# Supreme Court Review
# An Analysis of Recent Decisions Affecting Public Administrators

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Over the past year, a variety of issues related to public administration have been considered by the federal courts. This section of *Policy Perspectives* examines recent federal court decisions of particular significance to public administrators.

## Civil Rights and Homosexual Persons

In perhaps the most controversial and widely analyzed decision of last year's Term, the Supreme Court held invalid an amendment[1] to the Colorado Constitution that prohibited all legislative, executive, or judicial action designed to protect homosexual persons[2] from discrimination.[3] The decision in *Romer v. Evans*[4] is surprising in view of the Court's previous case law concerning homosexuals' civil rights.[5]

The challenged enactment, known as "Amendment 2," was adopted by the citizens of Colorado in a 1992 statewide referendum.[6] This measure was a response to various ordinances[7] passed by state and local entities which prohibited discrimination based on sexual orientation in many transactions and activities, including housing, employment, education, public accommodations, and health and welfare services.[8] Amendment 2 sought to repeal these ordinances to the extent they provided specific legal protection against discrimination on the basis of "homosexual, lesbian or bisexual orientation, conduct, practices or relationships."[9] Further, the amendment prohibited all legislative, executive or judicial action at every level of Colorado government designed to protect homosexual persons from discrimination.[10]

Shortly after the adoption of Amendment 2, homosexual persons (some of them government employees), municipalities, and others brought an action in state court challenging its validity.[11] The trial court granted a preliminary injunction to stay enforcement of Amendment 2 and an appeal was taken to the Supreme Court of Colorado.[12] The State Supreme Court sustained the preliminary injunction and ruled that the amendment was to be subjected to strict scrutiny because it interfered with the fundamental right of homosexual persons to participate in the political process.[13] On remand, the trial court rejected the State's arguments that Amendment 2 was narrowly tailored to serve compelling governmental interests, and therefore satisfied strict scrutiny.[14] The trial court enjoined enforcement of the amendment, and the Supreme Court of Colorado affirmed the ruling.[15] The Supreme Court granted certiorari.[16]

Justice Kennedy's opinion for the Court began with an admonition that the United States Constitution "neither knows nor tolerates classes among citizens."[17] This principle, enforced by the Equal Protection Clause of the Fourteenth Amendment,[18] requires "a commitment to the law's neutrality where the rights of persons are at stake."[19] Justice Kennedy immediately rejected the State's principal argument that Amendment 2 would place homosexual persons in the same position as all other persons, and

merely denied homosexuals "special rights."[20] In reality, according to Justice Kennedy, the amendment would effect a significant and adverse change in the legal status of homosexual persons.[21] Homosexual persons, as a result of state action, would be placed into a distinctive and disadvantaged class with respect to both public and private relationships.[22]

Justice Kennedy emphasized that Amendment 2 would impose a broad disability upon homosexuals as a class, depriving them of specific legal protection against discrimination.[23] For example, one of the governmental protections rescinded and forbidden by the amendment is a Colorado executive order[24] which prohibits employment discrimination against "'all state employees, classified and exempt' on the basis of sexual orientation."[25] Amendment 2 also would repeal various provisions prohibiting such discrimination by state colleges.[26]

Further, Justice Kennedy feared that the amendment's reach would not be limited to laws specifically enacted for the benefit of homosexual persons.[27] Amendment 2's broad language might deprive homosexuals of general legal protection against arbitary discrimination in both public and private contexts.[28] In the course of administering general anti-discrimination laws, a public official's determination that homosexuality is an impermissible basis for decision would itself amount to a policy of prohibiting discrimination based on sexual orientation, and therefore would be invalid under Amendment 2.[29]

Although Justice Kennedy acknowledged the burdens imposed on homosexual persons, he declined to examine Amendment 2 under a heightened standard of review. The Supreme Court never has held that homosexuals are a suspect or quasi-suspect class, and heightened judicial scrutiny traditionally has been reserved for classifications based on race, national origin, alienage, gender and illegitimacy. However, Justice Kennedy found that Amendment 2 could not satisfy even the conventional "rational basis" standard of review, let alone the rigors of strict scrutiny. Justice Kennedy concluded that the amendment's classification of homosexuals did not bear a rational relation to a legitimate governmental interest, but rather was based on a form of animosity toward homosexual persons.[30] Therefore, Amendment 2 was a violation of the Equal Protection Clause.[31]

