

The Right Books for the “Rights” Course: A Review of Four Civil Rights Casebooks

CONSTITUTIONAL RIGHTS AND CONSTITUTIONAL LITIGATION: CASES AND MATERIALS, 2d ed. By Charles F. Abernathy.[†] St. Paul, Minnesota: West Publishing Company, 1992. Pp. xxxiii, 753.

CIVIL RIGHTS LEGISLATION: CASES AND MATERIALS, 4th ed. By Theodore Eisenberg.^{††} Charlottesville, Virginia: Michie Law Publisher, 1996. Pp. xxvii, 1407.

CIVIL RIGHTS ACTIONS: SECTION 1983 AND RELATED STATUTES, 2d ed. By Peter W. Low^{†††} and John C. Jeffries, Jr.[‡] Westbury, New York: Foundation Press, 1994. Pp. 1, 928.

CONSTITUTIONAL TORTS. By Sheldon H. Nahmod,^{‡‡} Michael L. Wells,^{‡‡‡} and Thomas A. Eaton.* Cincinnati, Ohio: Anderson Publishing Company, 1995. Pp. xvi, 431.

*Reviewed by Stephen Shapiro***

INTRODUCTION: FOUR FOR THE PRICE OF ONE

This essay originally started out as a review of Charles Abernathy’s casebook, *Civil Rights and Constitutional Litigation*,¹ which I am currently using to teach my “Civil Rights Litigation”

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1. CHARLES ABERNATHY, *CIVIL RIGHTS AND CONSTITUTIONAL LITIGATION* (2d ed. 1992).

course at the University of Baltimore. Since at some point in my career I have used three of the four major casebooks available to law faculty teaching Civil Rights (the Abernathy casebook, Eisenberg's *Civil Rights Legislation*,² and Low and Jeffries' *Civil Rights Actions*)³, I decided to extend the review to all four books.⁴ All four are quite good, including the newest, Nahmod, Wells & Eaton's *Constitutional Torts*, which I haven't had a chance to use.⁵ They all differ, however, in coverage and focus, and these differences might lead a professor to choose one or the other, depending on the type of Civil Rights course one wants to teach. My hope is that this essay may prove helpful to someone choosing a casebook for such a course.

I will first discuss the nature of the Civil Rights course, as I teach it and as I believe it is taught at many law schools. Next, I will compare the general suitability of each of the four texts for various kinds of Civil Rights courses. Then I will discuss the Abernathy book, which I currently use, examining both its strengths and weaknesses. Finally, I will describe what I think are the advantages offered by each of the other three texts.

WHAT'S IN A NAME?

When a member of the Seattle University Law Review staff called last spring asking me to write a review of the Abernathy casebook for their Constitutional Law Casebook Review, I gave her the same caveat that I have given to students over the years who have expressed an interest in taking my Civil Rights class. The Abernathy book is not strictly a Constitutional Law casebook, and my Civil Rights class, in which I use that book, is not really about substantive constitutional rights.

2. THEODORE EISENBERG, *CIVIL RIGHTS LEGISLATION* (2d ed. 1996).

3. PETER LOW & JOHN JEFFRIES, *CIVIL RIGHTS ACTIONS* (2d ed. 1994).

4. I am currently using the second edition of Abernathy for the third time in three years (fall '95, fall '96, and fall '97). I used the current second edition of Low and Jeffries in spring '95 and the first edition of that book in summer '90. I used the previous first and second editions of Eisenberg several times in the nineteen-eighties. Obviously, since my familiarity with Abernathy is greater and more current, I will have more to say about it than the other texts. After this article was written but before it was published, a new casebook in this area became available. Because of the timing, it was not reviewed. See ROSALIE BERGER LEVINSON & IVAN E. BODENSTEINER, *CIVIL RIGHTS LEGISLATION AND LITIGATION* (1997).

5. SHELDON NAHMOD ET AL., *CONSTITUTIONAL TORTS* (1995).

If one uses the term “civil rights” with a member of the public, or most second-year law students, they probably think of a number of personal rights (such as freedom of speech and religion or freedom from discrimination) which are protected in the United States primarily by the Constitution. Those of us who teach in the field might be more likely to use the term “civil liberties” to describe such substantive constitutional rights.⁶ A student who is interested in this area would be advised to take a course such as one offered at my law school by another professor entitled “Civil Liberties Seminar.”

