Supplement to Gilbert "Constitutional Law" Summary, 31st

July 2017

Page 14: **Insert** after 3d Example:

Example: Congress authorized a special federal court to approve the Attorney General and Director of National Intelligence acquiring foreign intelligence information by surveillance of ***non***-"U.S. persons" (citizens and permanent resident aliens) located outside the country. A group of U.S. persons, including civil rights activists and lawyers, who exchange confidential communications allegedly with persons likely to be objects of such surveillance lack standing to challenge the law's constitutionality on its face. No direct injury to them is either threatened or impending, but rather is *"**highly speculative**."* Nor can they ***create*** such injury by spending money to protect the confidentiality of their communications. Moreover, the statute permits persons to challenge any government use of the surveillance in judicial or administrative proceedings and challenges may also be made by the providers of the electronic communications. [**Clapper v. Amnesty International USA**, 133 S.Ct. 1138 (2013)]

Page 19: **Insert** before para. (8) (a):

Example: Both the Governor and the Attorney General refused to defend an amendment to the state constitution (known as Proposition 8) -- which had passed as a ballot initiative by a voter majority -- even though these state officials continued to enforce Proposition 8. When same-sex couples who wished to marry challenged Proposition 8's constitutionality in an action in federal district court, the district judge allowed Proposition 8's sponsors to intervene and defend it. After the federal district judge held that Proposition 8 was unconstitutional, the sponsors appealed to the Ninth Circuit which certified the question of standing the California Supreme Court. It ruled that the sponsors had standing to defend Proposition 8 under state law, and the Ninth Circuit granted standing to appeal and affirmed the district court's finding of unconstitutionality. The sponsors petitioned the U.S. Supreme Court. *Held*: Under Art. III's "case or controversy" provision, the sponsors had no personal "stake" or 'injury" that was different from the general population, and thus had no standing to assert the interests of the state in federal court. [**Hollingsworth v. Perry**, 133 S. Ct. 2652 (2013)]

Page 19: **Insert** before first Example:

Example: The state legislature had standing to challenge a voters' initiative authorizing an independent commission rather than the state legislature to adopt congressional districts, because there was ***concrete*** injury to the legislature as an institution. [**Arizona State Legislature v. Arizona Independent Redistricting Commission**, 135 U.S. _____ (2015)]

Page 45 **Insert** at bottom

(3) Recess appointments

Article II, Section 2 empowers the President to fill "all Vacancies that may happen during the Recess of the Senate." The purpose of allowing these appointments is to ensure the continued functioning of the government during a Senate recess. "Vacancies" are those that either arise during, or continue to exist during a recess. That has been defined as a break between, or in the midst of, a formal session which must ordinarily be for 10 days or more and must be authorized under the Senate's own rules to permit it to transact business. [**NLRB v. Canning**, 134 S.Ct. _____ (2014)]

Page 46: **Insert** before para. (4); renumber subsequent para. accordingly:

(3) Power to "receive Ambassadors"

Article II, Section 3, stating that the President "shall receive Ambassadors," authorizes the President's ***exclusive*** power to grant formal recognition to foreign countries. Consequently, an Act of Congress that requires the Secretary of State to allow citizens born in Jerusalem to list their place of birth on passports as Israel unconstitutionally infringes on that presidential power. [**Zivotofsky v. Kerry**, 135 S. Ct. _____ (2015)]

Page 131: **Insert** after Para. 3); renumber subsequent paras. accordingly:

4) Percentage of personal property

A government requirement that growers donate some percentage of personal property to the government is a taking. [**Horne v. Department of Agriculture**, 135 S.Ct. _____ (2015) –- rule that raisin growers give government a percentage of their crop for sale or donation to other recipients is a taking]

Page 137: **Insert** after para. (a):

1) Immigration

The Court's ***deference*** to Congress's longstanding practice of regulating immigration prevails over the right to marry, at least when it involved denial of "priority immigration status" to U.S. citizen's Afghan husband. [**Kerry v. Din**, 135 S.Ct. _____ (2015) (opinion of three Justices) –- husband was deemed inadmissible because of "terrorist activities" and evidence that he worked for Taliban in Afghanistan]

