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THE CONSTITUTION OF FEAR

*Frederick Schauer**

At various places along the Massachusetts Turnpike, a limited access toll road with a speed limit (in most places) of 65 miles per hour, there are signs cautioning drivers not to back up on the turnpike if they have missed their desired exit. These signs tell us much about Massachusetts drivers, since in most other states we could not imagine the need for such signs, precisely because we could scarcely imagine the possibility of drivers engaging in the behavior that Massachusetts sees a need to warn against.

As they tell us much about Massachusetts drivers, these signs also instruct us in constitutional jurisprudence. Like the signs on the Turnpike, constitutional provisions tend to presuppose the likelihood of the behavior they prohibit. Just as there are no signs on the Turnpike prohibiting throwing Molotov cocktails at other vehicles, so too do we rarely see constitutional provisions addressed to theoretically unpleasant situations factually unlikely to occur in the world. And just as the signs on the Turnpike prohibit what the sign posters believe is actually likely to happen, so too do the drafters of constitutions go out of their way to address what they see as genuine threats.

Yet what is a genuine threat at one time may not be a genuine threat at another. Few students of American history fail to understand the perceived need, in 1791, for the Third Amendment, yet for the same reason it is unlikely that the Third Amendment would find its way into a constitution newly rewritten in 1995. That the Fourteenth Amendment makes no mention of gender discrimination is historically unsurprising, just as it is historically unsurprising that gender discrimination is explicitly prohibited in virtually every one of the new constitutions now emerging throughout the world.

From this perspective, the imperfections of the Constitution of the United States, in 1995, are likely to be imperfections of two types - guarding against problems that no longer exist, and

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not guarding against problems that exist now but did not exist (or were not then perceived as existing) at earlier times. As examples of the former, we have not only the Third Amendment, whose prohibition of a non-problem is relatively costless, but also the more costly efforts to guard against dangers now far less apparent, such as the Seventh Amendment right to trial by jury in civil cases and the Second Amendment right to keep and bear arms.¹ And as examples of the latter, we might quickly think of the lack of (textual) protection for the right to privacy or the right to be free from discrimination on account of, say, gender or sexual orientation. And many people believe (although I am not one of them) that the lack of term limits and the lack of a requirement of a balanced budget are perfect examples of the fact that the eighteenth century constitution did not anticipate all of the threats posed by the twenty-first century United States.

Yet the biggest question of guarding against what are now non-problems and not guarding against what are now problems is one not restricted to particular constitutional provisions. Rather, the eighteenth century constitution adopts a certain perspective about the state itself, not unlike the one that Massachusetts appears to adopt with respect to the people who are armed with automobiles. The eighteenth century constitution is not only a Lockean document, but in an important but less direct way a Hobbesian one, having as dim a view of concentrations of state power as Hobbes had about human nature in general. Whether it be the rejection of a parliamentary system in favor of strong checks and balances, the existence of numerous requirements of supermajorities (as, for example, with the trial of impeachments, amending the Constitution, and ratification of treaties), and the various side constraints of the Bill of Rights, an underlying theme of the Constitution has always been that the dangers of mistaken governmental action are more to be feared than the dangers of mistaken governmental inaction. To modify Black-

1. Implicit in the statement in the text is my belief that, judicial interpretations notwithstanding, the existence of the Second Amendment has legitimated a certain rhetoric and politics that have made gun control more difficult than would otherwise have been the case. I should note as well that a serious investigation into constitutional imperfection would examine with some care the genuine costs of various constitutional provisions. Although many parts of the constitution undoubtedly save lives, other parts most likely cost them. How many lives have been lost by the Second Amendment? How many by the Eighth's non-prohibition of capital punishment? How many by the Twenty-First's permission (against the background of the Eighteenth) of the manufacture, sale, and transportation of intoxicating liquors? Although not all parts of the Constitution can or should be evaluated by even a non-quantified cost-benefit analysis, some parts can be, and a careful look at constitutional imperfection would try to examine whether the costs of some constitutional provisions (or non-provisions) greatly outweigh their benefits.

stone's maxim about the criminal law, it appears that the existing Constitution is premised on the belief that it is better that ten good things go undone than that one bad one be permitted.

Such a libertarian view of the state may still be appropriate. Talk of "gridlock" may be misguided, and now just as in the eighteenth century the dangers of government overreaching may be far greater than the dangers of government impotence. But perhaps not. If knowing what we know about the world and the history of this country we were now to redraft the Constitution, would we be so concerned with George III, or would we instead be more concerned with the problems of government inaction? No amount of attention, however appropriate, to individual clauses and individual doctrines can transcend the fact that it is widely believed in other countries that the degree of distrust of government in the United States, a distrust both fostered by and reflected in the Constitution, surpasses that of any other country on the planet, including many whose populations have far greater reason to distrust their government than we have to distrust ours. If we are looking for constitutional imperfection, we would be better off looking not for various clauses or doctrines that could be different, but instead at whether the constitutional structure we now have has imperfectly calibrated, in light of the problems we now face, the balance between the dangers of erroneous governmental empowerment and the dangers of erroneous governmental disempowerment. The overarching theme of the Constitution of the United States, and the "who's to say/where do you draw the line/thin edge of the wedge/parade of horrors/foot in the door/slippery slope" rhetoric it has engendered, is one of fear, a fear that in 1787 and 1791 was properly aimed at the state. Yet just as the signs on the Massachusetts Turnpike would be misguided were Massachusetts drivers to become more sensible, so too would the aim of the eighteenth century Constitution - governmental tyranny - be misguided if the target had shifted. Whether it has is a question both political and empirical. But the measure of the imperfection of the Constitution is the extent to which the entire Constitution, as written, interpreted, and understood, is aimed at a danger that occupies a different position on the spectrum of all dangers than it did two centuries ago. If that is the case, then the imperfection of American constitutionalism cannot be trivialized by identifying the occasional flaws in this clause or that. To pick out a clause or two as imperfect is implicitly to endorse the remainder. Whether the remainder, in the

large and not in the small, is worthy of endorsement is an issue, in an era of constitutional transformation throughout the world, that should not easily be ignored.