Justice Scalia, in a bitter dissent, charged that the majority opinion "has no foundation in American law, and barely pretends to."[32] Rather, Justice Scalia argued, striking down Amendment 2 was "an act, not of judicial judgment, but of political will."[33] Justice Scalia chastised the majority for contradicting *Bowers v. Hardwick*,[34] for taking sides in an ongoing "cultural debate,"[35] and for employing a "novel and extravagant"[36] rationale which has no basis in relevant case law or the constitutional text.[37]

*Romer v. Evans* already is widely regarded as a significant victory for advocates of homosexuals' rights. A decade earlier, in *Bowers*, the Court had found that there was no basis for judicial creation of a fundamental right that would protect homosexual activity from criminal sanction.[38] Yet the *Romer* Court has made clear that discrimination against homosexual persons as a class violates the Equal Protection Clause unless the discrimination can be linked to a permissible governmental objective. Thus, a bare desire to harm homosexuals or prevent homosexual behavior will be insufficient, without more, to justify discriminatory measures in the future.[39]

## Redistricting and Apportionment

In *Bush v. Vera*,[40] the Supreme Court considered a racial gerrymandering challenge to a state's congressional redistricting decisions.[41] Following the 1990 census, it was determined that Texas was entitled to three additional congressional seats.[42] The Texas Legislature proposed a congressional redistricting plan which created three new majority-minority districts.[43] The plan: (1) created District 30, a new majority-African-American district; (2) reconfigured the pre-existing District 18, which made it a majority-African-Amerian district; and (3) created District 29, a new majority-Hispanic district.[44] The redistricting plan was successfully challenged by six Texas citizens in federal district court.[45] The district court ruled that the bizarrely shaped Districts 18, 29 and 30 constituted racial gerrymanders in violation of the Fourteenth Amendment.[46] An appeal by the Governor of Texas, among others, was taken to the Supreme Court.[47]

From a practical standpoint, the outcome of the case would depend on whether the redistricting plan was subject to strict scrutiny.[48] Three terms earlier, in *Shaw v. Reno*,[49] the Court had held that strict scrutiny applies

where "redistricting legislation ... is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles."[50] The Court went a step further in *Miller v. Johnson*[51] by invoking strict scrutiny where "race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines."[52] Application of strict scrutiny in cases like these truly can be described as "strict in theory, fatal in fact."[53]

The district court had found substantial direct evidence of the Texas legislature's race-based motivations in enacting the redistricting plan.[54] Although some legitimate redistricting principles (e.g., incumbency protection[55]) were reflected in the plan, Texas apparently had set out with a specific intention to create majority-minority districts.[56] This goal was achieved by neglecting traditional districting criteria (e.g., compactness) and manipulating district lines based on detailed demographic and political information.[57] Based on these findings, Justice O'Connor's majority opinion concluded that traditional, race-neutral districting criteria had been "subordinated to race."[58] Consequently, Justice O'Connor adhered to the Court's previous ruling in *Miller* and invoked strict scrutiny.[59] Justice O'Connor concluded that none of the districts were narrowly tailored to further a compelling governmental interest.[60] The redistricting plan could not be saved by any of the State's justifications, including a purported governmental interest in remedying past and present racial discrimination.[61] Justice O'Connor noted that the alleged dilution of minority votes resulting from racial bloc voting *can* constitute a compelling interest;[62] however, race-based districting is permissible only if "the State employ[s] sound districting principles,"[63] and this possibility was foreclosed by the Court's finding that the Texas plan failed to meet this requirement.[64]

It is important to remember that strict scrutiny "does not apply merely because redistricting is performed with consciousness of race,"[65] nor is it invoked in all instances where majority-minority districts are intentionally created.[66] Political gerrymanders are not automatically subject to strict scrutiny.[67] To determine whether strict scrutiny should be applied to a redistricting plan, the Supreme Court apparently has settled on the test articulated in *Miller*: strict scrutiny will be invoked if, and only if, race is "the predominant factor motivating the legislature's decision."[68] Even if factors other than race are considered in drawing district lines, a heightened standard of review will be utilized if race is the legislature's *dominant* interest in making congressional redistricting decisions.

