

CONSTITUTIONAL LITIGATION UNDER § 1983

Third Edition

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MATTHEW  BENDER

DEDICATION

For Katie and Helen. MRB

For Lizzie and Sara. KK

PREFACE TO THIRD EDITION

Constitutional law continues to evolve. So do the rules of constitutional litigation. The Supreme Court has devoted significant energy these past five years to understanding (and unraveling) the problem-child known as 42 U.S.C. § 1983. Immunity doctrines have formed a central part of recent developments, as have constitutional and statutory limits on prospective relief. Municipal liability continues to confound the Court, as does the availability of attorney's fees. In short, the world of constitutional litigation, five years after the last edition, is a bit different.

We have attempted to condense this third edition while fully incorporating the many post-2008 changes. Dissents and concurring opinions have again been included to provide students with an understanding of the Supreme Court's dynamics (and perhaps offer a glimpse into the future of constitutional litigation). Our continuing thought is that the book forms a suitable center for a two- or three-hour course, using either a traditional or seminar format, on the intricacies of suing government. As before, the chapters suggest a logical progression but do not provide the only path.

M.R.B.

K.K.

July 2013

PREFACE TO SECOND EDITION

Dozens of excellent casebooks address the topics of Constitutional Law, Civil Rights, Civil Procedure, and Federal Courts. Few casebooks, however, concentrate on the intersection of these subjects — what we call Constitutional Litigation. This book is designed to fill that gap. It does not replace any of the courses presently taught at most American law schools. Indeed, it assumes that students have taken basic courses, like Constitutional Law and Civil Procedure, and prods students to take more advanced courses, like Federal Courts and Civil Rights. Its focus is the peculiar problems that arise in litigation against states, local governments and their agents under the United States Constitution. Because 42 U.S.C. § 1983 is the dominant civil mechanism for vindicating constitutional rights in America, it forms a suitable center for the text.

The book is constructed to serve as the principal reading for a two- or three-hour course. Related civil rights statutes, such as 42 U.S.C. §§ 1981 and 1982, Titles VI and IX, and Title VII, are discussed where relevant, but are not afforded the full treatment one would find in a course on, say, Employment Discrimination or Statutory Civil Rights. The reason for this is simple — time. Our intent is to convey to the student a succinct understanding of the policies, procedures, problems and precedents that surround federal litigation with government. The most efficient — and interesting — tool to this end, we believe, is the Constitution of the United States. A student versed in constitutional suits against states, local subdivisions and their agents should readily master related subjects, including direct constitutional claims against federal officials, *see, e.g., Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), implied statutory causes of action, *see, e.g., Cannon v. University of Chicago*, 441 U.S. 677 (1979), and the use of § 1983 to redress statutory wrongs. *See, e.g., Maine v. Thiboutot*, 448 U.S. 1 (1980). Again, these topics are addressed in the casebook, but the focus is on the subject that has received the greatest attention from the Supreme Court: constitutional claims brought under § 1983.

The text is structured to flow from beginning to end without interruption or digression. Still, instructors should not hesitate to re-organize the materials. Chapter 3's Eleventh Amendment discussion, for example, could easily be taught after Chapter 4's materials on local liability, or indeed, even at the very beginning of the course. Chapter 9's foray into attorney's fees need not be taught last — indeed, it might be best taught first! — and Chapter 5's compilation of procedural problems need not be taught in the middle. Our ordering of chapters is logical, but hardly necessary to a proper understanding of the materials or subject matter.

In order to fit the subject into a manageable number of pages, the cases have been heavily edited. Text, including footnotes and citations, is often omitted from judicial opinions without indication. We attempt to alert readers to omissions within sentences and paragraphs with ellipses; however, text that is omitted at the beginnings and ends of paragraphs is not always apparent. Footnotes are sequentially numbered in each Chapter, with the courts' original numbering included in brackets. Footnotes that we have added to opinions are enclosed in brackets and do not indicate original numbering.

The Appendix includes the text of relevant provisions of the United States Constitution, federal statutes and federal procedural rules. We have limited the Appendix to constitutional, statutory and procedural provisions that are either discussed in the cases

PREFACE TO SECOND EDITION

or are directly relevant to constitutional litigation under 1983. Hence, much of the Constitution has been omitted, as has most of the United States Code and Federal Rules of Civil Procedure.

We trust that you will enjoy teaching and learning from the material. Having taught the course for several years from this text and others, we can attest to its resonance with students. No matter their ideologies or political persuasions, students enjoy learning about suing government.

M.R.B.

K.K.

August 2008

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