Preface

This book arises from the confluence of my seventeen years as a civil rights litigator — mostly spent at or in partnership with national or local offices of the American Civil Liberties Union — and more than a dozen semesters as a clinical or classroom law school instructor, including eight teaching Civil Rights Litigation at Harvard Law School. The book began as a set of supplemental materials to an existing textbook, created to fill what I saw as gaps in the textbook's coverage of civil rights litigation *as it is practiced*. With each year I taught, I found myself expanding my materials, sometimes in response to thoughtful questions from my students, sometimes in response to my own sense that I had taken just a few steps down a road that I needed to follow to its end. Ultimately, after my third semester teaching the course, I expanded my materials into a manuscript for this complete textbook. I subsequently revised the manuscript in response to student feedback, advice from Dean Erwin Chemerinsky and several other brilliant academic reviewers, and my experiences in both the classroom and the courtroom.

The first edition was published at the beginning of 2020, just before a series of historic events would change our national life in fundamental ways. At the start of 2020, George Floyd was not a household name, and almost no one could yet imagine the scope of the COVID-19 pandemic. Thus, the first edition, proud of it though I was, became in certain respects dated very quickly. Consequently, I am glad to have the opportunity to update the book to reflect significant developments in civil rights litigation set in motion by (among other things) the pandemic, George Floyd's murder (together with the resulting protests and national reckoning on racial injustice), and the dramatic Supreme Court term that concluded in June 2022. I am equally grateful to be able to incorporate the enormously helpful feedback I have received from students, instructors who adopted the first edition, and colleagues about how the book could be expanded and improved. The pandemic, of course, has affected legal education as well as civil rights law, so I am particularly appreciative of the students and law faculty who have engaged with my book in far less than ideal circumstances. This second edition is, I believe, much improved because of their insights.

The title of this book, *Civil Rights Enforcement*, reflects an important distinction between this book and others in this field: This book attempts (with one exception, as noted below) to maintain a rigorous focus on doctrines concerning the enforcement of civil rights (rather than the content of those rights) and on the aspects

of those doctrines of most relevance to those doing, or opposing, the enforcement: attorneys at civil rights organizations, in government, at plaintiff-side firms with a civil rights practice, and at firms of any kind that maintain a civil rights pro bono practice or represent governments. Put another way, this is a book with a practical bent that will hopefully speak not only to students interested in studying civil rights litigation for its rich lessons in statutory interpretation, the treatment of race and racism in the U.S. legal system, the relationship between rights and remedies, and tradeoffs between the values of federalism and judicial review, but also to students who are potential practitioners in this area of law.

I must note that it is a particular type of enforcement that I cover here: the enforcement of civil rights *through civil actions brought by non-governmental parties* (as opposed to enforcement by government or through criminal laws). Within the field of private civil actions to enforce civil rights, I focus mainly on doctrines relevant to the enforcement of many kinds of civil rights rather than specialized fields with their own unique statutory schemes (such as the Voting Rights Act).

From the book's orientation toward a pragmatic understanding of private civil actions to enforce civil rights, several of the book's characteristics follow:

1. **Detailed problems, application notes, and practical as well as theoretical questions.** At the end of each chapter, I include "Chapter Problems" that give students a chance to apply their knowledge to specific factual settings. Many of these are drawn from or inspired by real cases (including some of my own). In my experience, students get a lot out of tackling these problems — solidifying and testing their knowledge, exploring how legal theory plays out in practice, and building strategic thinking skills. Some of my best class discussions have arisen from these problems, which may be discussed in a wide range of formats, from small-group brainstorming to individual student presentations to full class debates with half the class assigned to argue the plaintiff's perspective and half the class the defendant's. Additionally, many problems in later chapters refer back to prior problems or include questions reviewing prior material, to help students see how doctrines and issues interrelate; in real life, of course, most cases do not fit neatly into a single box but instead require the application of multiple doctrines at the same time.

   For similar reasons, a number of notes following principal cases take the form of "Applications" sections in which I identify key follow-up cases extending or qualifying the main case and lower-court decisions applying it. Like the problems, the applications (I hope) help students see the effects of the rules laid down in the principal cases.

   Finally, I begin with, and weave throughout, larger strategic questions about the uses of civil rights litigation and the closely related subject of impact litigation. My Notes and Questions are designed to prompt students to think about the practical effects of civil rights enforcement doctrines in litigation and by extension their effects on government policies and practices. How do these doctrines interact with each other? How do they contribute to gaps between rights and remedies? What incentives do they create? How can litigators anticipate

obstacles in their cases and prepare to meet them? In anonymous surveys, my students report that they appreciate being challenged to think through these types of questions instead of only more esoteric ones.

2. **Exploration of the interrelationship between constitutional and statutory civil rights enforcement.** Although 42 U.S.C. § 1983 doctrines account for a substantial fraction of the material in the book, real-world legal problems do not divide themselves into constitutional and non-constitutional cases, and I think litigators should understand the statutory rights and causes of action that complement and sometimes surpass in effectiveness claims brought to remedy constitutional violations. Indeed, in practice, many civil rights cases consist of both constitutional and statutory claims. Therefore, I cover several enforcement doctrines in the latter category: those relevant to employment discrimination law, Titles VI and IX (and their disability-rights analogues), and the use of § 1983 to assert rights provided by other federal statutes. Studying these additional areas not only helps provide comprehensive coverage for students who might one day practice in the field; it also introduces remedial models other than the § 1983 framework and facilitates fruitful comparisons (for instance, institutional liability under *Ellerth* as compared with *Gebser*/*Davis* as compared with *Monell*; or the Court's approach to congressional intent in the context of implied rights of action, § 1983 enforcement of statutory rights, and *Bivens*). For comprehensiveness, I also identify types of parallel state-law claims that civil rights litigators often include alongside the federal ones that are the book's focus.

