CIVIL RIGHTS AND CONSTITUTIONAL LITIGATION

CASES AND MATERIALS

Fourth Edition

Charles F. Abernathy

American Casebook Series®

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Preface to the Fourth Edition

This edition remains committed to the original vision of the first edition—treatment of civil rights legislation as a "major body of federal law as sophisticated and as important as Labor Law, Securities Regulation, or Taxation." As a part of the original effort, a primary goal was to induce students to see that there are connections between apparently unrelated statutes and that these inter-relations tell us something important about civil-rights policy—and our national and personal values.

This edition includes updating material throughout the volume, but the unifying theme of the Fourth Edition is to highlight more clearly the "families" of civil rights statutes. Long-time users of the book will notice the first effect of this theme in the creation of three new "Parts" for the volume—

Part I, which emphasizes the connections between civil rights statutes (primarily § 1983) and constitutional law and judicial policymaking,

Part II, which highlights the quasi-constitutional status of some statutes in the sense that they raise complex questions of congressional power to expand or enforce constitutional norms,

Part III, which continues, as before, to focus on modern statutes that are policy-driven and often pragmatic products of the political process.

Part II presents some especially interesting developments because it discusses two civil rights statutes that have largely failed, 42 U.S.C. § 1985(3) and the Violence Against Women Act. The lessons of these statutes are especially important because they demonstrate that some significant provisions of older civil rights legislation, which are widely revered in modern life as embodying virtually constitutional values, actually rest on secondary assumptions about the extent of congressional power to enforce constitutional values that are themselves much narrower.

Other than this major realignment of emphasis, the other substantial changes that have occurred throughout the area of civil rights law have been integrated almost seamlessly into the existing third edition. Major cases remain as major cases, without a self-conscious attempt to change principal cases just for the sake of change. When new principal cases have been added, it is because the changes were sufficiently dramatic that students can best understand the law by reading the new case before hearing of an older one in the Notes. The Notes continue, as in the past, to direct students to a historical and contextual consideration of developments, with a light hand on judgmental issues that leaves professors and students free to pursue a structured but open-ended discussion. As before, the book continues a more demanding style that asks students to

think more deeply—not unpolitically, but more-than-politically—about the roles of Congress, regulators, and courts.

* * * *

I have been incredibly fortunate to teach some of the very best students in the world, people who have made my life in civil rights law exciting, fun, and inspiring. I have tried to return the favor, as I am sure all professors do every time we take to the podium. I am sure that I join my colleagues in thanking our students for giving us the splendid opportunity to discuss and consider civil rights each day of our lives. I also thank especially Jason Elstor, who has served as my research assistant during the last year and who gave generously of his time and energy to support this project. Thanks also to Georgetown's in-house editing team, Anna Selden and Zinta Saulkalns, who have also read and commented on drafts, often on short notice, and to my editors at West Group, especially Louis Higgins. Of course, despite the help of these and many other colleagues, I regret that mistakes will probably remain; they are mine alone.

Finally, I thank my wife Kathleen, who despite a very demanding legal position of her own, has continued to support my time-consuming (and humor-consuming) writing projects. My son Chip (my bocce ball and hiking partner and political sounding board) has been a source of education and inspiration, and Julia (now ten years old and already a star student and athlete) has kept her father young even as his eyes glow red before the computer monitor. Friends and family, I thank you.

CHARLES F. ABERNATHY

Washington, DC, 2006

Preface to the Third Edition

As this book has evolved over the years, I have tried to stay true to the original vision of the first edition. These materials should make it possible for a professor to teach a Civil Rights or Constitutional Litigation course that "would treat the area as a major body of federal law as sophisticated and as important as Labor Law, Securities Regulation, or Taxation." In practical terms this means that the materials have needed to serve two goals, one focusing largely on litigation of constitutional claims under § 1983 and its cohorts and another focusing on policy-based modern statutes, such as Titles VI and VII and the Americans With Disabilities Act, that are products of legislative compromise rather than, in some respects, constitutional command. From this broad coverage, one may create a course in constitutional litigation alone (Part One), a course in civil rights policy or statutory enforcement of civil rights (Part Two), or a course examining the intersection of constitutional litigation and legislative policy on civil rights (selecting from Parts One and Two).

