

UNDERSTANDING CONSTITUTIONAL LAW

Fourth Edition

LexisNexis Law School Publishing Advisory Board

William Araiza

Professor of Law
Brooklyn Law School

Ruth Colker

Distinguished University Professor & Heck-Faust Memorial Chair in Constitutional Law
Ohio State University, Moritz College of Law

Olympia Duhart

Associate Professor of Law
Nova Southeastern University Shepard Broad Law School

Samuel Estreicher

Dwight D. Opperman Professor of Law
Director, Center for Labor and Employment Law
NYU School of Law

David Gamage

Assistant Professor of Law
UC Berkeley School of Law

Joan Heminway

College of Law Distinguished Professor of Law
University of Tennessee College of Law

Edward Imwinkelried

Edward L. Barrett, Jr. Professor of Law
UC Davis School of Law

Paul Marcus

Haynes Professor of Law
William and Mary Law School

Melissa Weresh

Director of Legal Writing and Professor of Law
Drake University Law School

UNDERSTANDING CONSTITUTIONAL LAW

Fourth Edition

John B. Attanasio

*Judge James Noel Dean and Professor of Law &
Judge William Hawley Atwell Chair of Constitutional Law
Southern Methodist University
Dedman School of Law*

Joel K. Goldstein

*Vincent C. Immel Professor of Law
Saint Louis University School of Law*

ISBN: 978-0-7698-4734-4
ISBN: 978-1-4224-8660-3 (eBook)

Library of Congress Cataloging-in-Publication Data

Attanasio, John.
Understanding constitutional law / John B. Attanasio, Joel K. Goldstein. — 4th ed.
p. cm.
Rev. ed. of: Understanding constitutional law / Norman Redlich, John Attanasio, Joel K. Goldstein. 3rd ed. 2005.
Includes index.
ISBN 978-0-7698-4734-4
1. Constitutional law—United States—Cases. I. Goldstein, Joel K. (Joel Kramer), 1953- II. Redlich, Norman.
Understanding constitutional law. III. Title.
KF4550.Z9R43 2012
342.73—dc23

2012015336

This publication is designed to provide authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

LexisNexis and the Knowledge Burst logo are registered trademarks of Reed Elsevier Properties Inc., used under license. Matthew Bender and the Matthew Bender Flame Design are registered trademarks of Matthew Bender Properties Inc.

Copyright © 2012 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved.

No copyright is claimed by LexisNexis or Matthew Bender & Company, Inc., in the text of statutes, regulations, and excerpts from court opinions quoted within this work. Permission to copy material may be licensed for a fee from the Copyright Clearance Center, 222 Rosewood Drive, Danvers, Mass. 01923, telephone (978) 750-8400.

NOTE TO USERS

To ensure that you are using the latest materials available in this area, please be sure to periodically check the LexisNexis Law School web site for downloadable updates and supplements at www.lexisnexis.com/lawschool.

Editorial Offices
121 Chanlon Rd., New Providence, NJ 07974 (908) 464-6800
201 Mission St., San Francisco, CA 94105-1831 (415) 908-3200
www.lexisnexis.com

MATTHEW  BENDER

Acknowledgments

We mourn the death on June 10, 2011, of our co-author and friend, Norman Redlich. Norman was a giant in the law who made enormous contributions as a lawyer, scholar, academic administrator, public servant and citizen. In all respects he modeled professional excellence and human decency. Although a man of strong convictions and principles, he invariably gave those with different views a fair and courteous hearing and addressed their positions in a rational and intellectually honest manner. Notwithstanding his impressive accomplishments, Norman displayed constant humility. We are grateful for the inspiration he provided and the opportunity to have been associated with him. His passing is a great loss and we miss him.

Norman did not play a part in preparing this Fourth Edition although his thought influences much of it. We also pay tribute to Bernard Schwartz who co-authored, with Norman, the first edition of this book. He died on December 23, 1997. He was a leading scholar of the Constitution and the work of the Supreme Court. We are grateful to him for his contributions to shaping this book in its original form. His influence continues in these pages.