## First Amendment Issues and Government Contractors

Questions arose last Term concerning basic First Amendment issues raised by government contractors. In a pair of companion cases, *Board of Comm'rs, Wabaunsee Cty. v. Umbehr* [69] and *O'Hare Truck Service, Inc. v. City of Northlake,*[70] the Supreme Court addressed these topics.

In *Umbehr*, the Court considered whether independent contractors are protected from termination of at-will public contracts in retaliation for their exercise of First Amendment rights.[71] Umbehr's exclusive trash hauling contract with Wabaunsee County, Kansas was terminated in retaliation for Umbehr's criticism of the three-member governing body of the county.[72] Umbehr had addressed meetings of the Board of County Commissioners and written newspaper editorials concerning the county's landfill user rates, the cost of obtaining official documents from the county, the Board's alleged mismanagement of taxpayers' money, and other issues.[73] In response to this criticism, the Board terminated Umbehr's public contract by a 2 to 1 vote.[74] Umbehr then sued the two majority Board members in federal district court, alleging that his contract had been terminated based on his exercise of First Amendment rights.[75] The district court granted summary judgment for the Board members, having concluded that Umbehr, as an independent contractor, was not entitled to the First Amendment protection afforded to public employees.[76] The United States Court of Appeals for the Tenth Circuit reversed, holding that the First Amendment does protect independent contractors from retaliatory governmental action, and that a balancing test should be used to determine the extent of this protection.[77] The Supreme Court granted certiorari in order to resolve this disagreement over whether, and to what extent, independent contractors are entitled to First Amendment protection.[78]

Although the Court had not previously considered whether the First Amendment protects independent contractors from termination in retaliation for the contractors' speech, it had examined this issue in the similar context of government employees' rights.[79] Justice O'Connor, writing for the majority, turned to the Court's government employment precedents for guidance in resolving the instant question.[80] On numerous occasions, the Court had ruled that government employees enjoy substantial protection from termination based on the exercise of their First Amendment rights.[81] Although there is no guarantee of an absolute freedom of expression, an employee may not be terminated because he or she spoke on matters of public concern.[82] A government employee may successfully challenge a termination by demonstrating that: (1) the speech at issue is constitutionally protected and (2) it was a "substantial" or "motivating factor" in the employee's dismissal.[83] The burden then shifts to the government employer to prove that the termination decision would have been made regardless of the employee's expressive activity.[84] The Court also has made clear that a retaliatory dismissal may be justified if the government's action is based on legitimate countervailing interests.[85] In such a case, courts employ a balancing test to determine the extent of goverment employees' First Amendment rights.[86] In *Pickering v. Board of Ed. of Township High School Dist. 205*,[87] the Court held that these rights depend on the balance between the government employee's speech and the government employer's interest in the efficiency of its services.[88] The process of striking this balance is known as the *Pickering* test.

For the purpose of resolving the protection issue in *Umbehr*, Justice O'Connor declined to differentiate between government employees and independent contractors.[89] Justice O'Connor emphasized that a brightline rule distinguishing government employees from independent contractors would give government employers *carte blanche* to terminate public contracts simply because the independent contractor exercised his or her First Amendment rights.[90] After considering the arguments for and against extending First Amendment protection to independent contractors, Justice O'Connor found that all parties "can be accommodated by applying [the] existing framework for government employee cases to independent contractors."[91] Thus, the government employer retains the ability to terminate a public contract so long as it does not do so in retaliation for the independent contractor's exercise of First Amendment freedoms.[92] The government's legitimate interests for terminating a contract will be assessed in accordance with the fact-specific and deferential *Pickering* test.[93] Justice O'Connor indicated that proper application of this deferential balancing test should alleviate the Board's and the dissenting Justices' concern that government employers would be unduly burdened by excessive litigation initiated by independent contractors.[94] By adopting this approach, courts can be sensitive to the needs of government employers and, at the same time, the right of independent contractors to engage in expressive activity will not be neglected.[95]

