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Constitutional Law: Cases, Comments & Questions

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CONSTITUTIONAL LAW: CASES, COMMENTS & QUESTIONS. By William B. Lockhart, Yale Kamisar, and Jesse H. Choper. St. Paul: West Publishing Co. 1964. lxiii + 1424 pages. \$15.00.

Many teachers despair, I suspect, of finding a suitable vehicle for a *critical* examination of constitutional law in the basic course. Even the best casebooks focus so sharply on broken series of factual resolutions that, no matter how well the cases are grouped, the gaps can sometimes be bridged only by an undesirable amount of lecturing which tends to be superficial. Treatises in constitutional law bring to the subject a measure of coherence and continuity lacking in casebooks, but the demand for economy has apparently made it infeasible to consider adequately all that a given teacher regards as relevant. In any case, constitutional law treatises are scarcely suitable for classroom use.

It is probably true that only in the vast periodical literature of constitutional law can a critical examination of that law be found. Few teachers can afford the luxury of binding much of that literature for use by students, however, and few students have the time to wade through much of it on their own. Usually, selections from periodicals are mere asides in casebooks, passed off in string citations at the end of the cases. Occasionally, some teachers mimeograph selected bibliographies of their own, to which they more or less "expect" their students to attend. The expectation is always uncertain, however, and probably less warranted than we like to presume in easing our conscience.

Considerations such as these, plus the sheer enormity of the subject, may account for something approaching a consensus of resignation about the basic constitutional law course: circumstances have apparently reduced our opportunity to one of presenting an adequate survey of the law. The special pleasures of critical examination seem reserved for enjoyment only in advanced courses and seminars. We compensate for the infirmities of the basic course by proliferating electives in privacy, race

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relations, problems of church and state, the business of the Supreme Court, and so on.

With these considerations in mind, the editors' prefatory claim for this new casebook may seem a little brash. Dean Lockhart and Professors Kamisar and Choper boldly declare that their primary aim is "to stimulate critical examination of the law and the trends."¹ Thus, the claim is that this casebook offers a great deal more than a mere survey of constitutional law. The surprise, however, is not that the claim is made; it is rather that the editors have actually succeeded in accomplishing their aim so very, very well! They have done so principally by devoting much of their materials to incisive periodical commentary and to the statement of questions which strenuously test the scope, significance, and articulated rationale of the cases. In short, they have succeeded in blending some of the best constitutional law literature with a variety of informed, significant questions and a judicious selection of cases; the result is excellent. The blend is almost certain to force a high level of classroom dialogue; it should indeed stimulate critical examination of the law.

It is therefore a pleasure to be able to recommend this book. Even in schools where the few hours assigned to constitutional law will restrict the basic course to more of a survey than the scope of this book comfortably contemplates, the teacher should still find it most helpful in preparing his own notes.

In other respects the book is orthodox. It is a useful orthodoxy, nonetheless, and the book can hardly be criticized on that account. Its organization, for instance, follows the currently standard tripartite division: The nature and scope of judicial review; the sources, uses, and interaction of national and state powers; and the limitations on governmental power resulting from the first eight amendments and the civil war amendments. Subdivisions within the principal sections are also made along lines currently observed in other, widely adopted, casebooks. The selection of cases differs in some particulars from that of other casebooks, of course, just as other casebooks differ among themselves. But each of us can determine the comparative merits of these differences only after a more personal inspection of the book than can be secured vicariously from the bias of a review such as this. The point to be made here is simply that the book is more than good enough to merit that inspection.

