

## Howard Merrill Wasserman

### **Books:**

PAINTING CONSTITUTIONAL LAW: FLORIDA, THE SUPREME COURT, AND THE CREATION OF CONSTITUTIONAL RIGHTS IN CORDTADA'S "MAY IT PLEASE THE COURT" (Brill) (M.C. Mirow and Howard M. Wasserman, eds.) (forthcoming 2020)

INFIELD FLY RULE IS IN EFFECT: THE STORY OF BASEBALL'S FAMOUS RULE (McFarland Press) (forthcoming 2018)

[UNDERSTANDING CIVIL RIGHTS LITIGATION](#) (Carolina Academic Press) (2d ed. 2018) ([1st ed. 2013](#) Lexis Nexis)

[INSTITUTIONAL FAILURES: DUKE LACROSSE, UNIVERSITIES, THE NEWS MEDIA, AND THE LEGAL SYSTEM](#) (Howard M. Wasserman, ed.) (Ashgate Publishing) (2010)

### **Articles and Chapters:**

*Universal, Not Nationwide, and Never Appropriate: On the Scope of Injunctions in Constitutional Litigation*, \_\_\_ LEWIS & CLARK L. REV. \_\_\_ (forthcoming 2018)

*Police Misconduct, Video Recording, and Procedural Barriers to Rights Enforcement*, \_\_\_ N.C. L. REV. \_\_\_ (forthcoming 2018)

*Recording Of and By Police: The Good, the Bad, and the Ugly*, 20 J. GENDER, RACE & JUST. 543 (2017)

*The Uncertain Hope of Body Cameras*, in [FERGUSON'S FAULT LINES: THE RACE QUAKE THAT ROCKED A NATION](#) (Kimberly Jade Norwood, ed.) (ABA Publishing) (2016)

[Holmes and Brennan](#), 67 ALA. L. REV. 797 (2016)

[Just a Bit Aside: Perverse Incentives, Cost-Benefit Imbalances, and the Infield Fly Rule](#), 164 U. PENN. L. REV. ONLINE 145 (2016)

[The Process of Marriage Equality](#), 42 HASTINGS CONST. L.Q. 243 (2015) (*with* Josh Blackman)

[Fletcherian Standing, Substantive Merits, and Spokeo, Inc. v. Robins](#), 68 VAND L. REV. EN BANC 257 (2015)

[Crazy in Alabama: The Judicial Process and the Crawl Towards Marriage Equality in the Land of George Wallace](#), 110 NW. U. L. REV. ONLINE 1 (2015)

[Epilogue: Moral Panics and Body Cameras](#), 92 WASH. U. L. REV. 845 (2015); [WASH. U. L. REV. COMMENTARIES](#) (Jan. 26, 2015),

[Moral Panics and Body Cameras](#), 92 WASH. U. L. REV. 831 (2015); [WASH. U. L. REV. COMMENTARIES](#) (Nov. 18, 2014)

[\*Catalyzing Fans\*](#), 6 HARV. J. SPORTS & ENT. L. 1 (2015) (*with* Michael McCann and Dan Markel<sup>21</sup>)

[\*Mixed Signals on Summary Judgment\*](#), 2014 MICH. ST. L. REV. 1331

[\*An Empirical Analysis of the Infield Fly Rule\*](#), 4 J.L. (3 J. LEGAL METRICS) 127 (2014)

[\*Football and the Infield Fly Rule\*](#), 61 UCLA L. REV. DISCOURSE 272 (2014)

[\*The Economics of the Infield Fly Rule\*](#), 2013 UTAH L. REV. 479 (2013)

*Reappropriating Judicial Activism*, 16 GREEN BAG 2D 463 (2013)

[\*A Jurisdictional Perspective on New York Times v. Sullivan\*](#), 107 NW. U. L. REV. 901 (2013)

[\*Rejecting Sovereign Immunity in Public Law Litigation\*](#), 80 FORDHAM L. REV. RES GESTAE 76 (2012)

*The Roberts Court and the Civil Procedure Revival*, 31 REV. LITIG. 311 (2012)

[\*Prescriptive Jurisdiction, Adjudicative Jurisdiction, and the Ministerial Exemption\*](#), 160 U. PA. L. REV. PENNUMBRA 289 (2012)

[\*The Demise of "Drive-by Jurisdictional Rulings"\*](#), 105 NW. U. L. REV. 947 (2011); [105 NW. U. L. REV. COLLOQUY 184](#) (2011)

*Constitutional Pathology, the War on Terror, and United States v. Klein*, 5 J. NAT'L SEC. L. & POL'Y 211 (2011) (Refereed Journal)

