

Understanding Constitutional Law

CAROLINA ACADEMIC PRESS UNDERSTANDING SERIES

- Understanding Administrative Law,
Sixth Edition**
William Fox, Jr.
- Understanding Alternative Dispute Resolution**
Kristen M. Blankley and Maureen A. Weston
- Understanding Animal Law**
Adam Karp
- Understanding Antitrust and Its Economic
Implications, Seventh Edition**
E. Thomas Sullivan and Jeffrey L. Harrison
- Understanding Bankruptcy, Fourth Edition**
Jeffrey Ferriell and Edward J. Janger
- Understanding California Community
Property Law**
Jo Carrillo
- Understanding Capital Punishment Law,
Fourth Edition**
Linda E. Carter, Ellen S. Kreitzberg,
and Scott W. Howe
- Understanding Civil Procedure, Sixth Edition**
Gene R. Shreve, Peter Raven-Hansen, and
Charles Gardner Geyh
- Understanding Civil Procedure:
The California Edition**
Walter W. Heiser, Gene R. Shreve,
Peter Raven-Hansen, and Charles Geyh
- Understanding Civil Rights Litigation,
Second Edition**
Howard M. Wasserman
- Understanding Conflict of Laws,
Fourth Edition**
William M. Richman, William L. Reynolds,
and Chris A. Whytock
- Understanding Constitutional Law,
Fifth Edition**
William D. Araiza
- Understanding Contracts, Fourth Edition**
Jeffrey Ferriell
- Understanding Copyright Law,
Seventh Edition**
Marshall A. Leaffer
- Understanding Corporate Law,
Fifth Edition**
Arthur R. Pinto and Douglas M. Branson
- Understanding Corporate Taxation,
Fourth Edition**
Leandra Lederman and Michelle Kwon
- Understanding Criminal Law, Eighth Edition**
Joshua Dressler
- Understanding Criminal Procedure:
Vol. 1: Investigation, Seventh Edition**
Joshua Dressler, Alan C. Michaels,
and Ric Simmons
- Understanding Criminal Procedure:
Vol. 2: Adjudication, Fourth Edition**
Joshua Dressler and Alan C. Michaels
- Understanding Disability Law, Third Edition**
Mark C. Weber
- Understanding Election Law
and Voting Rights**
Michael R. Dimino, Bradley A. Smith,
and Michael E. Solimine
- Understanding Employee Benefits Law,
Second Edition**
Kathryn L. Moore
- Understanding Employment
Discrimination Law, Third Edition**
Thomas R. Haggard and Bruce N. Cameron
- Understanding Employment Law,
Third Edition**
Paul M. Secunda, Richard A. Bales,
and Jeffrey M. Hirsch
- Understanding Environmental Law,
Third Edition**
Philip Weinberg and Kevin A. Reilly
- Understanding Estate and Gift Taxation,
Second Edition**
Brant J. Hellwig and Robert T. Danforth
- Understanding Evidence, Fifth Edition**
Paul C. Giannelli
- Understanding Family Law, Fourth Edition**
John Gregory, Peter N. Swisher,
and Robin Wilson
- Understanding Federal and
California Evidence**
Paul C. Giannelli
- Understanding Federal Courts
and Jurisdiction, Second Edition**
Linda Mullenix, Martin H. Redish,
and Georgene Vairo
- Understanding Federal Income Taxation,
Sixth Edition**
J. Martin Burke and Michael K. Friel