A number of people over the years helped us produce this Fourth Edition. We would like to thank Kathleen Spartana for her administrative and editing work. Since the Third Edition was published, we have benefited from the work of research assistants Jennifer Allen, Jessica Benoit, Rachel Berland, Heather S. Bethancourt, Kristen Brown, Lacey Smith Cesarz, Henry Childs, John T. Davis, Kate Douglas, Christine Falgout, Jessie Gasch, Anthony Gilbreth, John J. Greffet, Matthew Guyman, Ryan Hardy, Meredith Head, Eric Hoffmann, Maxwell Huber, Sarah Jackson, Ausra Laurusaite-Kromelis, Sarah Lopano, Michael Lyons, Nathan McArthur, Leslie Mattingly, Mandi Montgomery, John Moore, Stacy Osmond, Heather J. Panko, Daniel Pearson, David Poell, Tina Potter, Molly Quinn, Bennett J. Rawicki, Justin Reinus, Joshua R. Reznick, Lacey Searfoss, Jonathan Skrabacz, Niel Smith, Paul Stohr, Kevin Sullivan, Phong Tran, Elizabeth Mills Viney, Elise Voges, and Ryan Yager for their contributions, and Brenda Aylesworth, Tina Brosseau, Mary Dougherty, and Stephanie Haley for their help over the years in typing (and retyping) the book. As always, we appreciate the institutional support of the Dedman School of Law at Southern Methodist University and of Saint Louis University School of Law including through the latter's summer research program. Finally, we are grateful to Pali Parekh of LexisNexis Mathew Bender for her skillful editing.

Joel Goldstein is primarily responsible for the first seven chapters which Bernard Schwartz had prepared in the first edition. John Attanasio prepared chapters 8 to 17; he and Norman Redlich had worked on those portions of the book previously.

John B. Attanasio
Joel K. Goldstein
April, 2012

TABLE OF CONTENTS

Chapter 1	THE CONSTITUTION AND CONSTITUTIONAL ARGUMENT	1
§ 1.01	CONSTITUTIONS	1
§ 1.02	RATIFYING THE CONSTITUTION	2
§ 1.03	THE STRUCTURAL CONSTITUTION	4
§ 1.04	CONSTITUTIONAL INTERPRETATION	6
§ 1.05	CONSTITUTIONAL ARGUMENT	9
[1]	Textual Argument	9
[2]	Intent of the Framers	12
[3]	Ongoing Practice	13
[4]	Judicial Doctrine; Precedent	15
[5]	Structural Arguments	18
[6]	Consequential Arguments	19
[7]	Ethical Argument	19
[8]	Sociological Evidence	20
[9]	Comparative Constitutional Argument	21
§ 1.06	CONCLUSION	21
Chapter 2	THE COURTS AND JUDICIAL REVIEW	23
§ 2.01	MARBURY v. MADISON	23
[1]	Historical Context	24
[2]	The Opinion	25
§ 2.02	JUDICIAL REVIEW	31
[1]	Constitutional Arguments	31
[2]	Later Formulations of Judicial Review	32
§ 2.03	SOLE OR ULTIMATE INTERPRETER?	35
§ 2.04	JUSTIFICATIONS OF JUDICIAL REVIEW	37
§ 2.05	REVIEW OF STATE ACTION	39
[1]	Fletcher v. Peck	40
[2]	Martin v. Hunter's Lessee	40
[3]	Cohens v. Virginia	42
[4]	Cooper v. Aaron	42
[5]	Bush v. Gore	43
§ 2.06	JUDICIAL INDEPENDENCE	45
§ 2.07	JUDICIAL DEPENDENCE	46
§ 2.08	COURT ORGANIZATION: THE SUPREME COURT	48
§ 2.09	SUPREME COURT JURISDICTION	48