Classes denominated as “Civil Rights” classes are more likely to focus on federal statutes passed both to enforce and to extend these substantive constitutional rights. To be sure, constitutional issues crop up frequently in a Civil Rights course. The interplay between the Constitution and various civil rights statutes is one of the more interesting aspects of such a course. Several years ago, in an attempt to clarify the substance of what I teach, I renamed the current version of my course “Civil Rights Litigation.” Similarly, Professor Abernathy changed the title of his textbook from *Civil Rights* to *Civil Rights and Constitutional Litigation* when the second edition was released.⁷ All four of the books reviewed here focus more on the process of enforcing constitutional and related rights, rather than on defining the rights themselves.

6. I am not saying that it would be incorrect to use the term “civil rights” to describe a group of rights, some of which are constitutionally based. Black’s Law Dictionary, in fact, defines “civil liberties” as “Personal, natural rights guaranteed and protected by Constitution” (emphasis added). BLACK’S LAW DICTIONARY 246 (6th ed. 1990). It does not contain a definition of “civil rights,” rather only one for “Civil Rights Acts,” which it defines as “Federal statutes enacted after Civil War, and more recently in 1957 and 1964, intended to implement and give further force to basic personal rights guaranteed by the Constitution.” *Id.* So it would be perfectly correct to use the term “civil rights” to describe personal rights, some of which are guaranteed by the Constitution and some by statute.

I am merely pointing out that as law school terms of art, the distinction is usually made between Civil Liberties books and courses, which comprehend the study of substantive constitutional rights, and Civil Rights books and courses, which describe the enforcement mechanisms for such civil liberties, or the study of statutorily created rights and their enforcement, or sometimes both.

7. ABERNATHY, *supra* note 1.

SCOPE OF THE COURSE: OLD RIGHTS AND/OR NEW?

There are two distinct sets of federal civil rights statutes. The first set was passed during the Reconstruction Era shortly after the Civil War. One of the keystones of this legislative era was Section 1 of the Ku Klux Klan Act of 1871, currently codified at 42 U.S.C. § 1983 (hereinafter Section 1983). Since its resurrection by the Supreme Court in 1961,⁸ Section 1983 has been the primary method of enforcing constitutional rights and redressing constitutional violations committed by state and local governments and their employees.⁹

The study of this statute, and its interpretation by numerous Supreme Court opinions since 1960, is the major focus of my Civil Rights Litigation course, as well as, I suspect, the majority of similarly named law school courses.¹⁰ If I wanted to be even more accurate, I might have to name the course "Constitutional

8. *Monroe v. Pape*, 365 U.S. 167 (1960), is the seminal case for modern § 1983 jurisprudence. It made clear that persons whose constitutional rights had been violated by local governmental officials could recover damages, even if those officials had exceeded their authority under state law. *Monroe v. Pape* is the first case presented in three of the four books reviewed here (in Eisenberg it is preceded by an extensive historical review of the history of civil rights legislation in the U.S.).

9. Section 1983 may also be used to remedy violations of federal statutory law, *Maine v. Thiboutot*, 448 U.S. 1 (1980), although not in all instances. See *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981); *Wright v. City of Roanoke Redevelopment & Housing Auth.*, 479 U.S. 418 (1987).

10. My course always exceeds the scope of § 1983 in one regard, as do all four textbooks under consideration and, I suspect, all similar law school courses. Suits against *federal* officials for violations of constitutional rights do not fall within the ambit of § 1983, since such officials are not acting "under color of" state law. 42 U.S.C. § 1983 (1994). The Supreme Court has judicially created a similar remedy against federal officials. See *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1988). The two remedies are treated so similarly in many, though not all, respects that it makes sense to study the two remedies together. In fact, it is impossible to study § 1983 jurisprudence without reading at least some *Bivens* cases, since the Court sometimes changes § 1983 law in a *Bivens* case. See, e.g., *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (change in qualified immunity announced in *Bivens* case but explicitly made applicable to § 1983 suits).

My course also exceeds the scope of § 1983 by covering several other civil rights statutes passed during the reconstruction, 42 U.S.C. §§ 1981, 1982 and 1985(3). These statutes are fundamentally different from § 1983 in that they prohibit and remedy *private* discrimination. Theoretically, they have no place in a course dedicated to constitutional litigation, but they are often dealt with along with § 1983. Three of the four casebooks under consideration provide significant coverage of these statutes; only *Nahmod*, which is specifically focused on § 1983 jurisprudence, does not. Unlike *Bivens* suits, which *must* be taught along with § 1983, these statutes, although historically linked with § 1983, are different enough to be omitted from a Civil Rights course focused on § 1983 and constitutional litigation.

