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AND
INDIVIDUAL RIGHTS IN CONSTITUTIONAL LAW—5TH EDITION

GERALD GUNTHER

1996 Supplement

by

FREDERICK SCHAUER

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INDIVIDUAL RIGHTS IN CONSTITUTIONAL LAW

Fifth Edition

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PREFACE

This Supplement covers the major constitutional developments since July 1, 1995, and includes full treatment of the Supreme Court Term that ended on July 1, 1996. Legislative, executive, and administrative developments are included as well, with July 5, 1995, being the cut-off date for such materials.

The Supplement is keyed by specific page numbers for Constitutional Law (Twelfth Edition) and Individual Rights in Constitutional Law (Fifth Edition). As used here, the abbreviation for the former is "12th Ed.", and for the latter "Ind.Rts."

As I have made clear for all of the Supplements since 1983, this one is entirely the work of the undersigned, and any errors or omissions are my responsibility, and not Professor Gunther's.

There has been a recent and noticeable rise in the number of opinions relying heavily on so-called "non-legal" materials. Among the most memorable are the joint opinion of Justices O'Connor, Kennedy, and Souter in *Planned Parenthood of Southeastern Pennsylvania v. Casey* in the 1991 Term, the dissenting opinion of Justice Breyer in *United States v. Lopez* in the 1994 Term, and Justice Ginsburg's opinion of the Court in *United States v. Virginia* in the just-completed 1995 Term, but there are many others as well. In all of these opinions, we find heavy citation of social science data and articles from social science journals; frequent reference to primary historical materials; and argumentative support coming from studies and analyses performed in disciplines other than the law. Although the phenomenon is not totally new—the "Brandeis brief" predates this Supplement by several generations, and scholars still debate the importance and the wisdom of the reliance on social science findings in *Brown v. Board of Education*—it is clear that the use by many of the Justices of materials other than cases, constitutional provisions, statutes, canonical sources of constitutional history, legal treatises, and the law review literature is on the increase.

As many of Justice Scalia's recent dissents indicate, this development is hardly without controversy. But the range of questions is larger than one might find explicitly engaged on the pages of the *United States Reports*. One question, of course, is whether any of this citation to social science data and the researches of non-lawyers actually makes a difference to the outcome. In an odd twist on a Legal Realist hypothesis, perhaps all of these extra-legal references are superfluous, merely the superficial indicia of erudition added by law clerks to support results reached on other grounds. But perhaps they signal an increased awareness by members of the Court that disputed factual propositions lie at the center of many of the largest decisions of constitutional law. Or perhaps the

proliferation of non-legal references is a product of the ease of gaining access to them in a world in which technological change and economic integration makes research into the so-called "non-legal" far easier than it has ever been before.

Whatever the cause of these developments, the consequences are even more intriguing. Will judges, lawyers, and legal scholars become more sensitive to the empirical dimensions—often contested or contestable—of the constitutional conclusions they reach in the name of constitutional doctrine? Will lower courts follow the lead of the Supreme Court in the kind of information they appear to use? Will law schools find it increasingly necessary to train their students in the use of materials that the Supreme Court has now put at the closer to the center of legal argumentation? And will all of this, if the trend continues, alter our conception of just where one finds the law, and thus of what law is? It is too early to offer definitive answers to these or a host of other related questions, but as the kind of material that the Supreme Court uses changes, it is worth watching whether what the Court *does* changes as well, and whether this reflects a larger change in the nature of constitutional law specifically, and law in general, than is often appreciated.

Changes in the nature of legal information, and in the size of the domain of legal information, are not only increasingly important, but also increasingly beyond the expertise of the constitutional generalist. I remain grateful to my wife and collaborator, Virginia Wise, for many things, but plainly one of them is her mastery of an increasingly vast informational universe that I can only begin to glimpse. She is a *sine qua non* to me for many reasons, but what she knows appears increasingly to be the *sine qua non* of constitutional competence.

FREDERICK SCHAUER

South Pomfret, Vermont
July, 1996

TABLE OF CASES

Principal cases are in italic type. Non-principal cases are in roman type. References are to Pages.

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TABLE OF CONTENTS

Numbers on the left indicate where the new materials fit into the casebooks. Cases and legislative material set out at length are in **bold face**.

CHAPTER 1(1). THE NATURE AND SOURCES OF THE SUPREME COURT'S AUTHORITY

CHAPTER 3. THE COMMERCE POWER

CHAPTER 10(5). THE POST-CIVIL WAR AMENDMENTS AND CIVIL LEGISLATION: CONSTITUTIONAL RESTRAINTS ON PRIVATE CONDUCT; CONGRESSIONAL POWER TO IMPLEMENT THE AMENDMENTS

CHAPTER 12(7). FREEDOM OF EXPRESSION: ADDITIONAL PERVASIVE THEMES; THE PUBLIC FORUM PROBLEM

CHAPTER 13(8). FREEDOM OF EXPRESSION IN SOME SPECIAL CONTEXTS

CHAPTER 14(9). THE CONSTITUTION AND RELIGION: "ESTABLISHMENT" AND "FREE EXERCISE"

CHAPTER 15(10). PROPER CONDITIONS FOR CONSTITUTIONAL ADJUDICATION: INTERESTED PARTIES; CONCRETE CONTROVERSIES; JUSTICIABLE ISSUES