3. **A litigator's organization and a litigator's selection of cases.** I organize the enforcement-focused materials the way a litigator might think about a constitutional civil rights case: (1) What's the cause of action? (2) What defenses should I anticipate? (3) What statutory claims can I add to the case and what rules govern their enforcement? and (4) What relief can I obtain for my client? (The remedies question, I recognize, could logically arise either first or last.) A nondoctrinal Prologue, which could be assigned as an introduction, an interlude between doctrinal topics, or an epilogue, situates private civil rights enforcement litigation within its social and historical context and invites students to consider its uses, successes, and shortcomings.

   I recognize some instructors may prefer other sequences for the various topics. Accordingly, I introduce topics that sometimes lead off this type of course — like sovereign immunity and remedies — in a manner that would facilitate starting a course with them instead of with the book's opening chapter on the interpretation of § 1983.

   In my choice of principal cases, I seek to expose students not just to the most challenging cases on a topic but also to the leading and foundational cases that reveal a doctrine's origins, rationale, and basic contours. Thus, students can become familiar with the cases that litigators in the field know and begin at the beginning of the law's development rather than partway through.

4. **A focus on enforcement in case selection and editing.** Because this book is chiefly about the relationship between rights and remedies and the tools used

by civil rights litigators, not the substance of the underlying rights themselves, I do not (with one exception noted below) emphasize cases that are primarily about *what* a constitutional or statutory right protects as opposed to *how* and *to what extent* these protections can be *enforced*. And I have edited the cases with the doctrines we're studying in mind so as to avoid such long excerpts that an instructor is forced to choose between devoting an entire class session to just one or two cases or skipping important cases entirely. As an instructor, I find that students come better prepared to understand the part of the case that matters to the subject at hand if they are reading shorter passages focused on that subject.

For the second edition, I have continued to maintain the enforcement focus for the core of the book — the four Parts that appeared in the first edition, which appear in revised and expanded form here. However, I have also added a fifth Part that breaks with my main focus in order to address selected substantive constitutional doctrines that are often taught in courses covering § 1983 litigation, because they tend otherwise to fall through the cracks of many law schools' constitutional law offerings. I hope this new Part will give students an opportunity to see how enforcement doctrines interact with the development of the substance of constitutional rights, while providing instructors the flexibility to choose between a purely enforcement-oriented course and a hybrid that incorporates some of the rights most often asserted via § 1983 and not taught in other courses.

My attempt to avoid treading into merits doctrines for most of the book raises an important pedagogical question: How much constitutional law must students have studied as a prerequisite to courses using this book? None, I believe. If substantive constitutional knowledge were required to understand the mechanics of civil rights enforcement, courses in this field would have too many prerequisites to be feasible, as the key cases address circumstances in which plaintiffs attempt to enforce their rights under the First, Fourth, Fifth, Eighth, and Fourteenth Amendments. Instead of requiring knowledge of all these doctrines, I have edited the cases keeping in mind students who lack substantive constitutional law knowledge (or knowledge of civil rights statutes like Title VII). To the extent students may find a bit of background on the relevant substantive law helpful as they read, the book includes as a reference a brief glossary describing in the most basic manner most of the substantive constitutional concepts that appear in the cases excerpted. I have found over several semesters that a glossary of this kind provides enough reference material to enable students to achieve fluency in the material without any prerequisites other than Civil Procedure.

A few notes about formatting: I use ellipses and other editorial punctuation within cases to indicate where I have chosen to omit material so that readers are aware of instances in which there is more in the original source in the event they want to seek that out for further context. The three exceptions to this general practice are a case's internal citations, footnotes, and section headings — these I retain only where I think they are of pedagogical value; otherwise, I truncate or omit them without comment. Relatedly, where a case cites 42 U.S.C. § 1983 as it used to be

known, "Rev. Stat. § 1979," I have replaced these citations with the modern § 1983. All footnotes that appear are the sources' own footnotes. I use square brackets [like this] to indicate alterations I have made in excerpted sources for clarity or conciseness or where I summarize a portion of a case.

Finally, having now spent several pages describing the book's orientation toward issues arising in practice, I should add a few words about theory. The pragmatic focus of this book does not mean that it shies away from important philosophical and policy questions in order to hammer on black-letter law alone. Quite the contrary: Because the field is such a heavily contested one in which many of the rules are malleable or in flux, I believe a solid grounding in the history, philosophy, and policy implications of the doctrine is critical for litigators working on this variable terrain. Running throughout the materials are several themes and arguments that recur in this area of law. These include the plaintiff-side goals of compensation and deterrence; defendant-side concerns about fair notice and the chilling of government officials' performance of their duties; and structural questions about institutional competence, federalism, the proper role of courts, and the *Marbury* principle that remedy should follow right. I have edited the cases with these themes in mind and highlight them in the Notes and Questions. I also flag instances in which a legal realist or critical-studies approach might have the most explanatory power given certain doctrines' twists and turns and the rightward shift of the Supreme Court in the past half-century. Relatedly, I treat *Bivens* in more detail than many textbooks, both because the cause of action, though in decline, is still regularly invoked to enforce constitutional rights against federal officials, and because the debate over *Bivens* exemplifies the clash among many of the principles — theoretical as well as practical — that have been central to shaping civil rights enforcement doctrines generally. It is my hope that by connecting the theoretical and policy underpinnings of the relevant doctrines directly to the practice of civil rights litigation, students will develop a deep understanding of how the rules governing this field have developed, have been applied, and may yet be revised.

Scott Michelman

November 2022