

“NECESSARY TO THE SECURITY OF A FREE STATE”

Eugene Volokh *

“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?

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 to the perceived threat to the ‘free[dom]’ of the ‘State[s]’ posed by a national standing army controlled by the federal government.” 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.”

This reading would tend to support the states’ rights view, 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. 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.”

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

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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.

We see a similar controversy about the change from James Madison’s original proposal, which spoke of “security of a free country,” to the final “security of a free state.” Some assume the change was a deliberate substantive shift towards a states’ rights provision, and point in support to the Constitution’s general use of “state” to mean state of the union (except where “foreign State” is used to mean “foreign country”). Others assume the change was purely stylistic, and thus did not reflect a shift to a states’ rights view; they sometimes point for evidence to the absence of recorded controversy about the change.

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, Montesquieu’s Spirit of Laws, Hume’s essays, Trenchard and Gordon’s Cato’s Letters, 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. It was also used by many leading American writers, including John Adams in 1787, James Madison in 1785, and the Continental Congress in 1774.

Those sources, which surprisingly have not been canvassed by the Second Amendment literature, 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.