("The purpose of the second amendment as stated by the Supreme Court in *United States v. Miller* was to preserve the effectiveness and assure the continuation of the state militia. The Court stated that the amendment must be interpreted and applied with that purpose in view." (citation omitted)).

171 See, e.g., *Parker*, 478 F.3d at 403–04 (Henderson, J., dissenting) ("Construing its two clauses together so that, as *Miller* declares, the right of the people to keep and bear arms relates to those Militia whose continued vitality is required to safeguard the individual

characterizes the constitutional “Militia” as a “state militia” or as a body aimed at safeguarding the individual states. Rather, it speaks only of the militia generally—the bulk of the adult male citizenry—which “the States were expected to maintain and train,”<sup>172</sup> but which Congress was expected to “organiz[e], arm[], and disciplin[e].”<sup>173</sup>

The notion that the Second Amendment’s reference to “Militia” means a “state militia” aimed at protecting individual states from the federal government likely stems from the misreading of “free State” as “state of the union independent of the federal government.” It does not come from *Miller* itself.

4. To 1780s Americans, “necessary to the security of a free State” thus meant “necessary to the security of a nondespotic country, so that it avoids devolving into despotism.” Maintaining a “well-regulated militia”—an armed citizenry<sup>174</sup> that could function well as a militia<sup>175</sup>—would provide the country with security while minimizing the chance of despotic takeover by the armed force or its masters.

And given this, it is no surprise that the Framers would combine the prefatory clause and the operative clause. The prefatory clause (“A well regulated Militia, being necessary to the security of a free State”) praises the value of an armed citizenry as a means for providing security from external aggression while avoiding the risk of internal oppression. The operative clause (“the right of the people to keep and bear arms, shall not be infringed”) protects the citizenry from being disarmed.

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States . . . the District is inescapably excluded from the Second Amendment because it is not a State.”).

<sup>172</sup> *Miller*, 307 U.S. at 178.

<sup>173</sup> *Id.* (quoting U.S. CONST. art. I, § 8).

<sup>174</sup> *See, e.g., id.* (so defining the militia); *see also* Act of May 8, 1792, ch. 33, § 1, 1 Stat. 271, 271 (repealed 1903) (same).

<sup>175</sup> *See* 13 OXFORD ENGLISH DICTIONARY 524 (2d ed. 1989) (offering definition “regulated . . . b. Of troops: Properly disciplined. *Obs. rare* [providing example from 1690]”); *cf., e.g.,* ARTICLES OF CONFEDERATION art. VI, para. 4 (U.S. 1781) (insisting that “every State shall always keep up a well regulated and disciplined militia, sufficiently armed and accoutred”); *Mayor of N.Y. v. Miln*, 36 U.S. (11 Pet.) 102, 128 (1837) (“The object of all well regulated governments is to promote the public good, and to secure the public safety . . .”); *Olney v. Arnold*, 3 U.S. (3 Dall.) 308, 314 (1796) (discussing “the policy of all well regulated, particularly of all republican governments”); THE FEDERALIST NO. 6 (Alexander Hamilton), *supra* note 39, at 32 (“Sparta was little better than a well regulated camp . . .”); *id.* NO. 83, at 567 (“The capricious operation of so dissimilar a method of trial in the same cases, under the same government, is of itself sufficient to indispose every well regulated judgment towards it.”). *See generally* Reynolds, *supra* note 7, at 474 (“A ‘well regulated militia’ was thus one that was well-trained and equipped; not one that was ‘well-regulated’ in the modern sense of being subjected to numerous government prohibitions and restrictions.”).