- Understanding the First Amendment,
Seventh Edition**
Russell L. Weaver
- Understanding Immigration Law,
Third Edition**
Kevin R. Johnson, Raquel Aldana,
Bill Ong Hing, Leticia M. Saucedo,
and Enid Trucios-Haynes
- Understanding Insurance Law, Sixth Edition**
Robert H. Jerry, II and Douglas Richmond
- Understanding Intellectual Property Law,
Fourth Edition**
Tyler T. Ochoa, Shubha Ghosh,
and Mary LaFrance
- Understanding International Business
and Financial Transactions,
Fourth Edition**
Jerold A. Friedland
- Understanding International Criminal Law,
Third Edition**
Ellen S. Podgor and Roger S. Clark
- Understanding International Law,
Third Edition**
Stephen C. McCaffrey
- Understanding Jewish Law, Second Edition**
Steven H. Resnicoff
- Understanding Juvenile Law, Fifth Edition**
Martin Gardner
- Understanding Labor Law,
Fifth Edition**
Douglas E. Ray, Calvin William Sharpe,
and Robert N. Strassfeld
- Understanding the Law of Terrorism,
Second Edition**
Erik Luna and Wayne McCormack
- Understanding the Law of Zoning
and Land Use Controls, Third Edition**
Barlow Burke
- Understanding Lawyers' Ethics, Fifth Edition**
Monroe H. Freedman and Abbe Smith
- Understanding Local Government,
Second Edition**
Sandra Stevenson
- Understanding Modern Real Estate
Transactions, Fourth Edition**
Alex M. Johnson, Jr.
- Understanding Negotiable Instruments
and Payment Systems, Second Edition**
William H. Lawrence
- Understanding Nonprofit and Tax Exempt
Organizations, Second Edition**
Nicholas P. Cafardi and Jaclyn Fabean Cherry
- Understanding Partnership
and LLC Taxation, Fourth Edition**
Jerold A. Friedland
- Understanding Patent Law, Third Edition**
Amy L. Landers
- Understanding Products Liability Law,
Second Edition**
Bruce L. Ottley, Rogelio A. Lasso,
and Terrence F. Kiely
- Understanding Property Law,
Fourth Edition**
John G. Sprankling
- Understanding Remedies, Third Edition**
James M. Fischer
- Understanding Sales and Leases of Goods,
Third Edition**
William H. Henning, William H. Lawrence,
and Henry Deeb Gabriel
- Understanding Secured Transactions,
Fifth Edition**
William H. Lawrence, William H. Henning,
and R. Wilson Freyermuth
- Understanding Securities Law,
Seventh Edition**
Marc I. Steinberg
- Understanding Taxation of Business Entities**
Walter D. Schwidetzky and Fred B. Brown
- Understanding Torts, Sixth Edition**
John L. Diamond, Lawrence C. Levine,
and Anita Bernstein
- Understanding Trade Secret Law,**
John G. Sprankling and Thomas G. Sprankling
- Understanding Trademark Law, Fourth Edition**
Mary LaFrance
- Understanding Trusts and Estates,
Sixth Edition**
Roger W. Andersen and Susan Gary
- Understanding White Collar Crime,
Fourth Edition**
J. Kelly Strader

Understanding Constitutional Law

FIFTH EDITION

William D. Araiza
PROFESSOR OF LAW
BROOKLYN LAW SCHOOL



CAROLINA ACADEMIC PRESS

Durham, North Carolina

Copyright © 2020
William D. Araiza
All Rights Reserved

Library of Congress Cataloging-in-Publication Data

Names: Araiza, William D., author.

Title: Understanding constitutional law / by William D. Araiza.

Description: Fifth edition. | Durham, North Carolina : Carolina Academic Press, LLC, [2020] | Series: Understanding Series. | Includes bibliographical references and index.

Identifiers: LCCN 2020030659 | ISBN 9781531018702 (paperback) | ISBN 9781531018719 (ebook)

Subjects: LCSH: Constitutional law--United States--Cases.

Classification: LCC KF4550.Z9 R43 2020 | DDC 342.73--dc23

LC record available at <https://lcn.loc.gov/2020030659>

Carolina Academic Press
700 Kent Street
Durham, North Carolina 27701
Telephone (919) 489-7486
Fax (919) 493-5668
www.cap-press.com

Printed in the United States of America

Contents

Acknowledgments	xvii
Chapter 1 · The Constitution and Constitutional Argument	3
§ 1.01 Introduction	3
§ 1.02 Constitutions	3
§ 1.03 Ratifying the Constitution	4
§ 1.04 The Structural Constitution	7
§ 1.05 Constitutional Interpretation	9
§ 1.06 Constitutional Argumentation	12
[1] Textual Argument	12
[2] Framers' Intent	14
[3] Ongoing Practice	16
[4] Judicial Doctrine and Precedent	17
[5] Structural Arguments	19
[6] Consequential Arguments	20
[7] Ethical Argument	20
[8] Sociological Evidence	21
[9] Comparative Constitutional Argument	21
§ 1.07 Conclusion	22
Chapter 2 · The Courts and Judicial Review	25
§ 2.01 Introduction	25
§ 2.02 <i>Marbury v. Madison</i>	25
[1] Historical Context	26
[2] The Opinion	27
[3] <i>Marbury's</i> Significance	32
§ 2.03 Judicial Review	33
[1] Constitutional Arguments	33
[2] Later Formulations of Judicial Review	33
[3] Is the Court the Sole or Ultimate Interpreter of the Constitution?	36
[4] The Judiciary and the Political Branches	37
§ 2.04 The Supreme Court	39
[1] The Supreme Court's Status and Structure	39
[2] The Supreme Court's Jurisdiction	40