TABLE OF CONTENTS

§ 2.10	LEGISLATIVE CONTROL OVER LOWER COURTS' JURISDICTION	53
§ 2.11	NON-ARTICLE III ADJUDICATION	58
§ 2.12	CASES AND CONTROVERSIES	62
[1]	Doctrines of Justiciability: An Overview	62
[2]	Advisory Opinions	63
[3]	Feigned and Hypothetical Cases	65
[4]	Standing	66
[a]	Constitutional Requirements	66
[b]	Prudential Requirements	70
[i]	Rights of Others	70
[ii]	Zones of Interests	72
[iii]	Generalized Grievance	72
[c]	Citizen Standing	72
[d]	Taxpayers	73
[e]	Voter Standing	76
[f]	Congressional Standing	77
[5]	Ripeness	78
[6]	Mootness	81
[7]	Political Question	83
Chapter 3	CONGRESSIONAL POWER	91
§ 3.01	STRUCTURE OF CONGRESS	92
[1]	Composition and Election	92
[2]	Qualifications	93
[3]	Delegation of Legislative Power	95
[4]	Legislating Procedures	95
[5]	Legislative Immunity	97
§ 3.02	IMPLIED POWERS	99
§ 3.03	GENERAL WELFARE	103
§ 3.04	TAXING POWER	104
[1]	Broad Power of Taxation For National Purposes	104
[2]	Purpose of Taxation	105
§ 3.05	SPENDING POWER	107
§ 3.06	FISCAL POWERS	109
§ 3.07	CITIZENSHIP	110
[1]	Becoming and Remaining a Citizen	110
[2]	Freedom of Movement	112
§ 3.08	TREATY POWER	112
§ 3.09	CIVIL RIGHTS ENFORCEMENT AND STATE ACTION	115
§ 3.10	CONGRESSIONAL ENFORCEMENT	121

TABLE OF CONTENTS

§ 3.11	INVOLUNTARY SERVITUDE	125
Chapter 4	COMMERCE CLAUSE	127
§ 4.01	MARSHALL’S CONCEPTION	127
§ 4.02	PRODUCTIVE INDUSTRIES	130
[1]	The <i>E. C. Knight</i> Formal Approach	130
[2]	Other Doctrinal Streams	132
[3]	Early New Deal Cases	133
[4]	<i>Jones & Laughlin</i>	134
[5]	<i>Darby and Wickard</i>	137
§ 4.03	REGULATION VERSUS PROHIBITION	139
[1]	<i>Lottery Case</i>	139
[2]	<i>Child Labor Case</i>	140
[3]	<i>Darby</i> and Bootstrapping	141
[4]	<i>Perez v. United States</i>	142
§ 4.04	1964 CIVIL RIGHTS ACT	143
§ 4.05	OUTER LIMITS	144
§ 4.06	LOPEZ: ANOTHER TURNING POINT?	144
§ 4.07	UNITED STATES v. MORRISON	147
§ 4.08	GONZALES v. RAICH	149
§ 4.09	SOME CONCLUDING OBSERVATIONS ABOUT THE COMMERCE CLAUSE	153
Chapter 5	THE FEDERAL SYSTEM	155
§ 5.01	MAIN FEATURES	155
[1]	Components of Federalism	155
[2]	Union of Previously Autonomous States	156
[3]	Division of Powers Between Nation and States	157
[4]	Direct Operation of States and Nation	158
[5]	Possession of Law-Enforcement Apparatus	159
[6]	Federal Supremacy	159
§ 5.02	RESERVED POWERS	161
[1]	Tenth Amendment as Source of State Power	161
[2]	The Rise and Fall and Rise of the Tenth Amendment	161
[3]	What’s A “Reserved Power”?	165
[4]	The Tenth Amendment Summarized	166
[5]	Police Power	167
§ 5.03	POLITICAL PROCESS AND FEDERALISM	168
§ 5.04	SUPREMACY AND STATE TAXATION	171
[1]	Federal Immunity From State Taxation: An Overview	171
§ 5.05	SUPREMACY AND POLICE POWER	173

TABLE OF CONTENTS

§ 5.06	STATE TAX IMMUNITIES	174
§ 5.07	STATE REGULATORY IMMUNITIES	174
§ 5.08	COOPERATIVE FEDERALISM	177
[1]	The Federal Government and the States	177
[2]	Litigating Against a State	180

