

The Dark Side of the Second Amendment

Arthur Austin

TRUE ECCENTRICS alternate between irascible foolishness and profound revelation. A colleague zealously pursues both extremes – he sued the Clinton administration over encryption regulations and jostled with the Sheriff of Nottingham on the Internet, while teaching Equitable Remedies of Cyberspace as Janku, now a dedicated Buddhist, formerly a hard drinking white shoe lawyer. A fortuitous encounter (Janku’s only contact with public dialogue was through the *New York Times* which he stopped reading when they colorized) exposed him to the incessant wrangling over the correct interpretation of the Second Amendment. I learned about the event when he appeared in my office to ask: “Who is this Rosie person?” Then, with solemn politeness he informed me that after he explained “the Second”, I was obligated to pass the message on to my red

brick colleagues. Here, to the best of memory, is Janku’s lesson.

I concede that the Tribes and Rosies of popular media society would assume that the Second deals with the right of citizens to keep guns for protection. It uses suggestive language and is part of a cluster of states’ rights. A logical conclusion – but wrong. Read the text.

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Count them – twenty-seven words. With typical economy the Framers got to the point to avoid ambiguity induced by word inflation. It says the state cannot stop people from keeping guns! (He paused to let me know that the time for truth had come.) But, as one of the legendary Buddhas – I think it was Siddhartha Gautama – said: “The objectivity of the text is

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an illusion and, moreover, a dangerous illusion, because it is so physically convincing.”¹

The Buddha teaches that silence is knowledge, ambiguity is insight, and the truth – the truth of revelation – can be discerned only, I repeat – only – in gaps, context, and contingency.² The truth of silence is the ultimate counter to the oppressive self-serving Machiavellian manipulations of the Tyranny of Objectivity. The Second idealizes two levels of silence to convey truth: first, it never expressly refers to guns, cannons, or the weapons of the day – muskets, swords, or lances. Remember, the drafters were brilliant scholars, politicians, and artisans – geniuses who devised a Constitution of checks and balances, a fact that leads us to the second, more subtle, implication from silence.

The profundity of the silence about guns is a conspicuous signal that the focus has shifted to the omniscience of context. The Colonies’ struggle was a repudiation of English monarchism, a system that dispensed power and privilege on the whims of parentage to create a frivolous and effete class of nobility. The spokesmen of the revolution were tenacious in expressing repugnance for the decadent effects of classism. They knew the political implications of the egalitarian vision of the Declaration of Independence. Yet, as the Buddha lovingly laments: “*The genius of genius inevitably comes from the dark side.*” (Emphasis supplied by the Buddha.) For political harmony, the Framers conceded slavery, and to preserve patriarchy they ignored the vassalage of women.

These two concessions to the dark side are well known. Not well known – at least to the red brick population – is that the Second is the third element in the dark side trilogy.

The idea could have originated with the Philadelphia crowd – they were notoriously serpentine, haughty, and self-indulgent. But it would not have appealed to Franklin. My intuition, guided by the Buddha’s vibes, plus intransigent research, points to that shrewd voice out of Charlottesville. He understood the repressed male psychology of the Framers and divined potential danger in their bruised pride. They had made inordinate sacrifices to beat the best from Europe yet had nothing to show for it except heavy debts and an uncertain future. It was an untenable irony: while the victors made a wretched journey back to ravaged estates, the vanquished returned to castles to resume the lavish lifestyle of Lords and Dukes.

He knew that it wouldn’t take much – a symbolic gesture of genuine respect would suffice. The solution came in the agitation of composing a letter to John Randolph. Nobility as a reward was out of the question but what about “Gentleman”? Catching my look of derisive confusion, Janku continued. Don’t give me that supercilious smirk of yours, you above all – aren’t you from U. Va. which, until 1971, esteemed Virginia Gentlemen? Perhaps too much.³ It was another brilliant Jeffersonian move – exalting “Gentleman” as status and offering it as a reward for merit and rugged individualism is perfectly consistent with an

1 So Stanley Fish is now a Buddha; Janku lifted this from Fish. Stanley Fish, *IS THERE A TEXT IN THIS CLASS?* 43 (1980).

2 This sounds like textbook postmodernbabble to me. For the Devil’s Dictionary of this subject see, Dennis W. Arrow, *Pomobabble: Postmodern Newspeak and Constitutional “Meaning” for the Uninitiated*, 96 MICH. L. REV. 461 (1997).

3 This is a standard Janku tactic – at a delicate point in an argument he makes an off the wall reference to soften your analytical defenses. He knew that Gentlemen defined the student ethos of my generation at the University of Virginia. Gentlemen wore coat and tie to class, where they politely hid their intelligence in Gentlemen’s c’s, adhered to the Honor Code (except for bounced checks) and passed out on Virginia Gentlemen’s bourbon. All of this ended in 1972 with the admission of women.

economics-driven Constitution. A matter of quid pro quo that completed the symmetry of the dark side trilogy: the creation of a Gentlemen class furthers the patriarchal origins of the nation – only males were entitled to the status. Finally, for a definition of Gentlemen he could rely on the imprimatur of William Blackstone:

[F]or whosoever studieth the laws of the realm, who studieth in the universities, who professeth the liberal sciences, and, to be short, who can live idly, and without manual labor, and will bear the past, charge, and countenance of a gentleman, he shall be called master, and shall be taken for a gentleman.⁴

By now it should be clear, even to the obtuse red brickers: silence thunders forth the meaning of the heretofore inscrutable scrutable word “arms.” The word refers to a *coat of arms*, a mark of gentility, family, and honor, which, under the rules of Heraldry, constitutes the universal signifier of Gentleman. A *coat of arms* verifies that a man has earned the right to stand above his neighbors. It institutionalizes patriarchy, and, unlike nobility, a gentleman’s status is earned, defined by what he is, not who he is. Then, with a quintessential white shoe swagger, Janku handed me a copy of *Tractatus de Armis*.⁵