Judicial development of the older civil rights statutes has led to some significant additions to Part One in this third edition. The Supreme Court, for example, has created a new doctrine of general "back-up" due process which makes actionable under § 1983 a potentially broad range of state and local activities that were previously covered only by specific constitutional provisions or were covered not at all. The Court has also reintroduced the concept that state common law may prescribe the elements that a plaintiff must prove to sustain a claim under § 1983, at least in suits by prisoners challenging their convictions. Despite these new developments, however, the long-term themes identified in the first edition remain: the tension between statutory and constitutional sources of law, the search for the relevance of state law in federal civil rights claims, and the role of courts in interpreting civil rights law when so many potential sources lie about begging for attention. The traditional user of this text will feel at home despite the updating.

Even greater changes have occurred in the topics covered in Part Two of this third edition, reflecting new activity flowing from passage of the Civil Rights Act of 1991 and the Americans With Disabilities Act of 1990. There has also been significant judicial activity in developing remedies under these and the other more traditional civil rights statutes that are pure creatures of legislative policy. Nevertheless, the themes found in Part Two of previous editions continue to dominate the scene: the wisdom and clarity of Congressional policy choices, the role of administrative agencies in interpretation and enforcement, and the judicial implication of remedies that subtly transfer more interpretive power to the courts by bringing such claims into widespread, privately-initiated litigation.

These are exciting new times for policy-based civil rights, but the creativity is within the limits of long-relevant and long-established parameters.

Because most "modern" civil rights legislation now goes back over half a century to taskforce reports of the late 1940's, and since many of the basic judicial disputes over interpretation go back almost forty years to the mid-1960's, Civil Rights law has become something of a stale middle-aged baby boomer in law. Therefore, this third edition makes a special effort, especially in Part Two, to stimulate students to question the results achieved so far, with an eye toward considering new and different solutions, ones that cannot be labeled liberal, conservative, or progressive. (As in the earlier editions, among the positions offered for dissection and criticism are ones that I litigated or on which I consulted, reflecting my belief that we should learn to second-guess not only our opponents, but also ourselves.) More consciously than before, this third edition, even while trying to provide more cases, more information, and more analysis, encourages the student to test what is given in order to stimulate greater creativity and experimentation.

* * *

In terms of pedagogy, this third edition proceeds with a more demanding style and focus that provides more information to students and expects more from them. The reading level required to master the Notes has been raised, and the questions go several steps beyond those presented in previous editions. I have also adopted a more argumentative tone in order to try to challenge students to produce more. I have also infused the Notes with many of the more intractable and ironic issues that I had previously raised only in my own classes at Georgetown. These changes have been stimulated by recognition that our students in law schools are better than any I have seen during my lifetime.

Despite its more demanding tone and style, this third edition remains user-friendly for professors. Although there are many questions followed by case citations, these citations now, more often than not, reveal the cited court's ruling, making it easier for professors and students to read the materials — and not incidentally, leaving more time for thinking about the issues raised. This edition is also structured so that a professor can pick and choose from among different chapters or sub-chapters in order to create his or her own course. Although Notes continue to make cross-references to other Chapters, they are now given with more context so that reading the entire other chapter is unnecessary.

Professors will notice one substantial pedagogical decision reflected in this edition. I have substantially restricted the number of citations to law review articles and books in order to reflect the Supreme Court's de-emphasis on such materials. Now, citations to law reviews are largely restricted to showing some historical position or to provide contemporaneous descriptions of how courts treated a particular issue at some point along its evolutionary path. This decision to de-emphasize secondary sources in the textbook makes room for professors who wish to use secondary materials to do so by adoption or creation of anthologies which

can be much more focused than I could provide in such a topically broad textbook. It also allows professors to choose the kind of anthology which allows individualizing the course to accentuate each professors area of interest. (I myself use an anthology of sociological readings about race, sex, and other timely issues, one which supplements the textbook with cutting-edge sociological research rather than strictly legal developments.)

* * *

In the past few years while I have taught this course at Georgetown, I have benefitted greatly from the magnificent diversity of students who have used this book. Committed progressives and Federalist Society members, feminists and racial radicals, old line liberals and conservatives, peace activists and police officers in search of a second career, and many others — all have contributed substantially to my understanding of civil rights law, and I thank them all. I also thank my research assistants who have worked with me on this third edition, Erica Salmon, Emily Friedman, Rhonda McKitten, Kenneth Terrell, Zhonette Brown, and Michelle Butler. I am much indebted to all my students here at Georgetown who have made teaching an enjoyable, central part of my professorial career.