Chapter 6	COMMERCE AND THE STATES: THE DORMANT COMMERCE CLAUSE	195
------------------	---	------------

§ 6.01	THE PURPOSE OF THE DORMANT COMMERCE CLAUSE	196
§ 6.02	HISTORICAL EVOLUTION	198
[1]	Chief Justice Marshall's Views	198
[2]	Local Pilot Case	199
[3]	Railroad Regulation	200
[4]	Towards a Balancing Test	202
§ 6.03	THE MODERN APPROACH	203
§ 6.04	DISCRIMINATORY LAWS	203
§ 6.05	PIKE BALANCING TEST	207
§ 6.06	THE POLITICAL PROCESS RATIONALE	208
§ 6.07	PROHIBITORY LAWS	209
[1]	Quarantine and Inspection	209
[2]	Embargo Measures	210
§ 6.08	EXCEPTIONS TO THE DORMANT COMMERCE CLAUSE	211
[1]	Market Participant Exception	211
[2]	Additional Exceptions	213
[3]	Congressional Consent	215
§ 6.09	CONGRESSIONAL CONFLICT: PREEMPTION	216
§ 6.10	PRIVILEGES AND IMMUNITIES	220

Chapter 7	EXECUTIVE POWER	225
------------------	----------------------------------	------------

§ 7.01	ELECTION	226
§ 7.02	THEORIES OF PRESIDENTIAL POWER	230
[1]	Historical Background	230
[2]	<i>Neagle</i> Case	232
[3]	Peace of the United States	233
[4]	United States v. Midwest Oil Co.	233
[5]	<i>Steel Seizure</i> Case	233
[6]	Jackson's Categories and Inherent Power Limitations	236
§ 7.03	PRESIDENT AS LEGISLATIVE LEADER	238
[1]	Constitutional Basis for Legislative Role	238
[2]	Veto Power	238
[3]	Legislative Veto	240

TABLE OF CONTENTS

§ 7.04	ADMINISTRATIVE ROLE	242
[1]	Appointing Power	242
[2]	Removal Power	245
§ 7.05	LAW ENFORCEMENT	248
[1]	Constitutional Duty to Execute Laws	248
[2]	Power to Pardon	249
§ 7.06	FOREIGN AFFAIRS	251
[1]	Leading Role of President	251
[2]	<i>Curtiss-Wright</i>	252
[3]	Power of Recognition	253
[4]	<i>Steel Seizure Case</i>	254
[5]	Executive Agreements	254
§ 7.07	COMMANDER-IN-CHIEF	257
[1]	Constitutional Duty of President	257
[2]	War Powers Resolution	259
[3]	September 11, 2001	260
[4]	Military Justice	261
§ 7.08	PRESIDENTIAL ACCOUNTABILITY	267
[1]	The President as Defendant	267
[2]	Executive Privileges and Immunities	268
[3]	Impeachment	271
§ 7.09	SUCCESSION AND DISABILITY	273
§ 7.10	SEPARATION OF POWERS	275

Chapter 8 LIBERTY, PROPERTY, AND DUE PROCESS, TAKING AND CONTRACT CLAUSES 281

§ 8.01	INTRODUCTION TO THE INCORPORATION CONTROVERSY AND THE BILL OF RIGHTS	282
§ 8.02	THE “INCORPORATION CONTROVERSY” AND THE RIGHTS OF THE ACCUSED	287
§ 8.03	THE SECOND AMENDMENT	297
§ 8.04	VAGUENESS	308
§ 8.05	REGULATION OF BUSINESS AND OTHER PROPERTY INTERESTS	309
[1]	Liberty of Contract Under the Due Process Clauses	309
[2]	Economic Regulation and the Contract Clause of Article I, Section 10	315
[3]	Government Takings of Property Requiring Just Compensation	318
[a]	The Public Use Requirement	318
[b]	Physical versus Regulatory Takings	320
[i]	Regulatory Takings	323
[ii]	Takings as a Government Condition for Granting a Permit	325
[iii]	Takings Clause in Other Contexts	327