## CONCLUSION

None of this categorically disposes of the collective/individual rights debate. This Article is not meant, for instance, to respond to arguments that a focus on the text and its original meaning is mistaken, and that we should instead ask whether the Amendment makes sense today, when arms and the military are vastly different than they were in 1791.<sup>176</sup>

But if scholars and courts are to rely on the text, they should recognize which phrases are terms of art, and avoid reading those phrases to mean something they were never understood as meaning. When the Double Jeopardy Clause speaks of "jeopardy of life or limb," for instance, we recognize the phrase "life or limb" as such a term of art. To the extent that we focus on the text of the provision, we see it as referring to crimes generally.<sup>177</sup> We reject the alternative meaning of "jeopardy of the death penalty or dismemberment," which may be plausible if one looks at the literal meaning of each word but not if one looks at what the phrase meant to those who enacted it.<sup>178</sup>

Likewise, when the Seventh Amendment speaks of "Suits at common law,"<sup>179</sup> we recognize that the Amendment was understood as meaning common law as opposed to equity, rather than common law as opposed to statutes or common law as opposed to European civil law.<sup>180</sup> To the extent we focus on the text of the provision, we use the original "common law as opposed to equity" meaning and not the others. Assuming one of the other meanings would be a pun rather than a sound form of legal interpretation—a play on words that may be consistent with their modern dictionary meaning but not with their meaning as a historically recognized term of art.

The same goes for "a free State." To political writers of the seventeenth and eighteenth centuries, and readers of those writers, "a free State" was a familiar idiom with a known meaning. And that meaning was "a nondespotically governed country," not "an independent state of the union."

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176 Compare, e.g., Michael C. Dorf, *What Does the Second Amendment Mean Today?*, 76 CHI.-KENT L. REV. 291 (2000) (arguing that the Second Amendment ought to be interpreted in light of changing circumstances), with Eugene Volokh, *Who's Right on Second?*, NAT'L REV. ONLINE, Dec. 6, 2002, <http://www.nationalreview.com/comment/comment-volokh120602.asp> (arguing that even under a "living Constitution" approach, the Second Amendment should be seen as securing an individual right).

177 See *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 170–73 (1873); GEORGE C. THOMAS III, *DOUBLE JEOPARDY* 120–22 (1998).

178 THOMAS, *supra* note 177, at 120–22.

179 See U.S. CONST. amend. VII.

180 See *Curtis v. Loether*, 415 U.S. 189, 193 (1974); *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 446 (1830); see also 3 STORY, *supra* note 7, at 645–46 (taking the same view).

APPENDIX: REMAINING REFERENCES TO “FREE STATE” IN *CATO’S LETTERS*

The following are the references to “free state” in *Cato’s Letters* beyond the first five, which were quoted in Part V. I italicize both “free state” and the terms from which free states are being distinguished (usually something like “tyrant,” “arbitrary prince,” “absolute prince,” or just “prince”). I have also tried to make these excerpts more readable by generally changing uppercase words to lowercase except when uppercase is required by modern convention.

In free countries, as people work for themselves, so they fight for themselves: but in *arbitrary countries*, it is all one to the people, in point of interest, who conquers them; they cannot be worse used; and when a tyrant’s army is beaten, his country is conquered: he has no resource; his subjects having neither arms, nor courage, nor reason to fight for him; he has no support but his standing forces; who, for enabling him to oppress, are sharers in his oppression; and fighting for themselves while they fight for him, do sometimes fight well: but his poor people, who are oppressed by him, can have no other concern for his fate, than to wish him the worst.

In attacks upon a *free state*, every man will fight to defend it, because every man has something to defend in it. He is in love with his condition, his ease, and property, and will venture his life rather than lose them; because with them he loses all the blessings of life. When these blessings are gone, it is madness to think that any man will spill his blood for him who took them away, and is doubtless his enemy, though he may call himself his prince. It is much more natural to wish his destruction, and help to procure it.

For these reasons, small *free states* have conquered the greatest *princes*; and the greatest princes have never been able to conquer *free states*, but either by surprizing them basely, or by corrupting them, or by forces almost infinitely superior, or when they were distracted and weakened by domestick divisions and treachery.<sup>181</sup>

It is therefore government alone that makes men cowardly or brave: and Boccacini well ridicules the absurd complaint of the *princes* of his time, that their subjects wanted that love for their country which was found in *free states*, when he makes Apollo tell them, that no people were ever in love with rapine, fraud, and oppression; that they must mend their own administration, and their people’s condition; and that people will then love their country, when they live happily in it.<sup>182</sup>

In *free states*, every man being a soldier, or quickly made so, they improve in a war, and every campaign fight better and better. Whereas

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181 2 TRENCHARD & GORDON, *supra* note 63, at 278–79.