[\*The Irrepressible Myth of Klein\*](#), 79 U. CIN. L. REV. 53 (2010)

*An Institutional Perspective on the Duke Lacrosse Case (in INSTITUTIONAL FAILURES: DUKE LACROSSE, UNIVERSITIES, THE NEWS MEDIA, AND THE LEGAL SYSTEM (Howard M. Wasserman, ed.) (Ashgate Publishing) (2010))*

*Civil Rights and Federal Courts: Creating a Two-Course Sequence*, 54 SAINT LOUIS U. L.J. 821 (2010) (in *Teaching Civil Rights*) (Symposium)

*Iqbal, Procedural Mismatches, and Civil Rights Litigation*, 14 LEWIS & CLARK L. REV. 157 (2010) (in *Pondering Iqbal*) (Symposium)

*Orwell's Vision: Video and the Future of Civil Rights Enforcement*, 68 MD. L. REV. 600 (2009)

*Jurisdiction, Merits, and Procedure: Thoughts on a Trichotomy*, 102 NW. U. L. REV. 1547 (2008)

*Jurisdiction, Merits, and Non-Extant Rights*, 56 KANSAS L. REV. 227 (2008)

[\*Jurisdiction, Merits, and Procedure: Thoughts on Dodson's Trichotomy\*](#), 102 NW. U. L. REV. COLLOQUY 215 (2008),

*Video evidence and summary judgment: The procedure of Scott v. Harris*, 91 JUDICATURE 108 (2008)

*Jurisdiction, Merits, and Substantiality*, 42 TULSA L. REV. 579 (2007) (in *Supreme Court Review 2005-06*) (Symposium)

Bartnicki as Lochner: *Some Thoughts on First Amendment Lochnerism*, 33 N. KY. L. REV. 421 (2006)  
(in *First Amendment Lochnerism? Constitutional Limitations on Economic Regulation of Communications, Information, and Technology Industries*) (Symposium)

*Fans, Free Expression, and the Wide World of Sports*, 67 U. PITT. L. REV. 525 (2006)

*If You Build it, They Will Speak: Public Stadiums, Public Forums, and Free Speech* 14 NINE: J. BASEBALL HIST. & CULTURE 15 (2006) (Invited)

*Jurisdiction and Merits*, 80 WASH. L. REV. 643 (2005)

*Cheers, Profanity, and Free Speech*, 31 J.C. & U.L. 377 (2005) (Refereed Journal)  
Reviewed in *Elsewhere*, LEGAL AFFAIRS 60 (Jan./Feb. 2005)

*Continuity of Congress: A Play in Three Stages*, 53 CATH. U. L. REV. 949 (2004)  
(in *Ensuring the Continuity of Government in Times of Crisis*) (Symposium)

*Symbolic Counter-Speech*, 12 WM. & MARY BILL RTS. J. 367 (2004)

*Civil Rights Plaintiffs and John Doe Defendants: A Study in § 1983 Procedure*, 25 CARDOZO L. REV. 793 (2003)

*The Trouble With Shadow Government*, 52 EMORY L.J. 281 (2003)

*Compelled Expression and the Public Forum Doctrine*, 77 TUL. L. REV. 163 (2002)

*Structural Principles and Presidential Succession*, 90 KY. L.J. 345 (2002)

*Two Degrees of Speech Protection: Free Speech through the Prism of Agricultural Disparagement Laws*, 8 WM. & MARY BILL RTS. J. 323 (2000)

*What's Good for General Motors: Corporate Speech and the Theory of Free Expression*, 66 GEO. WASH. L. REV. 235 (1998) (with Martin H. Redish)

Comment, *Second-Best Solution: The First Amendment, Broadcast Indecency, and the V-Chip*, 91 NW. U. L. REV. 1190 (1997)

**Ongoing  
Writing:**

Section Editor, [JOTWELL Courts Law](#)  
Editor and Contributor, [PrawfsBlawg](#)  
Contributor, [SCOTUSblog](#)  
Editor, [Sports Law Blog](#)

**SCOTUSBlog  
Publications:**

[\*Argument analysis: "Make an all-purpose consolidation, ... like marriage": Debating the meaning of consolidation and its effects on finality\*](#), SCOTUSBlog, Jan. 16, 2018

[\*Argument preview: Consolidation and finality\*](#), SCOTUSBlog, Jan. 9, 2018

[\*Opinion analysis: Only Congress can make a jurisdictional rule\*](#), SCOTUSBlog, Nov. 8, 2017