Do I detect another Virginia Gentleman smug-smirk curling ominously out of your mouth? When Anglo Saxons make laws about guns, they don’t play word games – they get to the point. Consider the implications of the

English Game Act of 1671, an expression of crown classism whose objective was to keep weapons out of the hands of the lower classes. The law was very specific, it restricted the possession of guns and bows – the most threatening weapons of the times – and greyhounds, setting dogs, or long dogs, to those with an income of at least 100 pounds, game keepers, and, of interest – esquires.⁶ The French were equally explicit; in seeking to protect the nobility from the mobs they prohibited commoners from possessing swords as well as guns.⁷ The point of this slice of history is obvious – an arm is an upper limb of the body, a gun is a gun.

The Buddha knows that zealotry turns the grasshopper into an empty rock. And so it is with “keep” and “bear.” To the Montana militia “bear” entitles them to openly pack guns – to church, school, or Yankee Stadium – anywhere they would be at risk. To Rosie to “bear” a gun means to use it, why else would she “bear” one? Both sides are shooting empty rocks. But under the rules of Heraldry the vision of the grasshopper returns: “bear” has nothing to do with guns, instead “bear” acknowledges the right to bear, display, or exhibit one’s *coat of arms*. “Bear” confers an exclusive entitlement; in *Tractatus de Armis Aureo* condemns without exception the practice of adopting a coat of arms identical to another person’s, even without malice.⁸ In 1417 Henry V made it a crime to steal a coat of arms.⁹

Reading a military connotation into “keep”

4 1 William Blackstone, *COMMENTARIES* *406 (quoting Sir Thomas Smith, Commonwealth of England, b. 1, c.20).

5 This was another Janku tactic – foist an obscure and “fugitive” scholarly work on an unsuspecting listener. This was one time I was ahead of him – I had encountered De Bado Aureo’s classic exposition of heraldic law in Craig Levin, *The Law of Arms in Medieval England*, *THE ARMIGERS NEWS*, vol. 22, Spring 2000, at 1.

6 David I. Caplain, *The Right of the Individual to Bear Arms: A Recent Judicial Trend*, 1982 *DET. C.L. REV.* 789, 798.

7 Don B. Kates, Jr. *Handguns, Prohibition, and the Original Meaning of the Second Amendment*, 82 *MICH. L. REV.* 204, 235 n. 137 (1983).

8 Janku was quoting Levin verbatim. Levin, *supra* note 5, at 6.

9 *Id.* at 8.


is a warped version of a Morris Zapp deconstructive striptease. “Keep” is the linchpin to the Second’s *coat of arms* entitlement – it assures exclusivity and heredity rights of the *coat of arms* – something akin to a trademark assuring a permanent presence. “Keep” means possession! I cite the foremost heraldry expert: “A man’s son would feel a natural pride in preserving the memorial of his fathers’ reputation, by assuming, and also by transmitting, his device.”¹⁰

When push comes to shove and arguments over “arms,” “bear,” and “keep” have succumbed to the grasshopper’s intersubjective zapp,¹¹ the NRA falls back on the last rampart, the reference to a “well regulated militia.” “Militia” is a word that conveys clear and definite messages about the use of guns in combat. The dictionary seemingly closes the case; “An army composed of citizens rather than professional soldiers, called out in times of emergency.”¹² Sounds convincing – especially to those who privilege the text. But in defending the Second as a gun entitlement the soldiers of the NRA make a tactical blunder in putting their gunpowder on a textual reading of militia, a miscalculation that hoists them by their own petard.

Under the eternal lamp of the magnanimous Buddha nothing is final – as he often says: “Unmasking meaning is exciting – the last intellectual thrill left. Like sawing through a branch you’re sitting on.”¹³ The gun people on both sides ignore a brute and irreducible

fact – heraldry has as strong an association with the militia as guns. Combat is the *raison d’être* for the *coat of arms*; in the bloodletting of hand to hand combat, “arms” identified comrades – and enemy. “Arms let us know, if the Bearers are Noblemen or Gentlemen, and what their dignity is, that appearing by their Helmets ...”¹⁴

What went wrong? How did “arms” morph into guns? While the Framers had a vested interest in deflecting attention from the malignancy of the slavery and patriarchy cover-ups they had a strong incentive to reward the Gentlemen constituency with *coat of arm* status. For explainable reasons years passed without the Second receiving any notice – much less controversy. In a prosperous post-Revolutionary War economy the Gentlemen class flourished as the old patriots got the recognition and rewards they deserved. As de facto Gentlemen many maintained a family *coat of arms*. As for guns, it was a moot issue – everyone had a stockpile of muskets which were used with great efficiency in the Westward movement. With the expiration of the migration – which was never finally consummated until the appearance of the Internet – the *coat of arms* intention of the Second was co-opted by the Gun Conspiracy composed of unsavory politicians, disingenuous Moms, greedy capitalists, opportunistic lawyers, and deranged academics.

When the grasshopper jumps even the Buddha does not know where he will land. 

10 Eugene Zieber, *HERALDRY IN AMERICA II* (Classic 1985 ed.).

11 A term from the crit obscurantism vocabulary. Janku went through a crit period before Buddhism.

12 *WEBSTER’S NEW TWENTIETH CENTURY DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED* (2d ed. 1979).

13 Another instance of Janku’s textual terrorism; the quote comes from David Lodge’s fictional character Morris Zapp. David Lodge, *SMALL WORLD: AN ACADEMIC ROMANCE* 118 (1984).

14 Zieber, *supra* note 10, at 13.