182 *Id.* at 283.

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the armies of an *absolute prince* grow every campaign worse; especially if they be composed of his own subjects, who, being slaves, are with great difficulty and long discipline made soldiers, and scarce ever made good ones; and when his old troops are gone, his new ones signify little. . . .

And if *free states* support themselves better in a war than an *absolute prince*, they do likewise much sooner retrieve their losses by it. The Dutch, when they had been beaten twice at sea by Cromwell's admirals and English seamen, with great slaughter and loss of ships, did notwithstanding, in two months time, after the second great defeat, fit out a third fleet of a hundred and forty men of war, under the famous Van Trump . . . . This is what no arbitrary prince in Europe, or upon the face of the earth, could have done; nor do I believe, that all the arbitrary monarchs in Europe, Africa, and Asia, with all their united powers together, could do it at this day. The whole strength of the Spanish *monarchy* could not fit out their famous armada, without the assistance of money from the little *free state* of Genoa; and that invincible armada, being beaten by the English, and quite destroyed, Spain has never been able, with all her Indies, and her mountains of silver and gold, to make any figure at sea since, nor been able to pay that very money which equipped that its last great fleet.<sup>183</sup>

The most absolute princes must therefore use their soldiers like freemen, as they tender their own power and their lives; and under the greatest *tyrants* the men of war enjoy great privileges, even greater than in *free states*.<sup>184</sup>

In fact, as arbitrary princes want a religion suited to the genius of their power, they model their religion so as to serve all the purposes of tyranny; and debase, corrupt, discourage, or persecute all religion which is against tyranny, as all true religion is: for this reason, not one of the great *absolute princes* in Europe embraced the Reformation, nor would suffer his people to embrace it, but they were all bitter and professed enemies to it: whereas all the great *free states*, except Poland, and most of the small *free states*, became Protestants. Thus the English, Scotch, the Dutch, the Bohemians, and Sweden and Denmark (which were then free kingdoms), the greatest part of Switzerland, with Geneva, and all the Hans-towns, which were not awed by the Emperor, threw off the popish yoke: and not one of the *free popish states*, out of Italy, could be ever brought to receive the Inquisition; and the state of Venice, the greatest *free state* there, to shew that they received it against their will, have taken wise care to render it ineffectual: and many of the popish *free states* would never come into persecution, which they knew would impoverish and dispeople them; and therefore the states of Arragon, Valencia, and Catalonia, opposed, as much as they were able, the ex-

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183 *Id.* at 285–86.

184 *Id.* at 290 (indentation added, here and in some of the following quotes).

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pulsion of the Moors, which was a pure act of regal power, to the undoing of Spain; and therefore a destructive and barbarous act of tyranny. As to the Protestant countries, which have since lost their liberties, there is much miserable ignorance, and much bitter and implacable bigotry, but little religion, and no charity, amongst them.<sup>185</sup>

The woful decay of people and plenty in many states in Italy is so astonishing, that were it not obvious to every eye that sees it, and so well attested to those who have not seen it, by those who have, it would seem beyond all belief. . . .

...  
The Great Duke's dominions lie . . . in . . . dismal solitude. When Sienna and Pisa were *free states*, they swarmed with people, and were rich in trade and territory: Sienna alone was computed to have had above half a million of subjects; but in a matter of an hundred and four-score years, during which time it has been in the possession of his Highness of Tuscany, they are sunk below twenty thousand, and these miserably poor. The same is the abject condition of Pisa, Pistoja, Arezzo, Cortona, and many other great towns. Florence, his capital particularly, which, in the days of liberty, could, by the ringing of a bell, bring together, of its own citizens and the inhabitants of the valley Arno, a hundred and thirty-five thousand well armed men in a few hours' time, is now so poor and low, that it could not bring together three tolerable regiments in thirteen months.<sup>186</sup>

[Letter title:] Polite arts and learning naturally produced in *free states*, and marred by such as are not free.<sup>187</sup>

Nothing is too hard for liberty; that liberty which made the Greeks and Romans masters of the world, made them masters of all the learning in it: and, when their liberties perished, so did their learning. That eloquence, and those other abilities and acquirements, which raised those who had them to the highest dignities in a *free state*, became under *tyranny* a certain train to ruin, unless they were prostituted to the service of the tyrant.<sup>188</sup>

The country of the Chozari, which was a vast empire, within these four hundred years, is now quite uninhabited, though great part of it is a fertile and beautiful country; and in its last struggle with Tamerlane,

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185 *Id.* at 303–04. “Popish states” here means Catholic states (such as Aragon, Valencia, and Catalonia), not the Italian Papal States that were governed directly by the papacy.

