CURRENT ISSUES IN CONSTITUTIONAL LITIGATION

A Context and Practice Casebook

Sarah E. Ricks
Rutgers School of Law - Camden

Evelyn M. Tenenbaum
Albany Law School

Carolina Academic Press
Durham, North Carolina
## Contents

Table of Cases  
Foreword by David Rudovsky  
Foreword by Karen Blum  
Acknowledgments  
Copyright Acknowledgments  

### Chapter One · Historical Context and Introduction to Modern 42 U.S.C. § 1983  
- A. Introduction  
- B. Translating the Results of the Civil War into Law  
- C. Resistance in Former Confederate States  
- D. Section 1983 as a Congressional Response to Klan Resistance  
  - Profile of Amos T. Akerman  
- E. Testimony of Survivors  
  - Report of the Joint Select Committee to Inquire into the Condition of Affairs in the Late Insurrectionary States  
  - For further discussion  
  - *Monroe v. Pape*  
  - For further discussion  
  - *Monell v. Dept. of Social Services of the City of New York*  
  - For further discussion  

### Chapter Two · Eighth Amendment Prisoner Litigation  
- A. Chapter Overview  
- B. Factual Context  
- C. Prison Health Care  
  - *Estelle v. Gamble*  
  - Exercise 2-A: Applying *Estelle* at the 12(b)(6) stage  
  - For further discussion  
- D. Violence in Prison  
  - Statement by Ronald Kaschak to the Commission on Safety and Abuse in America’s Prisons  
  - *Whitley v. Albers*  
  - For further discussion  
  - Exercise 2-B  
  - Exercise 2-C  
  - Exercise 2-D  
  - Third Circuit Model Jury Instruction for an Eighth Amendment Excessive Force Claim, with Comments  
  - Fifth Circuit’s Model Jury Instruction for Eighth Amendment Excessive Force Claims  

vii
E. Prison Rape
   Oral Argument before U.S. Supreme Court: *Farmer v. Brennan* 67
   *Farmer v. Brennan* 76
      For further discussion 85
   Exercise 2-E: Applying *Farmer* at the 12(b)(6) stage 85
   Interview with Elizabeth Alexander 86
F. Legislative Reaction to the Problem of Prison Rape 87
   The Prison Rape Elimination Commission Report 89
      For further discussion 92
G. Development of Doctrine in the Circuits: Applying the *Farmer* Standard to a Factual Record 93
   *Giroux v. Somerset County* 94
   *Miller v. McBride* 98
   *Rodriguez v. Secretary for Dept. of Corrections* 101
      For further discussion 110
   Guide to Law Practice Simulation 1 113
   Practice Pointer 114

Chapter Three · Fourteenth Amendment Substantive Due Process: Part One 117
A. Chapter Overview 117
   *Daniels v. Williams* 118
   Amici Curiae Brief of Local and State Government Organizations in *Lewis* 122
   Amicus Brief of Solutions to the Tragedies of Police Pursuits in *Lewis* 126
   *County of Sacramento v. Lewis* 130
   Exercise 3-A 135
B. Development of Doctrine in the Circuits: Applying *Lewis* to Liberty Interests 136
   *Ziccardi v. City of Philadelphia* 136
   Illustration of *Lewis* Threshold Spectrum of Fault Inquiry 139
C. Development of Doctrine in the Circuits: Applying *Lewis* to Property Interests 140
   Petition for Certiorari in *Eichenlaub v. Township of Indiana* 141
   Brief in Opposition to Certiorari in *Eichenlaub v. Township of Indiana* 144
   For further discussion 148