Most professors would consider themselves sufficiently blessed to be as well supported and challenged by students as I have been. (They are, I realize more each day, not really my students but my future colleagues.) I am additionally fortunate because I have had the constancy of family support as well. Kathleen, bar association president and national leader in her field of law, has found time to be my faithful spouse and best friend. Charles, who was Chip when the first edition of this book appeared (and remains so for me), is now a happy and well-adjusted attorney, no small achievement, who is also his father's confidant and principal advisor. And Julia — *inteligente* and *bella* Julia — has brought a twinkle to the eyes of her middle-aged father, with a promise of more excitement to come. Friends and family, I thank you.

CHARLES F. ABERNATHY

Washington, D.C.

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Preface to the Second Edition

Those familiar with the first edition of this book will notice a short addition to the title of the second edition. It is now Civil Rights *and Constitutional Litigation.* This represents neither a change of goals nor a change of emphasis, but only a more accurate description of the course or courses that can be taught from these materials.

The goal of the materials as a whole remains to demonstrate and highlight the fascinating interplay between statutory sources of civil rights law and constitutional sources. Given the structure of government and law in the United States, this could also be called the interplay between congressional and judicial sources of civil rights. To a much greater extent than the normal course in constitutional law, therefore, a course in civil rights discloses the tension between majoritarian solutions to community conflicts and judicial solutions.

The overall goal of the materials may be pursued in at least three different ways. 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 Rehabilitation Act.

Two other courses may also be taught from these materials. First, the first chapter—in essence the first half of the book—provides the basis for a self-contained course in constitutional litigation under 42 USC § 1983, the basic civil rights act that enforces the Fourteenth Amendment against state and local governments. Sometimes called "constitutional torts," this area involves more than a synthesis of constitutional law and torts; it may in fact show why synthesis is not completely possible. (Assignment of the materials on §§ 1981, 1982, and 1985 would valuably supplement coverage of § 1983.) Second, these materials may also be used as the shell around which many topical courses in civil rights may be built using the individual professor's own experiences. The professor who wants to try something new but is daunted by the prospect of assembling all the basic material is hereby invited to innovate, building on these foundation materials.

Napoleon reportedly asked his prospective generals not whether they were good, but whether they were lucky. He thought that good fortune played a strong role in life. I am unsure about the cosmic truth of Napoleon's views, but I know that I have been extraordinarily lucky to have the faculty, student, and family support that have made my life immensely rewarding and enjoyable. A chance meeting made possible a short, untraditional clerkship that confirmed my interest in civil rights. My son's illness in Cambridge, England, brought me back to the United States and led to work with two civil rights lawyers, to the founding of a public interest law firm, and to the opportunity to engage in a wealth of test-cases litigation before I entered teaching at age 27. The chance retirement of a treasured founder of the study of civil rights, Chester Antieau, made it possible for me to start at Georgetown, where I have always been challenged by intelligent and highly motivated students. Dean David Wilmot has joined me in teaching this course for over fifteen years, vastly expanding my understanding of civil rights. I feel very lucky.

I would like to thank the excellent research assistants whom fortune has brought my way. Bobbi Kienast and Marjorie Nicol provided valuable support in early research, and Kathleen Bender and Kelly Ramsdell helped me finish the materials and took me through the production process. I also thank the staff at West Publishing Company for their courteous and professional efforts. And to the users of the first edition, who have encouraged me to present this second edition, I express my sincere appreciation.

This may be a particularly difficult time to prepare materials for a course in civil rights, but I do it with enthusiasm. I have sought to write about fundamental and enduring themes that will prepare students for this volatile area of law; I have sought to provoke thoughts, without being merely provocative—to let truth speak for itself to each one of us. This has been a major challenge, for our vocabulary is changing at a time when many are re-emphasizing the value of vocabulary: Congress has been caught in the change as it moved from laws protecting "handicapped" persons to those protecting persons with "disabilities," and I write in these materials about both "blacks" and "African-Americans." It is my hope that the basic value of these materials—like the civil rights laws themselves—will survive, accommodate, and thrive on the changes that are coming.

Yet, even as I write this preface to the second edition, I am impressed by how constant the educational values in civil rights law have been. Many of the themes that I mentioned in that first preface, such as the goal of making the study of civil rights law as sophisticated and demanding as other fields, have endured and are now being pursued by many dedicated and talented professors. And I am similarly impressed by how constant my family's support and understanding have been. My son, Chip, has grown to be a mature adult, and my spouse, Kathleen, has not

only achieved her own career goals, she has also helped me meet one of my important goals, to grow older with her. Colleagues, friends, and family, I thank you.