Similar issues were addressed in *O'Hare*, as the Court considered whether an independent contractor's government contract may be terminated in retaliation for the contractor's refusal to comply with an official's demand for political support.[96] O'Hare Truck Service had provided towing services to the city of Northlake, Illinois for at least thirty years.[97] Problems arose in 1993, however, when O'Hare declined to make a financial contribution to the reelection campaign of Northlake's mayor, and instead openly supported the mayor's opponent.[98] In retaliation, O'Hare was removed from the list of towing companies available to provide service to the local government.[99] O'Hare sued unsuccessfully in federal district court, alleging a violation of First Amendment rights.[100] The district court dismissed O'Hare complaint.[101] The Court of Appeals affirmed, stating that "it should be up to the Supreme Court" to determine whether the protections generally afforded to public employees against being discharged for refusing to support a political party or its candidates also extends to independent contractors.[102] The Supreme Court granted certiorari to resolve this issue.[103]

As in *Umbehr*, the Court looked to government employment precedents to determine whether O'Hare was entitled to First Amendment protection. Twenty years ago, in *Elrod v. Burns*,[104] a plurality of Justices found that penalizing a public employee for exercising his or her right of political association is unconstitutional.[105] Four years later, in *Branti v. Finkel*,[106] the Court reaffirmed its holding in *Elrod* and stated that public employees are protected from termination based solely upon political

affiliation.[107] The sole exception to this rule would be a case in which the government employer could demonstrate that political affiliation is an appropriate prerequisite for a particular position.[108]

Justice Kennedy explained that, although governmental units enjoy broad discretion in formulating contracting policies, the protections of *Elrod* and *Branti* extend to situations where government employers retaliate against a contractor for the exercise of political association rights.[109] As in *Umbehr*, the Court declined to distinguish between independent contractors and government employees for the purpose of acknowledging an actionable First Amendment claim.[110]

Justice Kennedy concluded that the decision to terminate a public contract may be justified so long as it based on legitimate policy considerations.[111] These considerations might include interests of economy or the need to maintain stability, reward good performance, contract with reliable sources, or ensure an uninterrupted supply of goods or services.[112] Government officials retain significant discretion in making such decisions.[113] However, the action to terminate a public contract may not be related to an independent contractor's exercise of speech or associational rights,[114] except in the rare situation where these actions would impair the contractor's job performance.

The Supreme Court, by 7-2 votes in both *Umbehr* and *O'Hare*, has unequivocally acknowledged the existence of independent contractors' First Amendment protections in dealing with government employers. It is important to note, however, that these protections are limited to terminations of public contracts and presumably have no bearing on contract bids or applications.[115]

## Freedom of Expression and English As Official State Language

Recently, the Supreme Court ruled that a challenge to State constitutional provisions which make English "the official language of the State of Arizona"[116] was moot. Article XXVIII of the Arizona Constitution requires the State to "act in English and in no other language,"[117] and enables persons who reside or do business in Arizona "to bring suits to enforce the Article."[118] In *Arizonans for Official English v. Arizona*,[119] Yniguez, a government employee who used both English and Spanish in her work, sued the State and its governor in federal district court on First Amendment grounds. Yniguez feared that a broad reading of Article XXVIII might require her to face discharge or other discipline if she continued to use Spanish while serving the State.[120] The court dismissed the case and denied the motion of Arizonans for Official English (AOE) and its chairman (supporters of the ballot initiative which became Article XXVIII) to intervene as party appellants.[121] The day after AOE filed an appeal, Yniguez resigned her position.[122] On appeal, the Ninth Circuit ruled that AOE and its chairman did have standing to intervene in order to support the law's constitutionality, and that Yniguez was entitled to nominal damages from the State.[123]

The Supreme Court did not express a view on the correct interpretation of Article XXVIII or on its constitutionality. Instead, Justice Ginsburg's opinion for a unanimous Court focused on whether AOE and its chairman had standing to pursue appellate review. Justice Ginsburg concluded that, as initiative proponents, AOE and its chairman lacked standing to participate in the appeal in the place of Yniguez.[124] The Court has never recognized initiative proponents as qualified litigants pursuant to Article III's "case or controversy" requirement. The Ninth Circuit's judgment was vacated and the case dismissed.[125]