Litigation,” or perhaps “Constitutional Torts.”¹¹ Approximately the first half of the Abernathy casebook is devoted to Section 1983,¹² and this constitutes the bulk of the reading assignments I give my class. This material also constitutes approximately half of Eisenberg, most of Low and Jeffries, and all of Nahmod et al.¹³

The other set of federal civil rights statutes were passed mostly in the 1960s, to prohibit, among other things, racial discrimination in public accommodations,¹⁴ in housing,¹⁵ in employment,¹⁶ in federally assisted programs,¹⁷ and in voting.¹⁸ These statutes comprise the second half of the Abernathy and Eisenberg casebooks,¹⁹ but are not covered in the other two books. I do not cover any of this material in my course, from lack of both time and personal expertise. Abernathy is correct in stating that adding coverage of some of the more recent statutes gives students a fuller understanding of the whole picture of civil rights law, especially “the fascinating interplay between statutory sources of civil rights law and constitutional sources.”²⁰ To teach all of this material in one

11. The difference between these two names would depend on whether the course focuses exclusively on § 1983 *damage* actions, as does Nahmod (hence the textbook's name: *Constitutional Torts*), or whether the course also includes coverage of issues that arise in injunctive, or structural reform, litigation. Each of the other three books provide some coverage of such issues, but only Low and Jeffries provide an entire chapter dedicated to structural reform litigation.

12. ABERNATHY, *supra* note 1, at 1-355.

13. EISENBERG, *supra* note 2, at 3-703; LOW & JEFFRIES, *supra* note 3, at 1-300 and 449-928; NAHMOD ET AL., *supra* note 5, at 1-431.

14. Title II of the 1964 Civil Rights Act, 42 U.S.C. § 2000a (1994).

15. The Fair Housing Act of 1968, 42 U.S.C. § 3601 et. seq. (1994).

16. Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e (1994).

17. Title VI of the 1964 Civil Rights Act, 42 U.S.C. § 2000d (1994).

18. Voting Rights Act of 1965, 42 U.S.C. § 1971 (1994).

19. Eisenberg does not cover discrimination in public accommodations, but does have a chapter on law protecting the handicapped.

20. In suggesting the benefits of teaching the book as a whole, as opposed to only the Section 1983 material (which he also lists as a possible “self-contained course”), Abernathy states: First, the book as a whole offers broad coverage of the main themes of all major civil rights legislation, allowing students to see the connection between judicially developed themes and legislatively developed themes, for example, the difference between the intent test for racial discrimination in § 1983 cases involving the Fourteenth Amendment and the impact and intent tests for racial discrimination used under Title VII as well as the Voting Rights Act. The fuller picture also gives the student a more reassuring knowledge of how civil rights laws fit together as a whole to accomplish more finely detailed or sophisticated solutions: if § 1983's “under color of law” test does not reach all discrimination, it can be supplemented by legislation such as Title VI or the

semester, however, as he apparently has done on a number of occasions,²¹ seems quite daunting to me. I have instead accepted his more modest proposal to teach the first half of the book as "a self-contained course in constitutional litigation . . . [s]ometimes called 'constitutional torts'."²² There is plenty of material here to occupy a semester.

At the time the first editions of Abernathy, as well as Eisenberg, were published,²³ it was important that the newer statutory materials be included. This was because the material was hard to find in other casebooks, and most law schools had only one or two civil rights courses. Now most law schools have separate classes for Employment Discrimination Law, Disability Discrimination Law, Race and the Law, Women's Rights/Gender Discrimination, etc.,²⁴ and there are complete casebooks devoted to these more specialized areas of civil rights.²⁵

For those faculty wishing to teach a Constitutional Litigation course, any of the four books under consideration will do. If they wish to teach a broader course including some of the

Rehabilitation Act.

ABERNATHY, *supra* note 1, at v.

21. "I have five times taught almost the entire set of materials to dedicated-and challenged-classes at Georgetown, usually for only two credits." ABERNATHY, *supra* note 1, at x.

22. *Id.* at v.

23. In 1980 and 1981, respectively.

24. Other civil rights and civil liberties courses currently taught at my law school include: Civil Liberties Seminar, Employment Discrimination Law, Gender and the Law, Law and Disabilities Seminar, Law and Social Reform Seminar, Legal Rights of the Elderly, Race and the Law, and Sexual Orientation and the Law. University of Baltimore School of Law Catalogue, 1997-98.