§ 2.05 Congressional Control over Lower Federal Courts	43
§ 2.06 Other Constitutional Limits on Congressional Control over Federal Courts	46
§ 2.07 Non-Article III Adjudication	47
§ 2.08 Justiciability Doctrines	51
[1] An Overview of Justiciability	51
[2] Advisory Opinions	52
[3] Standing	54
[a] Constitutional Requirements	54
[b] Prudential Requirements	56
[i] Third Party Standing	56
[ii] Zone of Interests	58
[iii] Generalized Grievances and Citizen Standing	58
[c] Taxpayer Standing	60
[4] Timing Doctrines	61
[a] Ripeness	61
[b] Mootness	64
[5] The Political Question Doctrine	65
Chapter 3 · Executive Power and the Separation between Executive and Congressional Power	71
§ 3.01 Introduction	71
§ 3.02 The Presidency	73
§ 3.03 Election	74
§ 3.04 The President as Legislative Leader	76
[1] Constitutional Basis for Legislative Role	76
[2] Veto Power	76
§ 3.05 Law Enforcement	77
[1] The Constitutional Duty to Execute the Laws	77
[2] The Power to Pardon	78
§ 3.06 Succession, Disability, and Impeachment	80
[1] Vice Presidential Succession and Disability	80
[2] Impeachment	81
§ 3.07 Theories of Presidential Power	83
[1] Historical Background	83
[2] <i>Youngstown Sheet & Tube</i>	84
§ 3.08 The President, Congress, and the Setting of Domestic Policy	88
[1] Introduction	88
[2] Delegation of Legislative Power	88
[3] The Legislative Veto	90
[4] Staffing the Bureaucracy	93
[a] Introduction	93

[b] The Appointment Power	93
[c] The Removal Power	96
§ 3.09 Foreign Affairs	100
[1] The Leading Role of the President	100
[2] The Recognition Power	101
[3] Presidential Authority to Enter into Executive Agreements	103
§ 3.10 The President and the Use of Military Force	104
[1] The President’s Commander-in-Chief Power	104
[2] The War Powers Resolution	106
[3] Military Justice	107
§ 3.11 Presidential Litigation Immunities	110
[1] The President as Defendant	110
[2] Executive Privileges and Immunities	111
Chapter 4 · The Federal System: Introduction and Basic Concepts	115
§ 4.01 Introduction	115
§ 4.02 A Union of Previously Autonomous States	116
§ 4.03 Division of Power between the Federal and State Governments	118
§ 4.04 Direct Federal Government Operation on Citizens	119
§ 4.05 Federal Supremacy	120
§ 4.06 Reserved Powers	122
§ 4.07 Federalism and the Political Process	123
§ 4.08 The Advantages and Disadvantages of a Federal System	125
Chapter 5 · Congress and Congressional Powers	129
§ 5.01 Introduction	129
§ 5.02 The Structure of Congress	130
[1] Composition and Election	130
[2] Qualifications	131
[3] Lawmaking Procedures	133
[4] Legislative Immunity	133
§ 5.03 Implied Congressional Powers under the Necessary and Proper Clause	135
§ 5.04 Legislation to Provide for “The General Welfare”	140
§ 5.05 The Taxing Power	141
[1] The Breadth of the Power to Tax	141
[2] The Purposes of Taxation	142
§ 5.06 The Spending Power	144
§ 5.07 Congress’ Other Fiscal Powers	145
§ 5.08 Other Domestic Regulatory Powers	146
§ 5.09 Citizenship and Naturalization	147
§ 5.10 The Treaty Power	148