Chapter Four · Substantive Due Process (Part Two): Exceptions to *DeShaney* 151
A. Chapter Overview 151
   Chart: General Rule of *DeShaney* 152
B. Factual Context 153
      For further discussion 156
C. The General Rule of *DeShaney* 157
   Supreme Court Oral Argument in *DeShaney* 157
   *DeShaney v. Winnebago County Dept. of Social Services* 162
      For further discussion 169
D. Development of Doctrine in the Circuits: State-Created Danger Exception to *DeShaney* 169
   *Kneipp v. Tedder* 170
   *McClendon v. City of Columbia* 177
   *Butera v. District of Columbia* 184
CONTENTS

Practice pointer 359
Nicholas v. Pa. State Univ. 360

2. Enforcement of Restraining Orders 364
Castle Rock, Colorado v. Gonzales 365
Brief of Amici Curiae Denver Police Protective Ass’n, et al. in Castle Rock v. Gonzales 367
Amici Curiae Brief of National Black Police Ass’n, et al. in Castle Rock v. Gonzales 370
Town of Castle Rock, Colorado v. Gonzales 375
For further discussion 386

3. Development of Doctrine in the Circuits: Applying Castle Rock 389
Burella v. City of Philadelphia 390
Hudson v. Hudson 394
Guide to Law Practice Simulation 5 395
Guide to Law Practice Simulation 6 398

Chapter Nine · Absolute Immunity 401
A. Chapter Overview 401
B. Judicial Function 402
Pierson v. Ray 402
For further discussion 405
Forrester v. White 406
For further discussion 410
C. Prosecutorial Function 412
Kalina v. Fletcher 413
For further discussion 416
D. Development of Doctrine in the Circuits: Absolute Immunity for Social Workers 419
Ernst v. Child and Youth Services of Chester County 419
Holloway v. Brush 426
Guide to Law Practice Simulation 7 435

A. Chapter Overview 437
42 U.S.C. § 1988 Civil Rights Attorney’s Fees 438
The Civil Rights Attorney’s Fees Awards Act of 1976 439
For further discussion 441
Sole v. Wyner 442
B. Development of Doctrine in the Circuits 443
Roberson v. Giuliani 444
Walker v. Calumet City, Ill. 448
Dearmore v. City of Garland 451
For further discussion 453
Exercise 10-A 455
C. Prison Litigation Reform Act of 1995 455
Jones v. Bock 455
Attorney’s Fees Provision of Prison Litigation Reform Act 462
For further discussion 463
David Fathi, No Equal Justice: The Prison Litigation Reform Act in the United States 463
For further discussion 466
D. Selected Recurring Procedural Issues in § 1983 Litigation 466
1. Statute of Limitations 466
3. Accrual of a False Arrest Claim and the Heck v. Humphrey Bar 467
4. 42 U.S.C. § 1983 Pleading Requirements 467
5. Federal Rule of Civil Procedure 68 Offers of Judgment 470
   a. Cory Brente — Assistant City Attorney for Los Angeles 471
   b. Robert Davis — Attorney Defending City of Plano, Texas in § 1983 Suits 472
   c. Jacob Schwarzberg — Senior Trial Attorney for Detroit Law Department 472
   d. Liza Franklin — Chief Assistant Attorney for Chicago 472

Chapter Eleven · Qualified Immunity 475
A. Introduction 475
B. Chapter Overview 476
   Harlow v. Fitzgerald 477
   Exercise 11-A 481
      For further discussion 481
   County of Sacramento v. Lewis 484
   Hope v. Pelzer 485
      For further discussion 491
   Broseau v. Haugen 492
      For further discussion 497
   Brief Amicus Curiae of the ACLU in Pearson 497
   Pearson v. Callahan 500
      For further discussion 504
C. Development of Doctrine in the Circuits 507
   Exercise 11-B 507
   Butera v. District of Columbia 511
   Carr v. Tatangelo 517
   Espinosa v. City and County of San Francisco 525
      For further discussion 529
   Guide to Law Practice Simulation 8 530
   Guide to Law Practice Simulation 9 532