25. A partial listing of casebooks suitable for teaching in these areas includes:

Employment Discrimination: JOEL WILLIAM FRIEDLER & DARRYL J. STRICKLER, *CASES AND MATERIALS ON THE LAW EMPLOYMENT DISCRIMINATION* (3d ed. 1993); JAMES E. JONES ET AL., *CASES AND MATERIALS ON DISCRIMINATION IN EMPLOYMENT* (5th ed. 1987); ARTHUR B. SMITH ET AL., *EMPLOYMENT DISCRIMINATION LAW CASES AND MATERIALS* (4th ed. 1994); MICHAEL J. ZIMMER ET AL., *CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION* (3d ed. 1994).

Gender Discrimination: MARY JOE FRUG, *WOMEN AND THE LAW* (1992); HERMAN HILL KAY, *TEXT, CASES, AND MATERIALS ON SEX BASED DISCRIMINATION* (3d ed. 1988).

Disability Law: LAURA F. ROTHSTEIN, *DISABILITY LAW CASES, MATERIALS, PROBLEMS* (1995); MICHAEL L. PERLIN, *LAW AND MENTAL DISABILITY* (1994).

Race and the Law: DERRICK A. BELL, JR., *RACE RACISM AND AMERICAN LAW* (3d ed. 1992).

modern statutes, they would be limited to Abernathy and Eisenberg.

GETTING DOWN TO THE REAL NITTY GRITTY

For several reasons, the remainder of this review will focus on the use of the four casebooks for the narrower Constitutional Litigation course. First of all, I have greater familiarity with this kind of course, since it is the one I teach. Secondly, I believe it is the course that would be taught by the majority of other faculty who would use one of these books. And finally, since all four of the books cover this material, it makes for an easier, fairer comparison among them.

Size Does Matter

Before I get on to what I perceive are the more substantive differences among the four books, I think it important to talk about size: number of cases and pages. While this may seem like a mundane matter, it can make an important difference in how the class is taught by the professor and received by the students. Basically, the distinction in length of the material breaks down to this: Low and Jeffries and Eisenberg devote significantly more pages to this material than do Abernathy and Nahmod. In fact, the former two casebooks devote nearly twice the space for this material than Abernathy or Nahmod.²⁶ Obviously, there are advantages and disadvantages to both approaches, depending on how you like to teach the course.

Several years ago, I switched from using Low and Jeffries to Abernathy in part because it was more compact. This compactness is accomplished in two ways: it has the shortest average length for the edited version of the main cases²⁷ and the least

26. For the page length comparisons, I have included all the material that relates to § 1983 litigation (including *Bivens* actions (see *supra* note 11) and all issues that would arise in such actions (i.e., Eleventh Amendment jurisprudence, special problems involved in equitable relief, etc.). Low & Jeffries devote 779 pages to these topics, Eisenberg 690, Nahmod 431, and Abernathy 383.

27. In Abernathy, 48 cases take approximately 260 pages, an average of a little more than 5 pages per case. Nahmod's page length is approximately the same, while Low and Jeffries, at 15 pages per case, and Eisenberg, at about 9, use significantly longer versions.

amount of noncase material (notes and questions).²⁸ When I taught the course previously, using Eisenberg or Low and Jeffries, I perceived the students to be somewhat overwhelmed by the amount and detail of the material. With Abernathy, I can assign approximately two main cases, which average only five or six pages each, plus a page or two of notes for each.²⁹ I find the students come to class more familiar with the facts and law of the cases, which allows me to conduct a better discussion of the major issues involved.

There is a cost to this leaner approach, however. First, students are not forced to practice the fine art of gleaning the meaning from long and complex Supreme Court opinions and dissents. Teachers who see that as an important aspect of this course might be better off with Low and Jeffries or Eisenberg, which provide longer excerpts.³⁰

Second, while Abernathy provides material for discussion of most of the important legal issues in this area, it does not give the students as full a picture of the development and current status of the law. While Abernathy is a very good teaching tool, a student who actually had read and understood all or most of one of the other books would be more knowledgeable about the field. I myself sometimes turn to my desk copy of one of the other books when looking for the answer to a student's question.³¹

28. Approximately 122 pages, compared to 135 for Eisenberg, 149 for Nahmod, and 183 for Low & Jeffries.

29. For example, the material on qualified immunity from damages is made up of two main cases of 6 and 5 pages, respectively (*Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Malley v. Briggs*, 475 U.S. 335 (1986)), plus 5 pages of notes, for a total of 16 pages. ABERNATHY, *supra* note 1, at 149-65. By comparison, the material on qualified immunity in Low & Jeffries comprises 54 pages. LOW & JEFFRIES, *supra* note 3, at 43-96.