CHARLES F. ABERNATHY

Washington, D.C.
December, 1991

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Preface to the First Edition

As with most publication efforts, these materials began with the search for a book which did not exist. As a new professor preparing to teach civil rights, I found excellent casebooks on constitutional law and challenging new works on topical issues such as race and sex discrimination. Along with these grand books on substance I also considered the grand book of federal practice and procedure, Hart and Wechsler's, The Federal Courts and the Federal System.

None of these superior books, prepared for other courses, fit my conception of what a book for a course in civil rights ought to be. Civil rights is more than constitutional law because statutory considerations play such an important role. Civil rights is broader than race or sex discrimination, broader of course, in the topical sense, especially with Congress' newer legislation. More importantly, focusing on a single topic fails to disclose the similarities which many civil rights topics share—and the pertinent differences which so shape policies and decisions. The topical approach also sometimes produces students long on policy but short on the skills necessary to implement policy, and if there is anything the civil rights area needs it is attorneys as skilled as they are committed. Procedural skills alone, however, even the specialized knowledge of federal practice which serves a civil rights attorney so well, cannot win a case when substantive knowledge is lacking.

The civil rights course I wanted to teach would treat the area as a major body of federal law as sophisticated and as important as Labor Law, Securities Regulation, or Taxation. At the core of those courses, and at the core of this book, are major statutory frameworks around which issues of interpretation and policy swirl. Civil rights, moreover, is even more complex because the statutes interplay so often with constitutional considerations, yielding a much more overtly active judicial role than can be found in other areas of federal law.

The apparent statutory focus of these materials may therefore be grossly misleading. It does, however, serve real pedagogical purposes. The statutes provide a comfortable framework for orienting the subject matter because they give students a clear set of choices on how to proceed when they encounter a civil rights case. More importantly, however, each statute raises certain specific constitutional and policy issues that the statutory framework creates its own parallel constitutional framework. The division of statutes between Part One and Part Two also shows clearly the respective active roles of the Judiciary and Congress in promoting civil rights.

I should perhaps add a few points relating to use of this book in teaching. First, I realize that many of us who teach in this area are for-

mer civil rights attorneys or persons with specific experiences in civil rights. The materials which many of us have privately assembled in the past show substantial personal experience and commitment. I do not deny the value of the contribution made by such experiences: this book searches for common elements in our respective experiences so that we may begin to convey systematically and more certainly our knowledge of civil rights. I have planned the book to encourage individual professors to go beyond this common and systematic foundation. The statutory framework of the book lends itself to supplementation, and I have regularly in the past handed out problem sets to my classes on specific topical problems on which I have worked, including prisoner's rights, sex discrimination, and school desegregation.

Second, the statutory framework of this book, especially the division into Parts One and Two, makes it possible to teach only part of the material in a course. Several persons with whom I have shared these materials in the past have used Part One to teach a course in traditional civil rights which emphasizes the importance of the judicial role in lawmaking. One person has used Chapter 1 alone as the core material for a course on § 1983 and litigation against state officials. Of course you may want to use the entire book: I have five times taught almost the entire set of materials to dedicated—and challenged—classes at Georgetown, usually for only two credits.

Third, I have tried to eliminate as much bias as possible from these materials, even to the point of occasionally suggesting that holdings I supported—or even litigated—as an attorney may have been wrongly decided. My goal was not particularly to accommodate conservative students or professors, although I believe that every law student should learn civil rights law regardless of his political persuasion. Rather I firmly believe that civil rights law can be advanced permanently and regularly only when we bring the same rigor, the same willingness to ask hard questions, the same hardheadedness to this area of law as we apply in all others. The whirring of active minds is to be preferred over the click of knees jerking in unison.

I wish to thank my research assistants who have for four years hunted cases, cut and pasted them, and helped me catch my repeated mistakes: Ellen Miyasato, Pamela Perry, Kathy Russo, Jim Conner, and Carrie Schnelker. Also, I thank Tony Taylor, Judy Byrd, and Teri Jackson for their valuable proofreading. Joaquin Avila (University of Texas) and Paul Bender (Pennsylvania) as well as my colleagues here at Georgetown, Chester Antieau, Fred Dorsey, and David Wilmot, deserve my appreciation for having used and commented helpfully on earlier versions of these materials. My colleague Bob Schoshinski told me jokes funny enough to keep me sane while I was in the library. All of these persons are hereby credited with any contributions which this work may make and are absolved of all liabilities—some of their advice I refused to take.

Finally, there was a small set of friends who ensured that this book finally went to press. My family, especially my son Chip, gave me valu-

able psychological strength and much understanding. My mother and father watched for me as though I were thirty years younger, especially during the last nine months when I grew thirty years older. Pat Allred shepherded this project, painstakingly transforming my manuscript into material perfectly prepared for the printer. And Laura Glassman, a skilled Washington lawyer, gave time which she did not have to read and criticize my final draft. My friends, I thank you.

