CONSTITUTIONAL LAW

Cases and Materials —NINTH EDITION

WILLIAM COHEN
JONATHAN D. VARAT

1995 Supplement

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1995 Supplement

to

CONSTITUTIONAL LAW

CASES AND MATERIALS

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THE CONSTITUTION AND THE COURTS: THE JUDICIAL FUNCTION IN CONSTITUTIONAL CASES

Chapter 2

JUDICIAL REVIEW

SECTION 1. THE LEGITIMACY OF JUDICIAL REVIEW

Pages 37–38. Replace last two paragraphs of note, "Prospective and Retroactive Constitutional Decisions," with the following:

Despite the concern that prospective application of new constitutional decisions is inconsistent with the "integrity of judicial review," a footnote in *Griffith* referred to earlier civil cases that applied new rules of constitutional law prospectively only. Chevron Oil Co. v. Huson, 404 U.S. 97 (1971), had described a three-part inquiry: (1) whether the decision announced a new principle of law; (2) whether retrospective operation of the rule would further or retard the purpose of the rule; (3) whether retrospective application would produce substantial inequitable results. In Harper v. Virginia Department of Taxation, 113 S.Ct. 2510 (1993), however, the Court held that the *Griffith* principle was fully applicable to civil cases. Justice Thomas' opinion for the Court said:

> "When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule. This rule extends *Griffith*'s ban against 'selective application of new rules.' . . . Mindful of the 'basic norms of constitutional adjudication' that animated our view of retroactivity in the criminal context, . . . we now prohibit the erection of selective temporal barriers to the application of federal law in noncriminal cases. In both civil and criminal cases, we can scarcely permit 'the substantive law [to] shift and spring' according to 'the particular equities of [individual parties'] claims' of actual reliance on an old rule and of harm from a retroactive application of the new rule. . . . Our approach to retroactivity heeds the admonition that '[t]he Court has no more constitutional authority in civil cases than in criminal cases to disregard current law or to treat similarly situated litigants differently.' "

In Reynoldsville Casket Co. v. Hyde, 115 S.Ct. 1745 (1995), the Court summarized the holding in *Harper*:

> "[W]hen (1) the Court decides a case and applies the (new) legal rule of that case to the parties before it, then (2) it and other courts must treat that same (new) legal rule as 'retroactive,' applying it, for example, to all pending cases, whether or not those cases involve predecision events."

Chapter 3

THE JURISDICTION OF FEDERAL COURTS IN CONSTITUTIONAL CASES

SECTION 3. CASES AND CONTROVERSIES AND JUSTICIABILITY

B. STANDING

1. "CONVENTIONAL" STANDING

Page 107. Add to end of note, "Standing and the Requirement of 'Injury in Fact.' ":

Northeastern Florida Chapter of Associated General Contractors v. City of Jacksonville, 113 S.Ct. 2297 (1993). Non-minority contractors who alleged that they would have bid on construction work set aside for minority contractors had standing to challenge the requirement that 10% of city contracts be awarded to minority-owned businesses. It was not necessary that plaintiffs allege or prove that they would have been awarded contracts but for the challenged program. In equal protection cases, the injury in fact is not the denial of the benefit itself but the denial of equal treatment imposed by a barrier to obtaining a benefit—here the inability to compete on an equal footing in the bidding process.

United States v. Hays, 115 S.Ct. 1311 (1995). Voters attacking an alleged racial gerrymander lack standing unless they show that they, personally, have been subject to racial discrimination. White voters who neither reside in the challenged predominantly-Black district, nor prove that they were excluded from that district because they were White, have only a "generalized grievance" and have not suffered "individualized harm."

3. TAXPAYER AND CITIZEN STANDING

Page 114. Add footnote "a" to the end of the Court's opinion in Lujan v. Defenders of Wildlife:

[a] Justice Scalia's position in *Lujan* was originally propounded in Scalia, The Doctrine of Standing as an Essential Element of the Separation of Powers, 17 SUFFOLK U.L.REV.

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