## Section 504(a) of Rehabilitation Act and Government's Sovereign Immunity Against Monetary Damages Awards

Section 504(a) of the Rehabilitation Act of 1973[126] prohibits discrimination on the basis of disability "under any program or activity conducted by any Executive agency."[127] The Act creates a private right of action against federal agencies for instances of such discrimination.[128] In *Lane v. Pena*,[129] however, the Supreme Court held that Congress has not waived the federal Government's sovereign immunity against monetary damages awards for § 504(a) violations.[130]

In 1991, Lane entered the United States Merchant Marine Academy.[131] Although Lane passed a physical examination conducted by the Department of Defense, he later was diagnosed by a private physician as having diabetes mellitus.[132] Lane reported this diagnosis to the Academy's

medical staff.[133] Following a hearing to determine Lane's "medical suitability" to remain at the Academy, Lane was separated from the institution on the ground that diabetes was a "disqualifying condition" which rendered him ineligible to be commissioned for service in the Navy/Merchant Marine Reserve Program or as a Naval Reserve Officer.[134] Lane challenged the separation in the United States District Court for the District of Columbia, alleging that removal from the Academy solely on the basis of his diabetes was a violation of § 504(a) of the Rehabilitation Act.[135] The district court granted summary judgment in favor of Lane and ordered his reinstatement; it also ruled that Lane was entitled to a compensatory damages award against the Government for its violation of § 504(a).[136] However, prior to resolution of the specific amount of damages due, the Court of Appeals for the District of Columbia ruled in *Dorsey v. United States Dept. of Labor*[137] that Congress had not waived the Government's sovereign immunity against monetary damages awards for such violations.[138] In light of this ruling, Lane was denied a compensatory damages award on the ground of sovereign immunity.[139] The Supreme Court granted certiorari to resolve disagreement in the lower courts on the question of whether Congress had, in fact, waived the Government's sovereign immunity against monetary damages awards for § 504(a) violations.[140]

Justice O'Connor's opinion for the Court reflects the importance of the Government's interest in preserving its sovereign immunity. This concept of sovereign immunity evolved from the common law doctrine that "the king could do no wrong."[141] American courts adopted this doctrine, thereby preventing suits against the Government without the consent of Congress.[142]

Prior cases involving purported waivers of sovereign immunity established principles which guided the majority's reasoning in *Lane*. First, a waiver of sovereign immunity must be "unequivocally expressed in statutory text."[143] Congressional intent to create such a waiver will not be implied,[144] and legislative history cannot supply a waiver that is not clearly provided by a statute itself.[145] Second, the scope of a waiver of sovereign immunity is to be strictly construed in favor of the Government.[146] Third, when considering a purported waiver of sovereign immunity, the Court will resolve any ambiguities in favor of immunity.[147]

In *Lane*, the Court's adherence to these principles never was in doubt. Rather, the outcome would depend upon whether the Rehabilitation Act included an unambiguous, textual expression of intent to establish a waiver of the Government's sovereign immunity for § 504(a) violations. Justice O'Connor found that the requisite unequivocal waiver of immunity was lacking in the relevant statutory provisions.[148] Although, as Lane pointed out, § 505(a)(2) of the Act provides that monetary damages awards are available for violations of § 504(a) "by any recipient of Federal assistance or Federal provider of such assistance,"[149] this provision does not mention "programs or activities conducted by any Executive agency,"[150] which is the language used by Congress in § 504(a) itself.[151] Justice O'Connor explained that the reference to "federal providers" of financial assistance in § 505(a)(2) could not, without more, establish a waiver of sovereign immunity beyond the narrow category of § 504(a) violations committed by agencies which do, in fact, act as such providers.[152] Justice O'Connor noted that the Department of Transportation is not a "federal provider" of financial assistance with respect to its administration of the Merchant Marine Academy.[153] Further, based on the Court's established practice of narrowly construing purported waivers of sovereign immunity, Justice O'Connor rejected Lane's contention that liability under § 505(a)(2) should extend to any act of an agency that serves as a "federal provider" of financial assistance in any context.[154] In addition, Justice O'Connor rejected Lane's alternative argument that the "equalization provision" of § 1003 of the Rehabilitation Act Amendments of 1986 reflects congressional intent to equalize the remedies available against all defendants for § 504(a) violations.[155]