[\*Argument analysis: Alito and Ginsburg spar over the rules for timely appeals\*](#), SCOTUSBlog, Oct. 10, 2017

[\*Argument preview: The court returns to the jurisdictionality of appellate time limits\*](#), SCOTUSBlog, Oct. 3, 2017

[\*Opinion analysis: Majority sides with employee in civil service argument, but Justice Gorsuch announces his presence with authority\*](#), SCOTUSBlog, June 26, 2017

[\*Opinion analysis: Standing, intervention, and a narrow disposition\*](#), SCOTUSBlog, June 5, 2017

[\*Opinion analysis: But-for causation and inherent-power civil sanctions\*](#), SCOTUSBlog, Apr. 18, 2017

[\*Argument analysis: Intervention, standing, and control over litigation\*](#), SCOTUSBlog, Apr. 18, 2017

[\*Argument analysis: Pulling wings off flies and other efforts to make sense of the Civil Service Reform Act\*](#), SCOTUSBlog, Apr. 17, 2017

[\*Argument preview: Revisiting the proper forum for civil service review in mixed cases\*](#), SCOTUSBlog, Apr. 10, 2017

[\*Argument preview: Standing for intervention\*](#), SCOTUSBlog, Apr. 10, 2017

[\*Argument Analysis: "The train jumped the track and it went in an entirely wrong direction": The Court considers the causation standard for imposing sanctions\*](#), SCOTUSBlog, Jan. 11, 2017

[\*Argument preview: Bad-faith discovery sanctions, inherent authority, and direct causation\*](#), SCOTUSBlog, Jan. 3, 2017

[\*Opinion analysis: Improper motive can violate the First Amendment, even with a factual mistake\*](#), SCOTUSBlog, Apr. 26, 2016

[Argument analysis: The First Amendment, political inactivity, and improper government motive](#), SCOTUSBLOG, Jan. 20, 2016

[Argument preview: The First Amendment, public employees, and misperceived political association](#), SCOTUSBLOG, Jan. 12, 2016

[Opinion analysis: Removing discretion in convening three-judge district courts](#), SCOTUSBLOG, Dec. 8, 2015

[Argument analysis: “Wow . . . That’s my comment”--a passive Court and a predictable outcome on three-judge courts](#), SCOTUSBLOG, Nov. 5, 2015

[Argument preview: Is a three-judge court “not required” when a pleading fails to state a claim?](#), SCOTUSBLOG, Oct. 19, 2015

[Opinion Analysis: Clear Statements, sovereign immunity, and timeliness](#), SCOTUSBLOG, Apr. 23, 2015

[Opinion analysis: Finality, appealability, and single-claim actions](#), SCOTUSBLOG, Jan. 21, 2015

[Argument analysis: A living Federal Tort Claims Act?](#), SCOTUSBLOG, Dec. 12, 2014

[Argument analysis: Finality and a tale of two rules](#), SCOTUSBLOG, Dec. 11, 2014

[Argument preview: Jurisdictionality, timeliness, and the Federal Tort Claims Act](#), SCOTUSBLOG, Dec. 8, 2014

[Argument preview: Finality, consolidation, and multi-district litigation](#), SCOTUSBLOG, Dec. 5, 2014

[Opinion recap: Operational consistency and predictability prevail in defining when a judgment is final](#), SCOTUSBLOG, Jan. 16, 2014,

[Argument recap: Finding simple rules is not always so simple](#), SCOTUSBLOG, Dec. 10, 2013

[Argument preview: Attorney’s fees and the final judgment rule](#), SCOTUSBLOG, Dec. 2, 2013

[Argument recap: When is “an action subject to judicial review” not a “judicially reviewable action”?](#), SCOTUSBLOG, Oct. 3, 2012

[Argument preview: Finding the proper Article III forum](#), SCOTUSBLOG, Sept. 28, 2012

**Other Publications:**

[The Empirical Truth About Qualified Immunity](#), JOTWELL, Feb. \_\_\_\_, 2018 (review essay)

[Eight is Enough](#), JOTWELL, Feb. 3, 2017 (review essay)

[When They Were Kings: Greenberg and Koufax Sit on Yom Kippur](#), TABLET MAGAZINE, Oct. 11, 2016

[\*The Irrepressible Myth of SCOTUS\*](#), JOTWELL, June 2016 (review essay)

[\*Crazy in Alabama, but not for the reasons everything thinks\*](#), JURIST, Mar. 14, 2015

[\*University of Oklahoma expels the First Amendment\*](#), JURIST, Mar. 14, 2015

[\*Judicial Retention Meets Due Process\*](#), JOTWELL, Sept. 30, 2014 (review essay)