30. There are some faculty who prefer totally unedited versions of the cases for this reason. Such faculty will have to copy their own material and will also, I suspect, have to deal with some undeserved and unenlightened student resentment. I used to teach an upper-level course in Federal Jurisdiction using the Low and Jeffries Federal Courts casebook, which, like its sister Civil Rights casebook, is composed mostly of comparatively long excerpts from Supreme Court cases. I once had a student come up to me at the end of the semester and tell me how much he had liked the course, except for having to read those "long difficult Supreme Court cases," and asking whether I couldn't teach the course without them.

31. Again, using qualified immunity as an example, while Abernathy's 16 pages works well for a one-hour class discussion of the doctrine, the 54 pages in Low & Jeffries would be more useful for in-depth research.

These Are a Few of My Favorite Things

As mentioned above, what most attracted me to the Abernathy text was my perception that it gave the students enough information to discuss the important issues raised in constitutional tort cases without overwhelming them with too much detail. There are other reasons why I chose it.

I particularly like the second subchapter, right after the introductory material on *Monroe v. Pape*, which is entitled "Elements of a Plaintiff's § 1983 Claim - Deprivations of Constitutional Rights."³² The introductory cases first establish the proposition that there is no single standard of care for all Section 1983 cases, but that it will vary depending on the specific constitutional right being enforced.³³ The book then sets out examples of cases in which the Supreme Court has established the state-of-mind/standard-of-care element for each of four of the most important categories of Section 1983 cases: due process,³⁴ prisoners' rights,³⁵ police misconduct,³⁶ and racial discrimination.³⁷ I find this grounding in the substantive rights most often enforced through Section 1983 litigation very helpful to the students, before launching them off into the less familiar and more difficult territories of constitutional litigation, such as individual and governmental liability, sovereign immunity, abstention doctrines, and the like. The substantive rights grounding provides a link to, and review of, constitutional law doctrines which the students should already have studied,³⁸

32. ABERNATHY, *supra* note 1, at 27-89.

33. *Id.* at 22-33. The main Supreme Court case that settled this issue is *Daniels v. Williams*, 474 U.S. 327 (1986).

34. *Paul v. Davis*, 424 U.S. 693 (1996); *Baker v. McCollan*, 443 U.S. 137 (1979). ABERNATHY, *supra* note 1, at 27-28.

35. *Estelle v. Gamble*, 429 U.S. 97 (1976); *Whitely v. Albers*, 475 U.S. 312 (1986). ABERNATHY, *supra* note 1, at 33-48.

36. *Tennessee v. Garner*, 471 U.S. 1 (1985); *Graham v. Conner*, 490 U.S. 386 (1989). ABERNATHY, *supra* note 1, at 48-65.

37. *Hawkins v. Town of Shaw*, 437 F.2d 1286, *aff'd en banc*, 461 F.2d 1171 (5th Cir. 1971); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). ABERNATHY, *supra* note 1, at 75-89.

38. Although I do make some exceptions, our required course in Constitutional Law is a prerequisite for Civil Rights Litigation.

while offering some concrete examples of civil rights cases which I can refer back to at other points in the course.³⁹

Take Note

Another aspect of *Abernathy* that I like is that many of the notes and questions following the cases focus on the theme of the difficulty in construing a statute such as Section 1983. These notes were very helpful to my understanding of the Supreme Court's vacillation between treating Section 1983 cases as matters of constitutional versus statutory interpretation. A number of factors lead to this ambivalence by the Court. First, Section 1983 is sparsely written; it is more like a constitutional provision than the typical modern statute.⁴⁰ Second, its statutory history is often inconclusive, since it is more than one hundred years old and was directed almost exclusively to racial discrimination, which constitutes only a fraction of the Section 1983 cases today.⁴¹ Third, the interpretations of Section 1983 are often intertwined with, and affected by, the substantive constitutional rights being enforced.⁴² Finally, Section 1983 cases often affect the sensitive balance of federal-state relations.

39. Of the other three texts, the one that comes closest to covering this as broadly and, for my purposes, as usefully as *Abernathy* is *Nahmod*. NAHMOD ET AL., *supra* note 5, at 111-44. Low & Jeffries cover this material later in their book. LOW & JEFFRIES, *supra* note 3, at 187-236.

40. Section 1983 consists of only one sentence:

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress.

42 U.S.C. § 1983 (1994).

41. For example, in *Monroe v. Pape*, 365 U.S. 167, 187-92 (1961), the Court interpreted the statutory history of § 1983 as showing Congressional intent *not* to hold municipalities liable under the act. Just seventeen years later, in *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 689-94 (1978), the Court reinterpreted the same history to determine that municipalities *could* be sued.