Nor should consideration of this book be dropped merely because the book is lengthy, which it clearly is. The use of small print and double columns makes it even longer than the number of pages (1424) might suggest. Nevertheless, the rampant growth of constitutional law today

simply rules out any greater economy of style, especially since the editors have been true to their aim of stimulating a critical examination of that law. Additionally, the topical arrangement of subjects facilitates dropping particular sections from a course where everything cannot be covered, without doing damage to the sections which can be covered, for the sections are relatively independent of one another. For example, the one hundred pages devoted to state power to tax could well be deferred for consideration in a separate course in state and local taxation without significantly affecting the classroom treatment of state power to regulate. In any case, we tend too generally to lament the apparently continued expansion of constitutional law casebooks in recent years. It is interesting to recall, for instance, that Professor Thayer's casebook,² which was published in 1895 (when constitutional law was surely no more complicated than it is now), required 2434 pages to cover the subject.

Roughly half of all the principal cases considered in the casebook here reviewed were decided by the Supreme Court since 1950—a fact which confirms another declared aim of the editors: to examine the *trends* of the law. Viewed another way, roughly half of all the principal cases concern themselves with limitations on government power which can be loosely described as limitations involving civil rights and civil liberties. This emphasis necessarily contracts the sections on judicial review and federalism, but here again the editors are faithful to their declared purpose of emphasizing the trends of the law. In the 1963–1964 Term, for instance, forty of the fifty Supreme Court decisions accompanied by an opinion and concerned with constitutional questions were within the civil rights and civil liberties field. With eighty per cent of the Court's constitutional opinions thus directed, the editors' allocation of a little more than half of their materials to that subject is a fairly conservative acknowledgment of the trend.

As a matter of fact, the one major oversight of the book may be in its omission of cases and materials which would deal more adequately with an aspect of civil rights and civil liberties of great significance today, namely, the scope and constitutional bases of federal civil rights statutes. *Screws v. United States*³ and *Williams v. United States*,⁴ which have nearly emasculated the two major criminal statutes⁵ on constitutional grounds, are not treated as principal cases. Nor is *Collins v. Hardyman*,⁶ which very nearly junked the civil analogue to section 241.⁷ *Monroe v.*

2. THAYER, CASES ON CONSTITUTIONAL LAW (1895).

3. 325 U.S. 91 (1945).

4. 341 U.S. 70 (1951).

5. 18 U.S.C. §§ 241, 242 (1958).

6. 341 U.S. 651 (1951).

7. REV. STAT. § 1980(3) (1875), 42 U.S.C. § 1985(3) (1958).

Pape,⁸ which rescued section 1983⁹ from oblivion and which makes it the single most useful federal civil rights remedy outside the Civil Rights Act of 1964,¹⁰ is never mentioned. The Civil Rights Act of 1964 is treated rather slightly, and many other statutes descriptive of federal civil rights authority are never considered. Many of these materials are covered in competitive casebooks, and their omission from this volume is a serious defect, especially in view of the general emphasis of the book on civil rights and liberties.

It may be that the editors considered that treatment of these statutes and their interpretative cases would be inappropriate in the basic constitutional law course. Disagreement with this point of view might be based on several considerations. First, the scope and construction of these statutes have considerable relevance to basic issues of federalism, which is part of the foundation of a solid course in constitutional law. Secondly, the interpretative cases provide some insights into techniques of judicial analysis not provided equally well by other cases. Thirdly, the statutes have a political and practical importance which ought not to be reserved for consideration only by those few students who may find their way into some small civil rights seminar. There being no other major course in the usual law school curriculum where consideration of these statutes would be more appropriate than in constitutional law, they should be covered in constitutional law. This is not to insist, of course, that every teacher should take them up; but it would have been helpful had the editors made it possible to deal with them. Since this casebook should otherwise enjoy its greatest success among those most interested in the civil rights and liberties area of constitutional law, the omission seems even more unfortunate.

On balance, however, the book is excellent, particularly in the selection of materials and questions to supplement the cases. This selection does a great deal to place the book easily among the best available, and possibly to make it the very best for stimulating a critical examination of constitutional law.

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8. 365 U.S. 167 (1961).

9. REV. STAT. § 1979 (1875), 42 U.S.C. § 1983 (1958).

10. 1964 U.S. CODE CONG. & AD. NEWS 1589-621.

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