TABLE OF CONTENTS

[4]	Economic Penalties	331
§ 8.06	LIBERTY IN PROCREATION AND OTHER PERSONAL MATTERS	339
[1]	The Childbearing Decision: Contraception and Abortion	339
[2]	The Family Relationship	360
[3]	Homosexuality	364
[4]	Right to Die	367
[5]	Other Autonomy Issues	371
§ 8.07	PERSONAL PROPERTY RIGHTS: NEW FORMS OF PROTECTION FOR NEW PROPERTY INTERESTS	376
Chapter 9	RACIAL EQUALITY	383
§ 9.01	SEGREGATION IN PUBLIC FACILITIES	385
[1]	The Rise and Fall of “Separate but Equal”	385
[2]	Enforcing <i>Brown</i> : The Fashioning of Judicial Relief	388
[3]	Limiting the Remedies	392
§ 9.02	OTHER FORMS OF RACIAL DISCRIMINATION	402
[1]	General Principles: Purposeful Discrimination and Suspect Classes . . .	402
[2]	Racial Discrimination in Employment	407
[3]	Housing and Zoning	408
[4]	Voting	410
[5]	The Criminal Justice System	418
Chapter 10	EQUAL RIGHTS FOR THE SEXES	425
§ 10.01	CHANGING ATTITUDES TOWARD GENDER-BASED CLASSIFICATIONS	425
§ 10.02	EMPLOYMENT DISCRIMINATION BASED ON GENDER	436
§ 10.03	GENDER DISCRIMINATION IN GOVERNMENT BENEFIT PROGRAMS	438
§ 10.04	DISCRIMINATION INVOLVING PREGNANCY	441
Chapter 11	AFFIRMATIVE ACTION	445
§ 11.01	EDUCATION	446
§ 11.02	EMPLOYMENT	458
[1]	Title VII and the Equal Protection Clause	458
[2]	Government Set Asides	464

TABLE OF CONTENTS

Chapter 12	EQUAL PROTECTION FOR OTHER GROUPS AND INTERESTS	471
§ 12.01	DISCRETE AND INSULAR MINORITIES	472
[1]	Aliens	472
[a]	Resident Aliens	472
[b]	Illegal Aliens	474
[2]	Illegitimate Children	475
[3]	The Aged	476
[4]	The Mentally Retarded	476
[5]	Sexual Orientation	479
§ 12.02	EQUAL PROTECTION FOR THE POOR	481
[1]	Wealth as a Suspect Classification; Fundamental Rights to Necessities .	481
[2]	Access to the Justice System	485
§ 12.03	EQUALITY IN THE POLITICAL PROCESS	490
[1]	Distinctions Based on Wealth	490
[2]	Other Barriers to Political Participation: Apportionment, Ballot Access for Minority Parties, Gerrymandering	492
§ 12.04	THE RIGHT TO TRAVEL	508
[1]	Domestic Travel	508
[2]	International Travel	512
§ 12.05	“ECONOMIC AND SOCIAL LEGISLATION”	513
Chapter 13	POLITICAL SPEECH AND ASSOCIATION	517
§ 13.01	THE BASIC MODEL FOR PROTECTING FREE SPEECH	518
[1]	Advocacy of Unlawful Objectives	518
[2]	Other Basic Ideas in Protecting Free Speech	527
§ 13.02	MEMBERSHIP IN POLITICAL ORGANIZATIONS AS A BASIS FOR GOVERNMENT SANCTIONS	528
§ 13.03	DISCLOSURE OF POLITICAL AFFILIATIONS	530
§ 13.04	ASSOCIATIONAL RIGHTS TO ASSIST TERRORIST ORGANIZATION	534
§ 13.05	ASSOCIATION, POLITICAL PARTIES, AND THE ELECTORAL PROCESS	539
[1]	Regulation of Parties and Ballots	539
[2]	Judicial Elections	542
§ 13.06	ASSOCIATIONAL RIGHTS IN OTHER CONTEXTS	544
[1]	Political Boycotts	544
[2]	Private Clubs and Other Associations	545
§ 13.07	FREE SPEECH PROBLEMS OF GOVERNMENT EMPLOYEES	547
[1]	Restraints on Political Activity	547
[2]	Patronage Dismissals	552