Chapter 6 · The Commerce Clause	153
§ 6.01 Introduction	153
§ 6.02 Marshall's Conception	153
§ 6.03 The Commerce Clause in the Mid-Nineteenth Century	156
§ 6.04 The Commerce Clause in the First Third of the Twentieth Century	158
[1] The <i>E.C. Knight</i> Formal Approach	158
[2] Other Doctrinal Strands	160
[3] Early New Deal Cases	161
§ 6.05 The Commerce Clause from 1937–1995	163
[1] <i>Jones and Laughlin</i> and the Turn toward Greater Federal Power	163
[2] <i>Darby</i> and <i>Wickard</i>	166
[3] The Commerce Clause at Its Height	170
§ 6.06 <i>Lopez</i> : Another Turning Point?	172
§ 6.07 The Commerce Clause since <i>Lopez</i>	174
§ 6.08 Concluding Observations about the Commerce Clause	179
Chapter 7 · Commerce and the States: The Dormant Commerce Clause, Federal Preemption, and the Privileges and Immunities Clause	183
§ 7.01 Introduction	183
§ 7.02 The Purpose of the Dormant Commerce Clause	184
§ 7.03 The Historical Evolution of the Dormant Commerce Principle	187
[1] Chief Justice Marshall's Views	187
[2] <i>Cooley v. Board of Wardens</i>	188
[3] The Direct/Indirect Effects Test	189
[4] Towards the Modern Approach	191
§ 7.04 The Modern Approach	193
[1] Discriminatory Laws	194
[2] The <i>Pike</i> Balancing Test	198
§ 7.05 The Political Process Rationale	200
§ 7.06 Exceptions to the Dormant Commerce Clause	202
[1] The Market Participant Exception	202
[2] Additional Exceptions	203
[3] Congressional Consent	204
§ 7.07 Federal Preemption	205
§ 7.08 Interstate Privileges and Immunities	208
Chapter 8 · Federal Regulation of the States	213
§ 8.01 Introduction	213
§ 8.02 Federal Regulation of States as Economic Actors	214
§ 8.03 Federal Regulation of the States as Sovereign Actors: The Anti- Commandeering Principle	217
§ 8.04 Intergovernmental Taxation	220
§ 8.05 Conditional Federal Spending Grants to States	222

§ 8.06 Litigating Against a State: Eleventh and Tenth Amendment Limitations	224
[1] <i>Ex parte Young</i>	226
[2] State Waiver and Congressional Abrogation	229
Chapter 9 · Liberty and Property: The Due Process, Takings and Contracts Clauses	235
§ 9.01 Introduction to Substantive Individual Rights	236
[1] The Sources of Constitutional Individual Rights	236
[2] <i>Slaughter-House</i> : The Court's First Examination of the Fourteenth Amendment	238
§ 9.02 Regulation of Business and Other Property Interests	242
[1] Liberty of Contract under the Due Process Clauses	242
[2] The Contracts Clause	249
[3] The Takings Clause	253
[a] The Public Use Requirement	253
[b] Determining Whether a Taking Occurred: Physical and Regulatory Takings	254
[c] Taking as a Government Condition for Granting a Permit	257
[d] Takings Analysis in Other Contexts	259
[4] Economic Penalties	260
§ 9.03 Due Process Liberty, the Bill of Rights, and Incorporation	263
§ 9.04 Non-Economic Liberties	266
[1] Parental Control over Child-Rearing	266
[2] Sterilization and Contraception	266
[3] Abortion	271
[a] <i>Roe v. Wade</i>	271
[b] Public Funding	273
[c] Notification and Consent Requirements	273
[d] Direct Restrictions on Abortion	274
[e] <i>Planned Parenthood v. Casey</i>	275
[f] Abortion Restrictions after <i>Casey</i>	279
[i] Regulation of Abortion Procedures	279
[ii] Restrictions Justified as Protecting Women's Health	282
[g] Concluding Thoughts on Abortion	283
[4] Intimate Relationships	285
[a] Family Relationships	285
[b] Marriage	288
[c] Same-Sex Intimacy	290
[5] The "Right to Die"	293
[6] Informational Privacy	297
[7] Concluding Thoughts on Substantive Due Process	297
§ 9.05 The Second Amendment	298

