

Keeping Faith: Chapter 9 - Progress and Possibilities

Our Enduring Constitution—*Weens v. United States*

- A major reason for the continued vitality of our Constitution is its capacity for growth and adaptation, not only through formal amendment under Article V, but through interpretation and use by generations of ordinary citizens, elected officials, and judges. *Weens v. United States* illustrates this central theme. *Weens* involved the application of the Eighth Amendment's prohibition on cruel and unusual punishment. The case arose in the Philippines, which was then under U.S. sovereignty. A government officer was convicted of falsifying payments to a cash account and had been sentenced to a punishment that required his wrists to be chained to his ankles, that he perform hard and painful labor, that he endure total isolation, and that he suffer official surveillance for the rest of his life. In holding the punishment unconstitutional, the Supreme Court reasoned 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. The Court interpreted the Eighth Amendment to express "a precept of justice that punishment for crime should be graduated and proportioned to the offense."

Applying our Constitution to Changed Circumstances—Cruel and Unusual Punishment

- A century later, Americans continue to face the task of applying our Constitution to new contexts and so we still face some of the questions raised by *Weens*. How does the Constitution apply to U.S.-controlled territory overseas like the naval station at Guantanamo 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?

Technology, Communication, and Media

- The Constitution's text and principles must adapt to changes in technology, communications, and media. 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? Should campaign finance law be reconsidered in light of changes in modern communications and media?

Science

- Changes in scientific understanding inform constitutional law. How do the long-recognized principles of liberty and autonomy with respect to intimate matters of family life apply to abortion and end-of-life issues in light of medical advances and our evolving understanding of human development and 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?

The Environment

- 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. This may become untenable as our understandings of ecology evolve. 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?

Social Values

- Changes in social understandings often change how constitutional principles are applied. For example, today there is a vigorous debate over the right of same-sex couples to marry. State and local governments have always limited the right to certain people under certain circumstances. The current debate over same-sex marriage would have been unthinkable a half-century ago, but constitutional understandings have changed as the norms and values of our society changed.
- There will always be social developments and constitutional questions that we cannot imagine today. However, we can be confident that the Constitution's text and principles will endure because of their adaptability to new conditions and new challenges through an ongoing process of interpretation. 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.