42. See, e.g., *Daniels v. Williams*, 474 U.S. 327, 332-33 (1986) (holding that § 1983 did not contain a single state-of-mind requirement, but that this would vary depending on what constitutional remedy was being enforced); *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 66-7, 71 (1989) (holding that § 1983 plaintiffs could not get around the 11th amendment bar to suing a state in federal court by bringing suit in state court: "[I]n deciphering congressional intent as to the scope of § 1983, the scope of the Eleventh Amendment is a consideration, and we decline to adopt a reading of § 1983 that disregards it.").

On the Other Hand . . .

While I have found Abernathy's notes and questions helpful in developing my approach to the course, the students find them less helpful. The notes raise many difficult questions, often one after another, without providing many answers. Students have reported finding this frustrating, and it is clear to me that many of them eventually stop reading the notes unless I specifically call a particular one to their attention. While this is certainly an area where it makes sense to ask students to grapple with difficult and often unanswerable questions, I can understand their frustration at being bombarded with one after another.⁴³ Interestingly, they also have complained of exactly the opposite problem with many other note questions: the notes so clearly suggest one correct answer that they appear to be merely a disingenuous way of making a point.

The notes in Low and Jeffries are very different from those in Abernathy, and in fact quite different from those in most casebooks I have used. In addition to being longer than most, the notes are more substantive and textual. Rather than raising questions for the students to ponder, they provide a lot of information in a very straightforward manner. Instead of putting most of the notes only after the main cases, the authors use long explanatory notes both to set the stage for the main cases and to follow the course of the law after them.⁴⁴

I first became familiar with Low and Jeffries' approach when I used their similarly structured Federal Courts casebook to teach a Federal Jurisdiction course.⁴⁵ I switched to their casebook in that course from a casebook structured similarly to Abernathy (i.e., main cases not preceded by explanatory notes, with the notes to be read by the students after the cases), largely because

43. I think the students have a point here. For example, one note that I chose at random, a two-and-a-half page "Note on Sources of and Limits on Official Immunities," contains thirty questions, most of them either rhetorical or unanswerable. ABERNATHY, *supra* note 1, at 139-41.

44. See, e.g., LOW & JEFFRIES, *supra* note 3, at 57-67 (introductory notes on the qualified immunity defense, which precede the main case of *Anderson v. Creighton*, 483 U.S. 635 (1987)), and LOW & JEFFRIES, *supra* note 3, at 81-89 (notes following *Anderson*).

45. PETER LOW & JOHN JEFFRIES, *FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS* (3d ed. 1994).

of the detailed, explanatory nature of the notes.⁴⁶ Many of the Federal Jurisdiction cases are harder for the students to understand than the Civil Rights cases, and I was hoping that the introductory textual material would aid the students in their understanding of the cases. I don't think it's quite as hard for students to grasp the issues in the Civil Rights cases, and therefore I switched back to the leaner approach of Abernathy for this course.

Because of the large amount of material Low and Jeffries provides, including lists of relevant law review articles on each topic, I think it would be particularly well suited to a class in which students write a paper, rather than take an exam. The students might not be expected to read all of the explanatory notes for each topic, but the information would be easily available to get them started on a more in-depth look at a particular area.

Nahmod et al seems to take an intermediate approach. The authors do provide textual, explanatory notes before the main cases (although a good deal more truncated than Low and Jeffries), and they also include the kind of thought provoking notes after the case as in Abernathy, but again shorter and more focused.⁴⁷ I think this might be a good compromise that could work well.

Eisenberg also relies mostly on post-main-case notes that both raise questions and provide information, but also includes some limited introductory material before some cases.⁴⁸

If You Want to Know What Really Bugs Me . . .

My biggest criticism of Abernathy is that the current (second) edition is now more than five years old, and there is no

46. DAVID P. CURRIE, *FEDERAL COURTS: CASES AND MATERIALS*, (3rd. ed. 1982).

47. For example, in their presentation on absolute judicial immunity, the authors begin with two pages of background and history, then present the main case of *Stump v. Sparkman*, 435 U.S. 349 (1978), and end with a short series of questions about *Stump*. NAHMOD ET AL., *supra* note 5, at 233-39.