§ 9.06 Procedural Due Process	301
[1] The Existence of a Life, Liberty, or Property Interest	301
[2] Has There Been a Deprivation?	305
[3] Constitutionally-Required Procedures	306
Chapter 10 · Equal Protection	311
§ 10.01 Introductory Concepts	311
[1] The Class Legislation Era, and Equal Protection for Social and Economic Regulation	312
[2] Suspect Class Analysis	316
§ 10.02 Sex Equality	319
[1] Changing Attitudes toward Sex Classifications	320
[a] Development of the Intermediate Scrutiny Standard	320
[b] Application of the Standard	324
[c] Sex Equality Jurisprudence Today	326
[2] Sex Classifications Justified as Benefitting Women	331
[3] Sex Classifications Based on Inherent Differences between the Sexes	332
§ 10.03 Classifications Other Than Race and Sex	334
[1] Legitimacy	334
[2] Alienage	338
[a] The General Standard	338
[b] The Special Case of Undocumented Aliens	339
[3] Age	340
[4] Poverty	341
§ 10.04 Race Equality	343
[1] Introduction and Historical Background	343
[2] Government-Mandated Segregation	345
[a] “Separate but Equal”	345
[b] <i>Brown</i> , Its Implications, and Its Implementation	348
[i] <i>Brown</i> and <i>Bolling</i>	348
[ii] <i>Brown</i> and the Destruction of Jim Crow	350
[iii] Enforcing <i>Brown</i> : The Fashioning and Implementation of Judicial Relief	352
[3] Affirmative Action	357
[a] Higher Education	358
[b] Government Employment and Contracting	365
[c] Primary and Secondary Education	371
[d] Concluding Thoughts about Affirmative Action	372
§ 10.05 The Intent Requirement	373
[1] The Basic Doctrine	374
[2] Precursors to the Modern Rule	376
[3] Special Applications of the Intent Requirement	377

[a] Criminal Sentencing	377
[b] Voting	379
[4] The Policy Debate Underlying the Intent Requirement	381
§ 10.06 Equal Protection Today	381
[1] The Roots of Animus Doctrine	382
[2] <i>City of Cleburne v. Cleburne Living Center</i>	383
[3] Sexual Orientation	385
[4] The Animus Doctrine	388
§ 10.07 Equal Protection Fundamental Rights	389
[1] Introduction	389
[2] Access to the Justice System	390
[3] An Equal Right to Vote	392
[a] The Basic Principle	392
[b] Other Barriers to Political Participation: Ballot Access and Gerrymandering	395
[4] The Right to Travel	397
[5] Education	399
Chapter 11 · Freedom of Speech, Press, and Assembly	403
§ 11.01 The Fundamentals of Free Speech Law	403
[1] Introduction	403
[2] Categories of Unprotected and Partially Protected Speech	405
[a] Incitement	405
[i] The Early Cases	405
[ii] Increased Toleration and Renewed Repression	410
[iii] <i>Brandenburg</i> and the Modern Rule	412
[b] Fighting Words and Other Offensive Speech	414
[c] Libel, Defamation and Other Speech Torts	415
[i] Libel and Defamation	416
[ii] Other Speech Torts	420
[d] Sexual Speech	422
[i] Obscenity	422
[ii] Non-Obscene Pornography	426
[iii] The Special Case of Child Pornography	427
[e] Commercial Speech	428
[i] The General Doctrine	428
[ii] Professional Speech	434
[iii] The Future of Commercial Speech Doctrine	436
[f] Identifying and Understanding Unprotected Categories of Speech	437
[i] The Methodology for Identifying Unprotected Categories of Speech	437
[ii] The Consequences of Speech Being Unprotected	440

