



## CHAPTER NINE

# *Progress and Possibilities*

Since 1789, other nations' constitutions have come and gone. By one recent estimate, national constitutions last only an average of seventeen years.<sup>1</sup> The United States Constitution, by contrast, not only endures—it thrives. Why? As this book suggests, a major reason for its continued vitality is its capacity for growth and adaptation, not only through formal amendment under Article V, but also through interpretation and use by generations of ordinary citizens, elected officials, and judges. As an earlier professor-turned-President wrote, “the Constitution of the United States is not a mere lawyers’ document: it is a vehicle of life, and its spirit is always the spirit of the age.”<sup>2</sup>

In Chapter 2, we quoted at length from Justice Brandeis’s dissenting opinion in *Olmstead v. United States*, in which he said:

“Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, ‘designed to approach immortality as nearly as human institutions can approach it.’ The future is their care and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our *contemplation* cannot be only of what has been but of what may be.”<sup>3</sup>

Justice Brandeis was himself quoting from Justice McKenna’s opinion for the Court in *Weems v. United States*, a case that illustrates our central theme.

*Weems* involved the application of the Eighth Amendment’s prohibition on cruel and unusual punishment to a situation outside the experience or

expectations of the Framers. The case arose in the Philippines, which was then under U.S. sovereignty as a result of the Spanish–American War. A government officer had been duly convicted of falsifying two modest payments in a cash account, and the local court had sentenced him to a punishment called *cadena temporal*, which required, among other things, that the defendant’s wrists be chained to his ankles “night and day,” that he perform “hard and painful labor,” that he be entirely isolated “from friend or relative,” and that he suffer “a perpetual limitation of his liberty” in the form of official surveillance for the rest of his life.<sup>4</sup> In assessing the validity of the punishment, the Supreme Court held the principles of the Eighth Amendment applicable to the Philippines and noted that “[w]hat constitutes a cruel and unusual punishment has not been exactly decided.”<sup>5</sup> But the Court went on to explain, in a discussion culminating in the passage quoted above, that the scope of the Eighth Amendment’s protection cannot be confined to the abuses of the English monarchs or to the prevailing norms of cruelty or proportionality in the Founding era.<sup>6</sup> The Court interpreted the Eighth Amendment to express “a precept of justice that punishment for crime should be graduated and proportioned to offense” and held the punishment unconstitutional.<sup>7</sup>

A century later, Americans continue to face the task of applying our Constitution to new contexts. William Faulkner famously wrote, “The past is never dead. It’s not even past.”<sup>8</sup> And so we still face some of the questions raised by *Weems*. How does the Constitution apply to U.S.-controlled territory overseas—for example, the naval station at Guantánamo Bay or the Bagram Air Force Base in Afghanistan? Does the Eighth Amendment forbid repeat offender laws that impose draconian punishments for minor offenses? Are there punishments that may not be imposed under any circumstances, beyond the punishments already forbidden under existing case law?

More broadly, the Constitution’s text and principles must be adapted to changes in the world. Constitutional law has only begun to consider the array of issues arising from the omnipresence of computers. How should First Amendment principles of free speech apply in cyberspace? To what extent do constitutional principles restrict government surveillance of electronic communications? Should the various doctrines governing campaign finance law apply to candidates’ use of the Internet? Or should campaign finance law be reconsidered in light of changes in modern communications and media?

Moreover, how should changes in scientific understanding inform constitutional law? The Constitution has long recognized principles of liberty and autonomy with respect to intimate matters of family life. How do those principles apply to abortion and end-of-life issues in light of medical advances and our evolving understanding of human development and cognition? Scientists have managed to sequence the entire human genome and are now poised to elucidate the genetic bases of disease, behavior, and even cognition. What constraints does the Constitution impose on the government's collection and use of human DNA? What powers does Congress have under the enforcement clause of the Fourteenth Amendment to regulate state use of genetic testing? Advances in neuroscience may one day enable us to decode, model, and record the processes of human thought and decision-making. How should constitutional protections for individual privacy be adapted to the potential uses and abuses of such research?

How should constitutional interpretation respond to changes in our understanding of the environment? The current Supreme Court is divided over the scope of federal power to enact environmental protection statutes, with several Justices inclined to distinguish between environmental regulations that affect interstate commerce or navigable waters and those that bear only upon intrastate territory.<sup>9</sup> As our understandings of ecology deepen, that distinction may become untenable. More fundamentally, in a world of physical and economic global interdependence, how should legislatures, executive branch officials, and the courts think about questions of enumerated powers and federalism?

The changes that inform constitutional interpretation are not limited to scientific developments. As we have seen, changes in social understandings often, and rightly, change how constitutional principles are applied. Consider, for example, the history of litigation over the right to marry. State and local governments have always limited the right to certain people under certain circumstances. Not until 1948, when the California Supreme Court decided *Perez v. Sharp*,<sup>10</sup> did any court hold that the Equal Protection Clause forbids states from refusing to recognize interracial marriages, and it took an additional generation before the U.S. Supreme Court reached that conclusion in *Loving v. Virginia*.<sup>11</sup> In subsequent years, the Court came to recognize the marriage rights of prisoners and indigent individuals.<sup>12</sup> Today there is a vigorous

debate over the right of same-sex couples to marry. That debate, fueled by a 2004 decision of the Massachusetts Supreme Judicial Court and subsequent judicial and legislative activity,<sup>13</sup> would have been unthinkable a half-century ago, just as a debate over the right of interracial couples to marry would have seemed pointless a half-century before that. Here, as in other areas, constitutional understandings have changed as the norms and values of our society have changed.

Just as the Framers could not have imagined the internet, DNA testing, global warming, or women's equality, there are undoubtedly social developments and constitutional questions that we cannot imagine today. But if our national experience is any guide, we can be confident that the Constitution's text and principles will endure—and they will endure because of their adaptability to new conditions and new challenges through an ongoing process of interpretation. Throughout our history, this process of interpretation has sustained the vitality of the Constitution and its democratic legitimacy. Whatever allure there may be in theories that would reduce constitutional interpretation to a simpler, more mechanical process, those theories ultimately fail to explain our actual constitutional practice and its remarkable achievements over time. The American people adopted the Constitution in order to “establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty.” As our nation and the world continue to change, constitutional interpretation that is faithful to those purposes enables and motivates each generation of Americans to keep faith with the Constitution.