Chapter Twelve · Local Government Liability 535
A. Chapter Overview 535
B. Theories of Local Government Liability: The Supreme Court 536
   Questions to guide reading of Monell 536
      For further discussion 539
   Is a Police Chief a Final Policymaker? A Sampling of the Circuits 541
Chapter Thirteen · Case Study of a Legal Doctrine: The Evolving Scope of the Parental Liberty Interest

A. Introduction

B. Recognizing a Parental Liberty Interest in Companionship of Children

Bell v. City of Milwaukee  
Kelso v. City of Springfield

C. Refusing to Recognize a Parental Liberty Interest in Companionship Alone

Butera v. District of Columbia

D. Doctrinal Shift: Evolution of the Parental Liberty Interest in Companionship of Children

Amici Curiae Brief in McCurdy v. Dodd

Carmel Sileo, U.S. Courts Grapple with Constitutional Claims for Loss of Adult Children

E. Doctrinal Shift: Post-Butera/McCurdy Evolution of the Parental Liberty Interest in Adult Children

Russ v. Watts

Rentz v. Spokane County

Romana Kaleem, Towards the Recognition of a Parental Right of Companionship in Adult Children Under the 14th Amendment Substantive Due Process Clause

Guide to Law Practice Simulation 10
Chapter Fourteen · Protecting Freedom of Religion in Prison: The Free Exercise Clause and RLUIPA by Evelyn M. Tenenbaum

Exercise 1: Chapter Problem 615

A. Balancing Religious Freedoms Against Institutional Safety, Financial, and Administrative Concerns 616

B. Development of the Law Relating to Inmates’ Religious Rights 622

1. The Supreme Court sets the standard for deciding First Amendment free exercise cases in prisons. 622

   O’Lone, Administrator, Leesburg Prison Complex v. Estate of Shabazz 624

2. Congress Passes the Religious Freedom Restoration Act (RFRA) in Response to Smith and O’Lone 631

3. Congress Responds to City of Boerne by Passing the Religious Land Use and Institutionalized Persons Act (RLUIPA) 633

   Cutter v. Wilkinson, Director, Ohio Department of Rehabilitation and Correction 636

Law Practice Simulation # 1 641

4. The Law Regarding Inmates’ Religious Rights Since RLUIPA 642

   Washington v. Klem 647

Law Practice Simulation # 2 652

   Law Practice Simulation # 3 652

   For further discussion 653

   Law Practice Simulation # 4 653

5. Meetings and Inmate Religious Leaders 654

   Spratt v. Rhode Island Department of Corrections 656

   Baranowski v. Hart 662

   For further discussion 667

Law Practice Simulation # 5 667

Chapter Fifteen · The Eleventh Amendment by Evelyn M. Tenenbaum

A. Introduction and Chapter Overview 677

B. Historical Background 677

1. The Constitutional Debates 677

   Historical Debate Simulation 678

2. Chisholm v. Georgia: The First Supreme Court Case to Address Federal Court Jurisdiction Over States under Article III 680

   Chisholm v. Georgia 681

3. Congress Enacts the Eleventh Amendment in Response to Chisholm 684

4. Developments Through 1908 685

   Hans v. Louisiana 685

   For Further Discussion 687

C. What Constitutes “The State” for Purposes of the Eleventh Amendment? 688

1. Should Municipal Entities That Perform a Governmental Function on Behalf of the State Be Entitled to Assert the State’s Eleventh Amendment Immunity from Suit? 688

2. Should the Eleventh Amendment Apply to Lawsuits against State Agencies and Instrumentalities? 689

   Sturdevant v. Paulsen 690

3. Should the Eleventh Amendment Apply to Lawsuits Against State Officials? 696
CONTENTS

a. Suing State Officials in their Official Capacity 696
   *Ex Parte Young* 697
   For Further Discussion 705
b. Understanding the Difference Between an Official Capacity and a Personal Capacity Lawsuit 707
D. The Eleventh Amendment vs. the Fourteenth Amendment — Balancing State Sovereign Interests with Enforcement of Civil Rights Guaranteed by the Fourteenth Amendment 710
   For Further Discussion 711
   *Kimel v. Florida Bd. of Regents* 714
E. Can Congress Enact Laws under Its Article I Authority That Abrogate the States’ Eleventh Amendment Immunity? 718
   1. Commerce Clause 718
   2. Spending Clause 719