[3] The Content-Neutrality Rule	442
[a] The Basic Rule	442
[b] Identifying Content Discrimination	443
[c] Content versus Viewpoint Discrimination	445
[4] Analysis of Content-Neutral Laws	446
[a] Time, Place, and Manner Restrictions	447
[b] Regulation of Expressive Conduct	450
[c] Secondary Effects Regulation	453
[5] Forum Doctrine	455
[a] The Foundations of Forum Doctrine	455
[b] The Modern Rule	456
[c] Government Power to Restrict Speech in Public Forums	459
§ 11.02 Special Doctrines in the System of Freedom of Expression	461
[1] The Doctrine against Prior Restraints	462
[2] Vagueness and Overbreadth	468
[3] Compelled Expression	471
[a] Compelled Speech	471
[b] Compelled Subsidization of Speech	476
[4] Freedom of Association	479
[5] Campaign Finance	482
[a] <i>Buckley v. Valeo</i>	482
[b] Corporate and Union Campaign Speech	486
[c] Disclosure Provisions	490
[d] Continued Debate over Contribution Limits	491
[6] Government Spending on Speech	494
[a] Government Funding of Private Speech	494
[b] Government Speech	500
[7] Speech in Custodial or Proprietary Government Contexts	504
[a] Students' Speech Rights	504
[b] Government Employees' Speech Rights	507
[i] Speech-Based Claims	507
[ii] Patronage-Based Claims	512
§ 11.03 Government and the Press: Print and Electronic Media	515
[1] Special Protections for the Press?	516
[2] Taxation of the Press	517
[3] The Right to Report on Government Activity	519
[4] The Right to Access Government Activity	521
[5] Protection for the Newsgathering Process	524
[6] Mandated Access to the Media	527
[7] Medium-Specific Standards for Government Regulation	531
[a] Broadcast Media	531
[b] Cable Television	532
[c] The Internet	534

Chapter 12 · Government and Religious Freedom	539
§ 12.01 Competing Approaches: A “Wall of Separation” versus Accommodation	540
§ 12.02 The Establishment Clause	545
[1] Aid to Religious Schools	545
[a] The <i>Lemon</i> Test	545
[b] <i>Lemon</i> ’s Early Applications	548
[c] The Court’s Move toward More Accommodation	552
[2] Government Support for Other Religious Institutions	560
[3] Religious Displays on Government Property	562
[4] School Prayer	569
[5] Religious Instruction	576
[6] Legislative Prayers	577
[7] Religious Exemptions from Generally-Applicable Laws	578
[8] Grants of Government Power to Religious Groups	581
[9] Conclusion	583
§ 12.03 Free Religious Exercise	584
[1] The Meaning and Scope of “Religion”	584
[2] The Scope of Free Exercise Clause Protection	585
[a] The Development of Heightened Protection for Free Exercise	585
[b] The Rise and Decay of Heightened Protection	587
[c] <i>Smith</i> and the Non-Discrimination Rule	590
§ 12.04 The Relationship between the Establishment and Free Exercise Clauses	593
 Chapter 13 · Civil Rights Enforcement	 597
§ 13.01 Congressional Enforcement of the Thirteenth Amendment	597
§ 13.02 Congressional Enforcement of the Fourteenth Amendment	599
§ 13.03 Congressional Enforcement of the Fifteenth Amendment	606
 Chapter 14 · The State Action Requirement	 609
§ 14.01 Performance of a Public Function	611
§ 14.02 Judicial Action	612
§ 14.03 Entanglement	614
§ 14.04 The Continued Fact-Intensiveness of the State Action Doctrine	617
 Constitution of the United States	 621
Table of Cases	637
Index	653

Acknowledgments

I am honored to be taking over this book from John Attanasio and Joel Goldstein, who themselves had taken the reins from Norman Redlich and Bernard Schwartz, the co-authors of the First Edition. While this Fifth Edition reflects some reorganizing and editing in addition to the inevitable updating, the spirit of those earlier editions, and of their authors, remains in the book's basic structure and its insights. The book is surely better for that.

The task of editing a book of this size and scope necessarily requires the work of many hands, eyes, and minds. In writing the Fifth Edition I have had the benefit of extraordinary work by research assistants at Brooklyn Law School: Roger Acosta, Alexis Archer, Parker Brown, Katherine Cassirer, Derek Knight, Cody Laska, and Katherine Powell. It is no exaggeration to say that this book would not have been possible without their meticulous and creative work. I am also grateful to my friends and colleagues at Carolina Academic Press, especially Ryland Bowman, Sean Caldwell, and Linda Lacy, for giving me the chance to take on this project and for their help and encouragement along the way. Many thanks are also due to Keith Moore for excellent editing work. Of course, errors and omissions are my sole responsibility. I welcome any comments, criticisms, and suggestions, at bill.araiza@brooklaw.edu.

William D. Araiza
May, 2020