186 *Id.* at 328, 330–31. Note that Trenchard and Gordon are distinguishing the Sienna and Pisa of the past (which they label “free states”) from various cities, including Florence as well as Sienna and Pisa, of the time in which they were writing (which they treat as not “free states”). Florence was the Great Duke’s capital, and thus a city independent of any other; it follows that when Trenchard and Gordon distinguish Florence (among other cities) from “free states,” they use “free states” to mean nondespotically governed states, not independent states. *See id.*

187 3 *id.* at 27.

188 *Id.* at 31–32.

brought five hundred thousand men into the field: such a force of people were there so lately in a country where now there are none! . . .

What can be more affecting than this instance! Not a single soul to be met with in a vast and noble country, which a few centuries ago was a potent empire, and contained millions! In all probability, countries and empires, which now make a great noise and bustle in the world, will be lying, two or three centuries hence, in the same woeful and silent solitude, if they last so long; for depopulation makes every-where, except in a few remaining *free states*, a prodigious and flying progress; even in Europe, as I have before proved in many instances. And in some of those *free states*, the seeds of servitude, the true cause of depopulation, and of every misery, seem to be sown deep. Alas! Power encroaches daily upon liberty, with a success too evident; and the balance between them is almost lost. *Tyranny* has engrossed almost the whole earth, and striking at mankind root and branch, makes the world a slaughter-house; and will certainly go on to destroy, till it is either destroyed itself, or, which is most likely, has left nothing else to destroy.<sup>189</sup>

Or if the government of the Bank, which is purely republican, were improved into monarchical; I fancy our highest monarchy-men would rail at the change, and hasten to sell out, notwithstanding their inviolable attachment to the divine right of monarchy: unless perhaps they think that *absolute monarchy* does best protect their power, but a *free state* their money.<sup>190</sup>

Pisistratus, having procured from the city of Athens fifty fellows armed only with cudgels, for the security of his person from false and lying dangers, improved them into an army, and by it enslaved that *free state*.<sup>191</sup>

In popish countries there is a spirit or witch in every parish, in defiance of holy water, and of constant pater noster; and there are more of them in ignorant popish countries than in knowing ones, in poor than in rich ones; and they appear oftener in *arbitrary governments* than in *free states*.<sup>192</sup>

As Tyre, and other *free states* did formerly, so Holland at present grows vastly rich and formidable, by keeping its neighbours employed in the poor and menial trade of husbandry, whilst they employ their own people in arts and manufactures; a small part of which supplies them with the productions of the other's labour, and with the rest they

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189 *Id.* at 61–62.

190 *Id.* at 87.

191 *Id.* at 89. Pisistratus was a tyrant of Athens in the sixth century B.C., a domestic usurper who threatened Athens' domestic liberty, not a foreign ruler who threatened its independence. See Rosalind Thomas, *Pisistratus*, in *THE OXFORD CLASSICAL DICTIONARY* 1186, 1186–87 (Simon Hornblower & Anthony Spausforth eds., 3d ed. 1996).

192 3 TRENCHARD & GORDON, *supra* note 63, at 117.

purchase a great part of the riches of the world.<sup>193</sup>

Aristocracies put [the very rich] upon expensive embassies, or load them with honorary and chargeable employments at home, to drain and exhaust their superfluous and dangerous wealth; and democracies provide against this evil, by the division of the estates of particulars after their death amongst their children or relations in equal degree.