Index 721
Foreword by David Rudovsky

This new casebook admirably fills a significant need in the teaching of the complex and dynamic issues in the area of constitutional litigation. For many years, law teachers of this increasingly important topic have either had to generate their own materials or choose among some few standard case books. Now, Professor Ricks has authored a new and quite different casebook that provides far more than the usual cases, comments and questions.

Professor Ricks approaches the constitutional and statutory materials from several perspectives: doctrinal development, legislative responses, litigation decisions, and practical considerations that inform the litigation and decision making in this area. Included in each substantive chapter are the social and political contexts of the constitutional issues, leading Supreme Court and Circuit Court opinions, excerpts from oral arguments on major cases in the Supreme Court, legislative initiatives, expert reports, jury instructions, representative pleadings, and even interviews with leading civil rights litigators. Students are provided with the full range of materials from the files of litigators to the decisions by the courts.

As an example, the chapter on prisoner rights litigation includes the leading cases and the development of controlling doctrine, but also provides a rich mix of materials from litigation files, investigative reports from public interest organizations, and legislative hearings that bear on the major issues. Professor Ricks also provides thoughtful questions and innovative simulations that will encourage students to think through these problems from the perspectives of the lawyers, inmates, prison officials, judges, and legislators.

The world of constitutional litigation is far broader than case law. Professor Ricks has captured the multi-dimensional aspects of this field of law and has produced a casebook that will greatly enhance teaching, learning and practice of constitutional litigation.

David Rudovsky
Kairys, Rudovsky, Messing & Feinberg
University of Pennsylvania Law School
Philadelphia, Pennsylvania
August 2010
Foreword by Karen Blum

For years I’ve been putting together my own materials to teach a course on Police Misconduct Litigation. The course takes a practical approach and gets the students involved in working on real cases with attorneys, from both the plaintiffs’ and defense bar, who are experienced in the area of section 1983 litigation. There has been no casebook that provides students with the opportunity to see how all the facets of a case come together.

Sarah Ricks has created an incredibly useful, contextually-based casebook that tells the story of constitutional litigation from many different perspectives. Students go behind the scenes and come to understand litigation from reading not only case law, but from examining briefs, oral arguments, pleadings, and expert opinions.

Chapter Six explores Fourth Amendment standards and Police Misconduct. The Chapter begins with facts and statistics about a police officer’s job, the typical job requirements, salaries, and training. This is important information for students to have when they are reading cases that evaluate the reasonableness of a police officer’s conduct. Following the key cases of Tennessee v. Garner and Graham v. Connor, the Chapter includes sample jury instructions and verdict forms for excessive force cases. An excessive force “dog-bite” case is followed from complaint to verdict, giving the students insight into how multiple claims and defendants may be reduced as the case proceeds, with the ultimate disposition of the case turning on a single issue in a single claim with respect to a single officer. Students are invited to think about the time and expense of litigation and the economic pressures to reject a settlement that would not compensate for the investment of time expended by plaintiff’s counsel. The coverage of Scott v. Harris includes excerpts from the oral argument and an amicus brief submitted by the National Police Accountability Project. A post-Scott Circuit decision provides a window for exploration of how Scott is being applied and whether it establishes a “per se” rule for the use of deadly force in cases involving motor vehicle chases.

For professors and students who want more from legal education than the unadorned case-method approach can provide, Professor Ricks has compiled a set of materials that brings the case law to life. Teaching and learning about constitutional litigation will be a much richer experience thanks to her efforts.

Karen M. Blum
Professor of Law
Suffolk University Law School
Boston, Massachusetts
August 2010