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## Lockhart, Kamisar and Choper: 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. Pp. lxiii, 1424. \$15.00.

There is no shortage of casebooks on Constitutional Law; at least six major casebooks provide teaching material for this course. *Constitutional Law* by Lockhart, Kamisar, and Choper,<sup>1</sup> however, deserves special consideration not only by reason of its usefulness as a superior teaching tool, but also because of its value as a reference work. It contains almost an embarrassment of riches for the teacher, and its use will result in a highly rewarding experience for the student.

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1. Dean Lockhart and Professors Kamisar and Choper were all members of the faculty of the University of Minnesota Law School at the time of publication. Professor Yale Kamisar is now Professor of Law at the University of Michigan, and Professor Jesse H. Choper is now Professor of Law at the University of California, Berkeley.

One of the problems of teaching Constitutional Law is that an understanding of the development of its principles cannot be gained by studying the cases in splendid isolation. Because such an understanding requires a comprehension of the historical, social, political, and economic influences of the times, the teacher must require a large amount of relevant collateral reading. In many law schools this results in undue pressure upon library resources and facilities, and use of the *Selected Essays on Constitutional Law*<sup>2</sup> does not solve this problem. Few libraries can afford to stock sufficient copies of this volume for general classroom use. In addition, because of the inclusion in the *Selected Essays* of only one or two rather lengthy essays on a particular point of constitutional law, it is often necessary to supplement the material with outside sources. In contrast, the editors of *Constitutional Law* have minimized this problem by interspersing in the notes to the principal and abstracted cases short extracts from many appropriate secondary authorities. For example, the notes to *Marbury v. Madison*<sup>3</sup> contain extracts from works by M. R. Cohen, Charles Warren, James Thayer, Learned Hand, Herbert Wechsler, Eugene Rostow, and Alexander Bickel.<sup>4</sup> In addition, the notes to *Dennis v. United States*<sup>5</sup> include six extracts from law review articles, and the discussion of the reapportionment cases contains quotations from more than twenty law review articles.<sup>6</sup> These selections, although necessarily well-pruned, are designed to provide the student with the material for the development of rewarding insights and understanding.

Constitutional Law deals with aspects of almost every course in the curriculum. Even superficial coverage of its major topics requires the assimilation of a tremendous amount of cases and materials. Because of the limited number of teaching hours that can be allocated to the subject, comprehensive coverage of many topics is impossible if sufficient coverage is to be achieved. It is for this reason that many law teachers try to handle only a few specific areas in depth; their selection of these areas naturally varies according to personal choice. They hope that other areas will be taken up in other courses, but the crowded curriculum and the shortness of time may result in many students failing to take further courses in the constitutional law area. It is essential, therefore, that the constitutional law course at least introduce the student to all major topics. A case-book designed for general use must provide both wide coverage and

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2. ASSOCIATION OF AMERICAN LAW SCHOOLS, *SELECTED ESSAYS ON CONSTITUTIONAL LAW* (1938); ASSOCIATION OF AMERICAN LAW SCHOOLS, *SELECTED ESSAYS ON CONSTITUTIONAL LAW 1938-1962* (1963).

3. 5 U.S. (1 Cranch) 137 (1803).

4. Pp. 7-23.

5. 341 U.S. 494 (1951); pp. 974-79.

6. Pp. 1325-49.

a sufficient abundance of materials from which a teacher may select areas for more detailed treatment. Obviously a detailed presentation of all major topics in an attempt to satisfy the taste of all teachers would require an inordinately expensive multivolume casebook. The editors have, however, succeeded remarkably well in achieving both objectives. They have provided a large number of topics on which teachers may concentrate and at the same time have included something on almost every aspect of constitutional law.