CHARLES F. ABERNATHY

Washington, D.C.
December, 1979

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Introduction

This book is organized around the non-criminal statutes that Congress has enacted to protect the civil rights of Americans. Part One covers the section of the 1871 Civil Rights Act, § 1983, that gave rise to most modern constitutional litigation, especially after it was resurrected by an activist Supreme Court a century later. Part Three deals with modern legislation adopted during Second Reconstruction, the civil rights revolution which began in the 1950's and continues today. Sandwiched between is Part Two, which covers important transitional issues where constitutional law and legislative policy mix and collide. Few cases in any Part predate 1960. Most of the decisions have been handed down in the last twenty years.

From an ignored backwater at the middle of this century, civil rights has since that year emerged into a bustling metropolis of issues, disputes, and concerns, as timely, as sophisticated, and as interesting as any major area of federal legislation. In that sense the materials in this book should be as challenging and intriguing as courses in Securities Regulation, Labor Law, and Federal Taxation were in the early decades after these statutory schemes were set in place. And if Congress' recent pace of activity is a guide, civil rights should remain an area as dynamic as any of those others throughout the remainder of this century.

In presenting civil rights as a major area of federal legislative concern, this book will on one level focus on the usual issues attorneys must face in dealing with statutes: what is the meaning of ambiguous terms? How do related or similar pieces of legislation fit together? What recurring patterns emerge, suggesting long-standing Congressional policies or phobias? This statutory focus will, of course, involve some inquiry into the courts' role in interpreting and applying statutes, their power to rewrite and reshape legislation.

Although they are constructed on a statutory framework, it would be a mistake to assume that these materials cover only mundane topics of statutory interpretation. Because civil rights has long been a topic of peculiar federal judicial concern in the United States, federal courts have taken an especially active role—beyond that of mere statutory interpretation—in molding civil rights legislation to respond to the judicially declared terms of the Constitution. Sometimes it is impossible to determine which aspects of a holding are statutorily based and which constitutionally derived as the courts mesh the two together. At other times the two concerns may be artificially separated, with the Court arguing that the applicability of a statutory principle permits it to avoid a decision of constitutional significance. Finally, fluidity also works with sophistication in another direction, as a Congressionally adopted technique or prac-

tice will occasionally so commend itself to the courts that it will be adopted as constitutional doctrine.

The interplay between statutory and constitutional considerations, moreover, takes place on two different planes. On the plane discussed above, federal courts see civil rights legislation as interacting with constitutional safeguards for individual rights. For example, a statute protecting minority interests might parallel Fourteenth Amendment notions of equal protection, and the courts might act to bring the statute and Amendment into harmony. On a different plane, however, courts will be concerned with another set of constitutional considerations, those of a structural or federal nature: in our nation of limited central governmental power, what legislation is Congress constitutionally empowered to enact? What sources of authority may Congress call upon to enact civil rights legislation? The federal courts, in short, must also be concerned that Congress, in pursuit of a good cause, does not arrogate to itself power our Constitution has sought, for the safety of all citizens, to diffuse between Congress and Judiciary, between federal government and state government.

As we shall see throughout these materials, the two constitutional planes of individual rights and structural power are not wholly separate, and indeed most often intersect. Decision on a structural constitutional issue of Congressional power will almost necessarily enhance or impair the effectiveness of federal superintendence of constitutional rights of the individual, and every decision in the area of individual rights will surely affect the constitutional balance of federal and state powers.

In addition to the statutory and constitutional issues raised in this book, there is also a third set of concerns: not what Congress wants the law to be or what the courts perceive or demand that it be, but what in your policy judgment the law ought to be. The statutes covered in this book represent only the archtypes of federal civil rights legislation, with Congress writing new analogous legislation each session. To what extent have the archtypes been successful in promoting individual rights? Have they failed to provide guidance to courts or defendants? Has success been won at a cost too great to bear in the future? When new legislation needs to be drafted or old legislation reformed through legislative or judicial amendment, how should it be done?

In short, this book does not answer the old conundrum "what is the difference between constitutional rights and civil rights" by saying that the latter are statutory rights. This introduction suggests, and the materials here should show, that if there is an answer to the old question, it is a much more complex one than we have heretofore considered.

Table of Cases

The principal cases are in bold type. Cases cited or discussed in the text are roman type. References are to pages. Cases cited in principal cases and within other quoted materials are not included.