We have instances of the first in all *arbitrary monarchies*, as well as in all the Gothic governments formerly, and in Poland at present, which are constant states of war or conspiracy between their kings and nobles; and which side soever gets the better, the others are for the most part undone. By doing the second, the nobles of Venice keep up their equality; and Holland, Switzerland, and the *free states* of Germany, make the provision last named; which, as I have said, answers in some measure the purposes of an agrarian law . . . .<sup>194</sup>

It is a maxim of politicks in *despotick governments*, that twenty innocent persons ought to be punished, rather than one guilty man escape; but the reverse of this is true in *free states*, in the ordinary course of justice . . . .<sup>195</sup>

In *free states*, where publick affairs are transacted in popular assemblies, eloquence is always of great use and esteem; and, next to money and an armed force, is the only way of being considerable in these assemblies. This talent therefore has been ever cultivated and admired in commonwealths, where men were dealt with by reason and persuasion, and at liberty to ratify or reject propositions offered, and measures taken, by their magistrates, to examine their conduct, and to distinguish them with honours or punishments as they deserved. But in *single monarchies*, where reason is turned into command, and remonstrances and debating into servile submission, eloquence is either lost, or perverted to sanctify publick violence, and to deify the authors of it.

In the *free states* of Greece and Rome this popular eloquence was of such force and consequence, that the best speakers generally governed them; and their greatest orators were often not only their chief magistrates, but their principal commanders.<sup>196</sup>

[Letter title:] *Free states* vindicated from the common imputation of ingratitude.

It is a common objection against *free states*, that they are ungrateful: but I think that I shall be able to shew the contrary, that they are much

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193 *Id.* at 183. Holland was of course noteworthy in the early 1700s not for being an independent state—the leading powers of the era were all independent—but for being one of the comparatively few powerful republics. M.S. ANDERSON, EUROPE IN THE EIGHTEENTH CENTURY, 1713–1789, at 160–63 (Pearson Educ. Ltd. 4th ed. 2000). Tyre too had been earlier characterized by Trenchard and Gordon as nonmonarchical. 2 TRENCHARD & GORDON, *supra* note 63, at 286–87.

194 3 TRENCHARD & GORDON, *supra* note 63, at 207–08.

195 *Id.* at 303.

196 *Id.* at 313–14.

more grateful than *arbitrary princes* . . . .

It is the chief and first ambition of *free states*, to preserve themselves; and such as contribute most to that end amongst them, are generally placed by them in the first stations of figure and power.<sup>197</sup>

Sometimes a man's ill deeds balance his good, and then he pays himself; or overbalance them, and then he is entitled more to punishment than reward; and both rewards and punishments ought to be faithfully paid: though there is generally more crime and insecurity in not punishing well, than in not paying well; a fault too frequent in *free states*, who, dazzled with great benefits, are often blind to greater offences, or overlook them, and reward before they enquire.<sup>198</sup>

I have seen a loud and vehement clap raised upon it by those who were angry at the word *commonwealth*, though they lived under a free government: for every *free state* is, in a large sense, a commonwealth; and I think our own the freest in the world.<sup>199</sup>

Scipio did likewise another thing, which ought by no means to have been suffered in a *free state*. When he was cited to answer before the people to the crimes with which he was charged, he refused to answer. "Upon this very day, my countrymen," says he, "I vanquished Hannibal"; and tearing the papers that contained the charge, walked haughtily out of the assembly. This was disowning or contemning the supreme authority of Rome; yet the people were so personally fond of the man, that they would decree nothing severe against him.<sup>200</sup>

[A] *free state* produces more great men in fifty years, than an *absolute monarchy* does in a thousand.<sup>201</sup>

*Athenians*, like other *free states*, had suffered so much from their first-rate citizens, who suppressed their liberty under colour of advancing it, that they had great reason to be jealous of such. Whoever would live in a *free state*, must live upon a foot of equality; which great officers, accustomed to command, care not to do; and if they do not, they are justly removed.<sup>202</sup>

As armies long kept up, and grown part of the government, will soon engross the whole government, and can never be disbanded; so liberty long lost, can never be recovered. Is not this an awful lesson to *free states*, to be vigilant against a dreadful condition, which has no remedy?<sup>203</sup>

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197 4 *id.* at 104–05.

198 *Id.* at 108.

199 *Id.* at 109.

200 *Id.* at 111.

201 *Id.* at 112.

202 *Id.* at 113.

203 *Id.* at 321.