48. In Eisenberg's treatment of *Stump* and judicial immunity, the author precedes the case with a two-page background informational note and follows the case with a four page note that both describes additional cases and asks questions about both *Stump* and these other cases. EISENBERG, *supra* note 2, at 219-31.

supplement available.⁴⁹ Compare this to Nahmod,⁵⁰ which is only a few years old, Eisenberg,⁵¹ which just last year came out with its fourth edition (and which, in the past, has been regularly supplemented), and Low and Jeffries,⁵² which although three years old comes out with a very comprehensive supplement every year. Section 1983 jurisprudence is an area that regularly produces several important Supreme Court cases each year, and a supplement is a much more convenient way of keeping the course up to date than having to edit and copy new cases for the students. When I asked a West Publishing representative several years ago whether a supplement or new edition of *Abernathy* was in the works, she said there was not, because the small number of books sold each year did not justify the expense. It is certainly true that here at the University of Baltimore we order only ten to twenty Civil Rights textbooks, compared with three hundred for each first year subject. Up until now, I have been willing to work around the fact that *Abernathy* gets a little more out of date each year; but at a certain point this might be a factor that might lead me to switch, or someone else to adopt, a different book.

Giving Credit Where Credit Is Due

There is general agreement about main cases to include in a Civil Rights course or casebook. Almost all of these are Supreme Court cases since 1960. While the choice of main cases in the four texts is not identical, there is a very large overlap. I have already discussed many of the differences in the four casebooks, including length of the material, length of the main case excerpts, extent of the coverage outside of Section 1983, and length, style, and focus of the notes accompanying the text. I have also already explained what I particularly like about *Abernathy*. There are aspects to each of the texts which I like, and which I think distinguish it somewhat from the others.

49. The second edition of *Abernathy* was published in 1992.

50. NAHMOD ET AL., *supra* note 5.

51. EISENBERG, *supra* note 2.

52. LOW & JEFFRIES, *supra* note 3.

Eisenberg

As previously noted, Eisenberg is probably the most comprehensive of the four books, giving extensive coverage both to the newer and older civil rights statutes.⁵³ Additionally, it contains some useful textual material that the others do not.

The book begins with an extensive section on the historical background of civil rights law, beginning with the end of the Civil War, the passage of the Thirteenth and Fourteenth Amendments, and the Civil Rights Act of 1866, and tracing the restrictive interpretations of that law through the years.⁵⁴ This is very helpful in setting the stage for *Monroe v. Pape*, which is where the other books begin.⁵⁵ For a professor with the time and interest to cover it, this material could be very helpful in putting the more modern cases in context. It is, however, long and difficult material, for which not all classes might have the patience.

The book also contains more extensive practical information about the number, nature, and effects of different kinds of civil rights cases. Two particularly good sections⁵⁶ examine research conducted by Eisenberg himself and others into the reality of the perception, by the Supreme Court and others, that "§ 1983 suits were engulfing the federal courts."⁵⁷ Law students are rarely exposed to this kind of empirical research, and I believe that many would find it interesting and helpful.

Low and Jeffries

The most distinguishing characteristic of Low and Jeffries, as noted above, is that it provides the most comprehensive coverage of Section 1983 jurisprudence.⁵⁸ It has longer case excerpts, and longer, more detailed notes containing a huge amount of

53. EISENBERG, *supra* note 2, at 3-64.

54. *Id.*

55. *Monroe v. Pape*, 365 U.S. 167 (1961).

56. See EISENBERG, *supra* note 2, at 180-91 (The Reality of Constitutional Tort Claims) and 532-42 (The Flood of Federal Court Prisoner Cases).

57. *Id.* at 532 (quoting Eastman, *Draining the Swamp: An Examination of Judicial and Congressional Policies Designed to Limit Prisoner Litigation*, 20 COLUM. HUM. RTS. L. REV. 61, 71 (1988)).

58. LOW AND JEFFRIES, *supra* note 3, at 1-299.

information which is presented in a straightforward way that makes the text reasonably manageable.

Low and Jeffries' Civil Rights casebook is an offshoot of, and companion to, their earlier text, *Federal Courts and the Law of Federal-State Relations*.⁵⁹ While all four books under review here necessarily treat the problems of federalism and federal-state relations that inevitably arise in Section 1983 jurisprudence, Low and Jeffries, with their Federal Courts background, seem to put more emphasis on it.⁶⁰ Those who are making the transition, as I did, from a Federal Courts to a Civil Rights course, might find that Low and Jeffries eases that transition.⁶¹

One interesting section of Low and Jeffries, not contained in any of the other books, is a long chapter entitled, "Selected Problems in Structural Reform Litigation."⁶² Section 1983 has been used as the vehicle to bring both damages actions (constitutional torts) and suits for injunctive relief.⁶³ The injunctive suits sometimes ask for a simple remedy, such as enjoining an unconstitutional statute or regulation.⁶⁴ Such suits may also be brought, however, to try to force structural reform of whole government systems, such as schools,⁶⁵ prisons,⁶⁶ or mental hospitals.⁶⁷ This chapter focuses on some of the special problems inherent in such remedial litigation to a much greater extent than the other texts.

