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Understanding Civil Rights Litigation

THIRD EDITION

Howard M. Wasserman

PROFESSOR OF LAW
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Preface to Third Edition

When I began this project a decade ago, I did not realize how much it would evolve with each edition. Each time I teach my Civil Rights course reveals ways to change the book; each time I change the book reveals ways to teach my Civil Rights course. The book and the class work together and I believe I have both where I want them.

This Third Edition make significant changes.

It addresses areas of major doctrinal, legislative, and scholarly controversy and change since the Second Edition appeared in 2018. The Supreme Court narrowed, if not quite eliminated, the Bivens damages cause of action against federal official. (*Egbert v. Boule* (2022); *Hernandez v. Mesa* (2020)). Courts continue to struggle with the defenses of qualified immunity, engaging in a push-and-pull between demanding factual similarity between precedent and the current case for a right to become clearly established and recognizing that some conduct violates the Constitution without on-point precedent. Justices, lower-court judges, legislators, and scholars question and urge elimination or alteration of the defense and its doctrinal underpinnings; these criticisms gain increased salience in the debate over police and criminal-justice reform and the perception of immunity's contribution to police misconduct. Other critics urge the Court to reject prosecutorial immunity as similarly textually and historically unjustified and a similar hurdle to criminal-justice reform. Without recent Supreme Court guidance, lower courts have taken the lead in narrowing the *Younger* and *Rooker-Feldman* limits on federal jurisdiction, expanding when plaintiffs can pursue cases in federal court despite pending state litigation. Finally, lower courts have applied longstanding state-action doctrine to new defendants in new situations attracting substantial public attention—public officials blocking viewers from social-media pages, social-media sites removing users and “moderating” content, and voting-machine manufacturers providing equipment for public elections.

In addition to a history of federal civil rights legislation and enforcement, the new Introduction provides a framework for constitutional litigation, identifying the range of procedural postures in which individuals assert, litigate, and vindicate constitutional and civil rights—“offensively” or “defensively,” “pre-enforcement” or “post-enforcement.”

The Third Edition further expands the use of Puzzles, providing multiple cases for the major doctrinal sections and at least a few for almost every topic. Drawn

from news stories, lawsuits, and lower-court decisions, these short problems challenge students to work through and apply the doctrine discussed in the text, including in cases touching on recent civil rights and public controversies. These puzzles have become the focus of class sessions and a larger part of the book. It enhances the book's effectiveness as the sole source in a problem-based law school course.

This represents a substantial rewrite of the Second Edition (which represented a substantial rewrite of the First Edition). I write with the class in mind and how to provide a complete, sharp, and readable discussion of the law of civil rights litigation.

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As always, all my love to Jennifer and Reuben, who have seen me through the many versions and uses of this book and who even have sat through class discussions of its contents.

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