Page 148: **Insert** after para. 2; reletter subsequent paras. accordingly:

a. Definition of "arms"

The Second Amendment extends to arms that were not in existence at the time of the founding. [**Caetano v. Massachusetts**, 136 S. Ct. _____ (2016)]

Page 150: **Insert** after para. (b):

(1) IQ limits

A rule that rule that IQ must be 70 or below to bar execution is invalid. It disregards (a) established medical practice, (b) psychiatric and professional studies showing that IQ margin of error is needed so that other evidence of intellectual disability may be considered, and (c) a trend of the vast majority of states. [**Hall v. Florida,** 134 S.Ct. _____ (2014)].

Page 151: **Insert** after para (3):

(a) Burden of proof

The Eighth Amendment requires proof beyond a reasonable doubt that mitigating circumstances outweigh aggravating circumstances. But the existence of mitigating circumstances need ***not*** be proven beyond a reasonable doubt. [**Kansas v. Carr**, 136 S. Ct. – – – (2016)]

Page 163: **Insert** before para. (1); renumber subsequent paras. accordingly:

(1) Government's right not to speak

Just as government cannot compel private speech, private persons cannot force government to convey their messages [**Walker v. Texas Sons of Confederate Veterans**, 135 S.Ct. _____ (2015) –- state rejected a specialty license plate featuring the Confederate flag]

Page 187: **Insert** after para. a:

(1) Trademarks

Denial of a trademark ("The Slants") to a group because its name disparaged a race ("Asians") violates Free Speech [**Matal v. Tam**, 137 S.Ct. _____ (2017)]

Page 205. **Insert** after 2) at bottom:

a) Distinguish

A state law that closes public sidewalks within 35 feet of an abortion clinic to persons, including those who are not "protestors," but who offer "caring consensual" information about abortion alternatives also violates freedom of speech because it is not narrowly tailored. ***However***, a law that specifically bars "obstruction," "intimidation," interference," or "blocking" of access are ***less intrusive*** and thus permissible. [**McCullen v. Oakley**, 134 S.Ct. _____ (2014)]

Page 217: **Insert** after Example at top of page; renumber subsequent paras. accordingly:

(1) Limiting aggregate recipients

A federal statute limiting the aggregate amount of contributions that person may make to all recipients, even though no one recipient gets more than the statutory limit, unduly ***limits political*** speech even under the more lenient "closely drawn" test. Congress has many permissible alternatives, such as requiring disclosure or regulating transfers of contributions among recipients. [**McCutcheon v. Federal Election Commission,** 134 S.Ct. _____ (2014)]

Page 221: **Insert** after para. 3:

(a) Solicitation of funds

State rules that bar judicial candidates from ***personally*** soliciting campaign funds does not violate the First Amendment because its purpose in preserving public confidence in judiciary is ***compelling***, and it is narrowly (although "not perfectly") tailored. Further, a state may reasonably conclude that allowing solicitation by campaign committees creates a lesser risk of undermining public confidence. [**Williams-Yulee v. Florida Bar**, 135 S.Ct. _____ (2015)]

Page 232: **Insert** after para. (a); reletter subsequent para. accordingly:

(b) Outdoor signs

City regulation requiring permits for outdoor signs, but exempting "Political," "Ideological," and "Temporary Directional," signs (and twenty others), regulates content and does not survive ***strict scrutiny***, even though it has a benign purpose and does not target viewpoints, because the city has alternative content neutral methods to handle its safety and aesthetic concerns. [**Reed v. Town of Gilbert**, 135 S.Ct. _____ (2015)]

Page 235 **Insert** after 1)

Exception: A service fee need ***not*** be paid by "personal assistants" of home-care recipients who are almost fully controlled by the recipients. These persons are paid by the state but do not have most benefits of state employees, such as differential pay or union help with grievances. [**Harris v. Quinn,** 134 S.Ct. _____ (2014)]