59. *Id.* at 46.

60. The clearest example of this is their treatment of the federalism-based doctrine of Younger Abstention (based on *Younger v. Harris*, 401 U.S. 37 (1971)). They spend 82 pages on it (LOW & JEFFRIES, *supra* note 3, at 638-720), compared with 35 for Eisenberg (*supra* note 2, at 552-87), 37 for Abernathy (*supra* note 1, at 257-94) and none for Nahmod.

61. Low and Jeffries themselves refer to the two books as "companion volumes." LOW & JEFFRIES, *supra* note 3, at iv. Obviously, this transition factor would be even more persuasive for those faculty who, like myself, used Low and Jeffries to teach Federal Courts.

62. *Id.* at 721-818.

63. The statute, by its terms, provides for "an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983 (1994). The first and most well-known case in which the Supreme Court approved its use to obtain damages was *Monroe v. Pape*, 365 U.S. 167 (1961).

64. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973).

65. *Board of Education of Oklahoma City v. Dowell*, 498 U.S. 237 (1991).

66. *Pugh v. Locke*, 406 F. Supp. 318 (M.D. Ala. 1976).

67. *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981).

Nahmod, Wells and Eaton

As its name implies, Nahmod, Wells and Eaton's *Constitutional Torts* deals only with Section 1983 suits for damages. Although this book would not be useful for someone interested in teaching other civil rights statutes or structural reform litigation, its narrower focus makes it particularly suitable for a Constitutional Torts class. I think such a class is not only reasonable, but in some ways very attractive. Section 1983 cases seeking damages raise very different issues from those seeking injunctive relief, and certainly provide enough material for a one semester course. In fact, my course comes very close to a Constitutional Torts course, with only a few class hours on the particular problems associated with injunctive relief.

The benefits of the narrower focus are not only a more manageable amount of material for the students, but the ability to include a significant number of Court of Appeals cases. According to the authors, "[t]his enables students to see how principles articulated in Supreme Court decisions are implemented by lower courts."⁶⁸ I think this approach makes a lot of sense. I also like the straightforward way the material in this book is organized and presented. There is enough textual information to help the students understand the main cases, and there are enough questions to get them to think about the important issues, but not so much of either as to overwhelm them.⁶⁹ For years I have used Nahmod's wonderful treatise on Section 1983 law⁷⁰ as a personal resource, and even considered using it as a class text. He has wisely imported the straightforward nature of the treatise into this casebook.

Earlier in this review, I mentioned that Low and Jeffries might be suitable for a class requiring student papers, because the in-depth notes provided significant resource material. I think Nahmod, et al. may also be suitable for a paper or project

68. NAHMOD ET AL., *supra* note 5, at xv.

69. For example, in their presentation on absolute judicial immunity, they begin with two pages of background and history (NAHMOD ET AL., *supra* note 5, at 233-35), then present the main case of *Stump v. Sparkman*, 435 U.S. 349 (1978) (NAHMOD ET AL., *supra* note 5, at 235-38), and end with a short series of questions about *Stump* (*id.* at 238-39).

70. SHELDON NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION (2d ed. 1991).

course, but for a different reason: its shorter length and narrower focus might allow coverage of the substantive material in less than a semester. This would allow time at the end for student projects.

I have recently thought of changing the format of my course, from a discussion class with a take-home exam at the end to either a paper or workshop course where the students conduct all or part of a simulated Section 1983 litigation. The problem with these approaches, however, is that the material is so complex that I feel that, until near the end of the semester, the students are not prepared for these kinds of projects. Given the Nahmod et al. casebook's narrower focus, shorter length, and more straightforward style, it might be reasonable to teach Nahmod et al. for the first eight to ten weeks of the semester, and then have the students use the rest of the time to write a paper or to participate in some sort of simulated litigation experience.

AND IN CONCLUSION . . .

I really enjoy teaching a course in Civil Rights Litigation. It allows me to combine my professional expertise in federal courts and procedure with my personal interest in civil liberties. I feel lucky to have four very good casebooks from which to choose for this course. Right now, I am fairly happy using the Abernathy casebook. But since I have never used Nahmod, Wells and Eaton, I might give it a try, if I can overcome the typical professorial inertia to stick with the same book from year to year. I hope I have provided enough information to help others who are, or will be, teaching Civil Rights Courses make an informed choice among these four books.