It is a long book of 1,424 pages—the equivalent of roughly 1,800 pages in standard casebooks, assuming that the same type size is used, since it is printed in the double-column page format designed by the West Publishing Company to conserve space.<sup>7</sup> The casebook contains almost all the landmark cases, as well as a generous sampling from more recent cases. It has been estimated that over half the cases were less than ten years old, and twenty per cent of them less than five years old, as of March 1, 1964, the cut-off date for inclusion in the book. The notes following the cases contain searching queries to aid in developing proper analysis and understanding, as well as references to approximately 550 law review articles and books, and excerpts of varying lengths from 104 such sources. In addition, the table of authorities contains an exceptionally complete listing of law review articles on constitutional law. Appendix A is a useful listing of all the Justices of the Supreme Court, giving appropriate data as to dates of service, by whom they were appointed, and their previous public or private service. Appendix B contains the text of the Constitution and amendments.

This casebook is divided into three parts. Part I presents a discussion of the nature and scope of judicial review, the constitutional basis for "judicial supremacy," limitations on judicial power, and the nature and source of national legislative power. Part II covers the major aspects of the federal system, including the commerce power, the federal taxing and spending powers, the regulation of police powers, and state power to regulate and tax. Part III includes materials dealing with limitations on government powers and the protection of liberty and property.

Comprehensive coverage is given to the legal problem of proper allocation of the taxing power between the federal and state governments—a problem of growing importance because of the rapidly increasing need for new sources of revenue caused by the expanding

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7. Letter from Roger F. Noreen, Associate Manager, Law School and College Dep't, West Publishing Co., to *Michigan Law Review*, Nov. 11, 1965, on file at the *Michigan Law Review*. However, since BARRETT, BRUTON & HONNOLD, *CONSTITUTIONAL LAW, CASES AND MATERIALS* (2d ed. 1963), and DOWLING & GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* (7th ed. 1965) are set in smaller type, they contain as much printing per page as does the book under review. See letter from Roger F. Noreen to the *Michigan Law Review*, Dec. 22, 1965, on file at the *Michigan Law Review*.

activities of both state and federal governments. In addition, a surprisingly large portion of the book is concerned with the Bill of Rights, the struggle for racial equality, and apportionment. This is as it should be. The present United States Supreme Court docket is crowded with cases in these areas, and the accelerated judicial and legislative developments compel special consideration. The presentation of these difficult problems is extremely well-balanced. The materials emphasize the importance of a judicial answer to the question how the law may preserve the worthwhile features of federalism without at the same time losing sight of individual liberties and properly safeguarding the integrity of the judicial system. While doing this, however, the editors failed to include sufficient cases and materials relating to the historical background of civil rights legislation. Indeed, many of the earlier cases which severely limited the power of Congress to legislate in this area are omitted. The editors did include, of course, the *Civil Rights Cases*,<sup>8</sup> which can serve as a springboard to a discussion of civil rights legislation. While many early cases included in the book may be regarded as having been at least in part overruled by current cases, the use in southern courts of early restrictive decisions to frustrate the quest for equality requires the student to be acquainted with such theories. Specifically, I regret the failure to include texts of the civil rights acts which were enacted at the end of the Civil War, and the later amendments. The 1963 draft of the Public Accommodations Section of the Civil Rights Act of 1964 is reproduced in the casebook, but it is included with materials on the commerce clause, where it may be lost.

The rights of the accused are comprehensively treated. The materials detail the many prickly problems raised by *Mapp*<sup>9</sup> and *Gideon*.<sup>10</sup> As one would expect in any volume of which Kamisar and Choper are co-editors, this is extremely well done.<sup>11</sup> Unfortunately, *Powell v. Alabama*<sup>12</sup> was not included as a principal case despite the fact that the decision in that case initiated the use by the United States Supreme Court of the due process clause of the fourteenth amendment to invalidate state criminal convictions. This, however, seems to be but a matter of taste and a carping criticism, since the cases included cite the *Powell* case at least twelve times.

