

Understanding Civil Rights Litigation

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Understanding Civil Rights Litigation

SECOND EDITION

Howard M. Wasserman

PROFESSOR OF LAW
FIU COLLEGE OF LAW



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Preface to Second Edition

This book is intertwined with my annual Civil Rights course. I wrote the First Edition in 2012 by converting the class I had been teaching since 2001 into narrative form. I write this Second Edition having taught from the book five times, seeing what works for student-readers and for class discussions and determining how to improve the writing, format, and style to work for both audiences.

This Second Edition includes several significant changes.

First, it expands the discussion of jurisprudential areas that saw major developments or that played a significant role in constitutional litigation during the past five years. The Supreme Court narrowed the availability of actions for damages against federal officers under *Bivens*, most recently in *Ziglar v. Abbasi* (2017). In nine decisions since publication of the First Edition, several of them per curiam summary reversals, the Court expanded the defense of qualified immunity, demanding factual similarity between precedent and the current case for a right to become clearly established. The Court issued its first decision on *Younger* abstention in many years in *Sprint Communications v. Jacobs* (2013), purporting to confine abstention to three “exceptional” categories of cases, although lower courts continue to take an expansive approach to abstention. Chapter 7 expands the discussion of procedure and jurisdiction in federal constitutional litigation, especially in exploring the details of equitable relief, which has been a flashpoint in litigation campaigns challenging bans on same-sex marriage and executive orders relating to immigration. Chapter 7 also goes into greater detail about jurisdictional and procedural rules for the three levels of the federal judicial hierarchy, providing foundation for the following two chapters. This edition discusses recent scholarly criticisms and calls for reconsideration of certain doctrines, including qualified immunity, *Bivens*, remedies, and the scope of injunctions. Finally, civil rights enforcement by the federal government, both criminal (18 U.S.C. § 242) and civil (42 U.S.C. § 14141), became a point in recent public controversies over racially charged police-involved shootings. Federal action against local police departments and officers was a significant project for the Department of Justice under President Obama, but far less of a priority in the early days of the Trump Administration. This edition also includes a new Appendix B containing the Emancipation Proclamation, the first step in Reconstruction civil rights efforts. New Appendix C, containing relevant statutes, adds several provisions.

Second, this edition increases the use of Puzzles, offering one or more discussion problems for most topics and sub-topics in the book. These were effective as reader reviews and as part of class discussions, and I make them central to the book. Several Puzzles are carried forward from the First Edition, while others are drawn from recent cases that I have added in my class or used in end-of-semester arguments.

Third, I changed the format and structure for this edition. The book now contains nine chapters rather than seven. Each of the first three topics—“Under Color of Law,” “Rights Secured,” and “*Bivens*”—occupies its own chapter, rather than being combined in one long chapter; this allowed me to break the material into major sections and fewer

sub-sections. The discussion of procedure and jurisdiction is expanded in its own chapter, providing foundation for later chapters, without repeating the material.

Fourth, modeling the format of similar books from CAP and others, this edition eschews footnotes in favor of incorporating statutes, case names, and authors into short parentheticals in the text. I believe this format makes for an easier, clearer, and more enjoyable read, while flagging for readers the major sources for reference and further reading. Separate tables of cases and of secondary sources provide full citations of all sources discussed in the text.

Fifth, this edition represents a substantial rewrite of the First Edition, based on my experience teaching and working from the book for five years. This book has become the primary source for my class, and I write the Second Edition with thoughts of that use and the goal of providing a complete, sharp, and readable discussion of the law of civil rights litigation.

For research assistance on this edition, I thank Tina Childers (FIU College of Law '18), Mary Corbin (FIU '19), Angelique Gulla (FIU '19), Sandra Ramirez (FIU '18), and Cori Varsallone (FIU '18). Thanks to Will Baude and James Pfander for reviewing excerpts. Thanks to former FIU College of Law deans Alex Acosta and Tawia Ansah for their support of this project. Thanks to the FIU students who have passed through my Civil Rights class and the FIU students who will pass through the class with the Second Edition. Thanks to the many professors, attorneys, and students who have offered comments on the First Edition and suggestions for this edition, many of which I have tried to incorporate. I hope professors, students, attorneys, and judges who use this new edition find it even more workable and helpful than its predecessor.

All my love to my wife, Jennifer, and my daughter, Lily, who have seen me through the many versions and uses of this book and who even have sat through class discussions of its contents.

Miami, Florida
December 2017