TABLE OF CONTENTS

[3]	Employee's Rights to Criticize Government	555
[a]	Free Speech	555
[b]	Petition Clause	562
[4]	Special Protection for Legislators and Other Government Employees . .	564
Chapter 14	GOVERNMENT AND THE MEDIA: PRINT AND ELECTRONIC	565
§ 14.01	THE DOCTRINE AGAINST PRIOR RESTRAINTS	565
§ 14.02	THE RIGHT TO REPORT JUDICIAL AND GOVERNMENTAL AFFAIRS	571
§ 14.03	ACCESS BY THE MEDIA TO GOVERNMENT ACTIVITY	575
§ 14.04	PROTECTING THE NEWSGATHERING PROCESS	578
§ 14.05	ACCESS TO THE MEDIA	582
§ 14.06	TAXATION	584
§ 14.07	ELECTRONIC MEDIA	586
[1]	Broadcast Media	586
[2]	Cable Television	587
[3]	The Internet	594
§ 14.08	DEFAMATION AND PRIVACY	597
[1]	Public Figures versus Private Individuals	597
[2]	Opinions	602
[3]	Quoted Material	603
[4]	Jurisdictional and Other Procedural Rules	603
[5]	Matters of Public Concern	604
[6]	Invasions of Privacy	605
Chapter 15	SPEECH IN PUBLIC PLACES	609
§ 15.01	OFFENSIVE SPEECH IN PUBLIC PLACES	609
[1]	General Principles	609
[2]	Hate Speech	611
[3]	Sexually Offensive Speech	615
§ 15.02	SPEECH IN TRADITIONAL PUBLIC FORUMS: STREETS, SIDEWALKS, PARKS	622
§ 15.03	THE CIVIL RIGHTS MOVEMENT, MASS DEMONSTRATIONS, AND NEW RULES FOR NEW PUBLIC FORUMS	630
§ 15.04	THE MODERN APPROACH: LIMITING SPEECH ACCORDING TO THE CHARACTER OF THE PROPERTY	632
[1]	Classifying Public Property into Various Types of Public Forums	632
[2]	Reasonable Time Place and Manner Restrictions	642
[3]	Private Property: Shopping Centers and Company Towns	650
§ 15.05	SPEECH IN PUBLIC SCHOOLS	652

TABLE OF CONTENTS

§ 15.06	RELIGIOUS SPEECH IN PUBLIC PLACES	654
---------	---	-----

Chapter 16	SPECIAL DOCTRINES IN THE SYSTEM OF FREEDOM OF EXPRESSION	663
-------------------	---	------------

§ 16.01	EXPRESSIVE CONDUCT	664
§ 16.02	EXPENDITURES OF MONEY IN THE POLITICAL ARENA	669
§ 16.03	GOVERNMENT SPENDING ON SPEECH RELATED ACTIVITIES . .	700
§ 16.04	COMMERCIAL SPEECH	707
[1]	Protection for Commercial Speech: General Principles	707
[2]	Lawyer and Other Professional Advertising	722
§ 16.05	OBSCENITY	726
[1]	The Constitutional Standard	726
[2]	Procedural Issues in Obscenity Cases: “Prior Restraints” and Seizure of Materials	740

Chapter 17	GOVERNMENT AND RELIGIOUS FREEDOM	745
-------------------	---	------------

§ 17.01	COMPETING APPROACHES: WALL OF SEPARATION VERSUS ACCOMMODATION	746
§ 17.02	THE ESTABLISHMENT CLAUSE AND AID TO RELIGIOUS INSTITUTIONS	750
[1]	Tension Between Burdening Free Exercise and Promoting Establishment	750
[2]	Aid to Religious Schools	752
[3]	Government Support to Religious Institutions in Contexts Other Than Religious Schools	769
§ 17.03	GOVERNMENT SUPPORT OF RELIGIOUS PRACTICES	773
§ 17.04	ESTABLISHMENT OF RELIGION THROUGH RELIGIOUS INSTITUTIONS BECOMING INVOLVED IN GOVERNMENTAL DECISIONS	791
§ 17.05	FREE EXERCISE OF RELIGION	795

Constitution of the United States	811
--	------------

Table of Cases	TC-1
---------------------------------	-------------

Index	I-1
------------------------	------------