The presidential power is treated in connection with *Youngstown Sheet & Tube Co. v. Sawyer*.<sup>13</sup> While the *Youngstown* case has many facets and provides the teacher with a vehicle for discussing

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8. 109 U.S. 3 (1883).

9. *Mapp v. Ohio*, 367 U.S. 643 (1961).

10. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

11. For an earlier product of this fruitful collaboration, see Kamisar & Choper, *The Right to Counsel in Minnesota: Some Field Findings and Legal-Policy Observations*, 48 MINN. L. REV. 1 (1963).

12. 287 U.S. 45 (1932).

13. 343 U.S. 579 (1952).

almost all aspects of the problem, I have a nagging suspicion that this one case is just not enough. This seems especially true because of the expanded use of the executive power by the last three presidents; the unsatisfactory delineation of the limitations of such powers in the opinions in *Youngstown* presages increased constitutional litigation in this area.

Two other matters deserve further treatment. The misuse of disorderly conduct, loitering, and vagrancy statutes for the purpose of harassing civil rights workers has been growing, at least in southern communities. As a matter of fact, one case dealing with the constitutionality of the Birmingham, Alabama, loitering ordinance has been decided by the Supreme Court this term.<sup>14</sup> Under the circumstances it would seem that the "void for vagueness" doctrine needs reexamination and deserves far more than the one paragraph given on page 836. A recent prophetic article by Justice Douglas on "Vagrancy and Arrest on Suspicion" questions the validity of such statutes;<sup>15</sup> while the article is cited on page 752 in connection with the discussion of arrests on suspicion, a pertinent excerpt from the part dealing with disorderly conduct would seem appropriate under an expanded treatment of the "void for vagueness" doctrine. Finally, the materials do not focus on self-incrimination as such.<sup>16</sup> This topic is, of course, relevant to the courses in both Criminal Law and Evidence as well as Constitutional Law. Unfortunately, in many schools it is slighted in both of the first two courses, so the teacher of Constitutional Law must at least delineate the present contours of the privilege. It is hoped, therefore, that the notes in the next edition will be expanded to cover at least superficially the manifold problems raised by the invocation of the privilege.<sup>17</sup>

The discussion on freedom of expression, particularly speech and obscenity, is covered in the expert manner one would anticipate in

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14. *Shuttlesworth v. City of Birmingham*, 86 Sup. Ct. 211 (1965).

15. Douglas, *Vagrancy and Arrest on Suspicion*, 70 YALE L.J. 1 (1960).

16. Since the book went to press before *Escobedo v. Illinois*, 378 U.S. 478 (1964), was decided, self-incrimination in the context of police interrogation is treated only in a one-paragraph note (pp. 747-48). A reference to the index will show that self-incrimination, in so far as it is a dimension of other problems in criminal procedure, is treated in scattered places throughout the book. For example, *Adamson v. California*, 332 U.S. 46 (1947), is a principal case in the section entitled "The Nature of Due Process," and *Breithaupt v. Abram*, 352 U.S. 432 (1957), is discussed in a note in that section (pp. 669-70). Similarly, self-incrimination in the context of forced registration of the Communist Party is treated in the section entitled "Freedom of Expression and Association."

17. The "Nature of Due Process" section of the 1965 Cumulative Supplement to the casebook does include the important self-incrimination cases of *Malloy v. Hogan*, 378 U.S. 1 (1964), and *Griffin v. California*, 380 U.S. 609 (1965), as principal cases. Moreover, the "Right to Counsel" section of the Supplement includes *Escobedo v. Illinois*, *supra* note 16, as a principal case. As some of the many notes and questions following this landmark case underscore, *Escobedo*, or at least *Escobedo's* "potential for expansion," has enormous consequences for the nature and scope of the privilege against self-incrimination.

a book co-edited by Dean Lockhart, the acknowledged authority on that subject. Here is gathered the most complete collection of available teaching materials.

I heartily recommend this casebook for classroom use. The few inadequacies I have touched upon are not meant to detract from the overall high quality of this casebook.

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