[\*The Truth About Empathy\*](#), JOTWELL, July 2013 (review essay)

Introduction: *Football at the Crossroads*, 8 FIU L. REV. 1 (2013)

[\*In Defense of Baseball's Infield Fly Rule\*](#), THE ATLANTIC, Oct. 12, 2012

[\*SCOTUS in Focus: Two Takes on Cameras in the Federal Courts\*](#), JOTWELL, Aug. 2012 (review essay)

[\*What If New York Fans Could Have Paid Jeremy Lin to Stay in New York?\*](#), THE ATLANTIC, July 23, 2012 (with Dan Markel)

[\*Evidence Meets Civil Procedure\*](#), JOTWELL, Apr. 2011 (review essay)

*The Phases and Faces of the Duke Lacrosse Controversy: A Conversation*, 19 SETON HALL REVIEW OF SPORTS & ENT. L. 181 (2009)

*Subsidized Speech*, in ENCYCLOPEDIA OF THE SUPREME COURT OF THE UNITED STATES (Macmillan Reference 2008) (David Tanenhaus, ed.)

[\*Allow 'cheering speech'\*](#), USA TODAY, Mar. 7, 2008

[\*The Mitchell Report on Steroids in Major League Baseball: Historical Accounting, Future Recommendations, and What Lies Ahead for the National Past time\*](#), FINDLAW'S WRIT COMMENTARY, Dec. 21, 2007

[\*The Civil Suit Arising Out of the Duke Lacrosse Rape Case: How it Illustrates the Limits of Civil Rights Litigation Even When Serious Wrongs Have Been Done\*](#), FINDLAW'S WRIT COMMENTARY, Oct. 16, 2007

*Can A Voluntary Athletic Association Prohibit Member Schools From Using 'Undue Influence' To Recruit Athletes?*, PREVIEW OF UNITED STATES SUPREME COURT CASES (*TSSAA v. Brentwood Academy*), No. 7, p.370, Apr. 16, 2007

[\*The Supreme Court's Recent Decision in Wallace v. Kato: Complicating the Process for Civil Rights Plaintiffs Challenging Unconstitutional Convictions\*](#), FINDLAW'S WRIT COMMENTARY, Apr. 9, 2007

Introduction: *Mass Media in the Twenty-first Century*, 2 FIU L. REV. 1 (2007)

[\*The West Wing' and the VP: Constitutional Quandary\*](#), NAT'L LAW JOURNAL, June 13, 2006

[The West Wing and Presidential Succession](#), PICTURING JUSTICE: ON-LINE J. LAW AND POPULAR CULTURE, May 19, 2006

[Baseball, the Law, and the Rules, Part Three: Barry Bonds Takes on the First Amendment](#), FINDLAW'S WRIT COMMENTARY, Apr. 7, 2006

[Baseball, the Law, and the Rules, Part Two: Should the Pete Rose Hall-of-Fame Precedent Apply to Steroids-Era Players?](#), FINDLAW'S WRIT COMMENTARY, Mar. 27, 2006

[Baseball, the Law, and the Rules, Part One: Thoughts on Barry Bonds, Mark McGwire, Pete Rose, and the Baseball Hall of Fame](#), FINDLAW'S WRIT COMMENTARY, Mar. 24, 2006

*Title VII: Does § 701(b) Limit the Subject Matter Jurisdiction of the Federal Courts?*, PREVIEW OF UNITED STATES SUPREME COURT CASES (*Arbaugh v. Y&H Corp.*), No. 4, p.176, Jan. 9, 2006

[East Food Justice: Infamous Cases Involving French Fries, Obesity, Too-Hot Coffee, and Fingertips](#), FINDLAW'S WRIT COMMENTARY, Oct. 6, 2005,

*May a Court Enjoin a Defendant's Speech as a Remedy in a Defamation Case?*, PREVIEW OF UNITED STATES SUPREME COURT CASES (*Tory v. Cochran*), No. 6, p.320, Mar. 20, 2005

*Free to Express His Views*, MIAMI HERALD, Feb. 1, 2005

*Must States Give Political Parties the Option of Holding Open Primaries?*, PREVIEW OF UNITED STATES SUPREME COURT CASES (*Clingman v. Beaver*), No. 4, p.192, Jan. 10, 2005

[Fan Profanity](#), First Amendment Center Online, Freedom Forum, *reprinted* in BARBARA CLOUSE, PATTERNS FOR A PURPOSE (4th ed. 2005) (college-level textbook on rhetoric and writing)

[No Sacred Cows](#), NAT'L LAW JOURNAL, Jan. 26, 2004