Page 236 **Insert** at end of note b)

But a government supervisory employee who gives sworn testimony in a judicial proceeding, resulting in an employee's conviction for misusing state funds, does speak as a "***citizen*** on a matter of public concern" that is distinct from any obligation owed to the employer in the scope of ordinary job responsibilities. It is protected speech for which an employee cannot be fired. [**Lane v. Franks**, 134 S.Ct. _____ (2014)]

Page 237: **Insert** after 6)

7) Mistaken sanction by employer because of employee's speech may violate the First Amendment and require payment of damages (under §1983) even if the employer was mistaken about employee's behavior. [**Heffernan v. City of Paterson**, 130 S. Ct. _____ (2016)]

Page 264: **Insert** at end of para. (1):

Similarly, a ***town's*** practice of opening its monthly meetings with a prayer does ***not*** violate the Establishment Clause. The town invited clergy open to ***all creeds*** but, like the community, were ***predominantly*** Christian. They sometimes invoked Jesus Christ and similar phrases. But all others (including atheists) could also participate, and the town later invited Jewish and Baha'i laypersons. A Wiccan priestess also volunteered. *Rationale*: Historical practices and understandings show acceptance of this practice by the Framers and state and local legislatures. Many faiths, even though not agreeing on religious doctrine, also accepted such practice, showing the general community's devotion to prayer and its tolerance and cooperation. Importantly, the town's policy showed no ***sectarian purpose***. Moreover, a different rule would require legislatures and courts to supervise and censor religious speech, which would pose great difficulties in reaching consensus. [**Town of Greece v. Galloway,** 134 S.Ct. _____ (2014)]

Page 267: **Insert** at end of 2d para:

But a state program to dispose of scrap tires may not deny a church's request to use the scraps for resurfacing its school's playground. [**Trinity Lutheran Church of Columbus, Inc. v. Comer,** 137 S.Ct. _____ (2017)]

Page 296: **Insert** after 2d Example:

(a) Qualification of prior decisions

A voter-enacted constitutional amendment, providing that race-based preferences in State University admissions should not be continued, does ***not*** violate equal protection. It did not reflect a ***racial purpose*** nor command or encourage injury on racial minorities. The rationale of several contrary prior decisions (in above Examples) was unnecessary, and itself raises serious concerns because it requires courts to determine which government policies benefit or injure particular racial minorities. [**Scheutte v. BAMN,** 134 S.Ct. _____ (2014)]

Page 310: **Insert** before para. (1); renumber subsequent paras. accordingly:

(1) Same-sex marriage

Although history and tradition are guides, they do not set the Court's outer boundaries, which account for new insights and societal understandings. The right to marry, as protected by the Due Process Clause ***and*** the Equal Protection Clause, extends to certain personal choices central to liberty and autonomy. This includes same sex couples' right to intimate association, which safeguards the couples' children and families. [**Obergefell v. Hodges**, 135 S.Ct. _____ (2015)]

Page 316: **Insert** at end of partial para. at top:

Independent committee's 8.8% population deviation was ***primarily*** in good faith, and not to advantage Democrats. [**Harris v. Arizona Independent Redistricting Commission** 136 S. Ct. _____ (2016)]

Page 317: **Insert** after para. 2):

3) Authority to establish districts

The Elections Clause of the Constitution, Article I, Section 4, Clause 1, which provides that "The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislatures thereof," permits a voters' initiative that authorizes an independent commission to adopt congressional districts. *Rationale*: Legislative functions may include the "people" themselves because the Constitution's animating principle was that the people are the source of all government power. [**Arizona State Legislature v. Arizona Independent Redistricting Commission**, 135 S.Ct. _____ (2015)]

Page 318: **Insert** after para. (d):

1) Permissible population

As a matter of history, precedent and settled practice, state legislative districts may be based on total, rather than voter, population. Rationale: All residents, not just voters, are subject to the legislature's benefits and burdens. [**Evenwel v. Abbott**, 136 S. Ct. _____ (2016)]