For these reasons, Justice O'Connor concluded that Congress did not intend to create a waiver of the Government's sovereign immunity against monetary damages awards for § 504(a) violations.[156] Therefore, a plaintiff's private right of action against a federal agency for disability discrimination under § 504(a) is limited to equitable remedies.[157]

## Notes

[1] The amendment read, in pertinent part:

"No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination."

Colo. Const., Art. II, § 30b (1996).

[2] For the purposes of this article, the terms "homosexual persons"and "homosexuals" refer to homosexual, lesbian and bisexual persons.

[3] 116 S. Ct. at 1623.

[4] 116 S. Ct. 1620 (1996).

[5] *See Bowers v. Hardwick*, 478 U.S. 186 (1986) (upholding state laws criminalizing homosexual conduct).

[6] 116 S. Ct. at 1623.

[7] *See* Denver, Colo., Rev. Mun. Code art. IV, §§ 28-91 to -116 (1991) (prohibiting discrimination in employment, public housing and public accommodations on the basis of sexual orientation); Boulder Rev. Code § 12-1-2 to -4 (1987) (same); Aspen, Colo., Mun. Code § 13-98 (1977) (same); Boulder Rev. Code § 12-1-1 (1987) (defining "sexual orientation" as "the choice of sexual partners, i.e., bisexual, homosexual or heterosexual");; Denver Rev. Municipal Code, Art. IV § 28-92 (1977) (defining "sexual orientation" as "[t]he status of an individual as to his or her heterosexuality, homosexuality or bisexuality").

[8] 116 S. Ct. at 1623.

[9] Colo. Const., Art. II, § 30(b) (1996).

[10] 116 S. Ct. at 1623.

[11] *Id.* at 1624.

[12] *Id. See Evans v. Romer*, 854 P.2d 1270 (Colo. 1993) (*Evans I*).

[13] *Id.*

[14] *Id.*

[15] *Id. See Evans v. Romber*, 882 P.2d 1335 (Colo. 1994) (*Evans II*).

[16] *Id.*

[17] *Id.* at 1623 (*quoting Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

[18] U.S. Const. amend. XIV.

[19] 116 S. Ct. at 1623.

[20] *Id.* at 1624.

[21] *Id.* at 1625.

[22] *Id.*

[23] *Id.*

[24] Colorado Executive Order D0035 (1990).

[25] 116 S. Ct. at 1626.

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.* at 1627-28.

[31] *Id.* at 1629.

[32] *Id.* at 1637.

[33] *Id.*

[34] *Id.* at 1629.

[35] *Id.*

[36] *Id.* at 1637.

[37] *Id.* at 1630, 1633.

[38] *See generally Bowers*, 478 U.S. 186.

[39] *See, e.g.*, Cass R. Sunstein, "The Supreme Court 1995 Term: Foreword: Leaving Things Undecided," 110 HARV. L. REV. 6, 68 (Nov. 1996).

[40] 116 S. Ct. 1941 (1996).

[41] *Id.* at 1950.

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.* at 1951.

[46] *Id.* at 1951. *See Vera v. Richards*, 861 F. Supp. 1304 (1994).

[47] 116 S. Ct. at 1951.

[48] *Id.*

[49] 509 U.S. 630 (1993).

[50] *Id.* at 642.

[51] 115 S. Ct. 2475 (1995).

[52] *Id.* at 2486.

[53] This phrase often is repeated, by commentators and Supreme Court Justices themselves, to illustrate the difficulty of overcoming the strict scrutiny standard of review.

[54] 116 S. Ct. at 1952.

[55] *Id.* The Supreme Court has recognized incumbency protection as a legitimate districting objective. *See Karcher v. Daggett*, 462 U.S. 725, 740 (1983).

[56] 116 S. Ct. at 1953.

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] *Id.* at 1962-3.

[61] *Id.*

[62] *Id.* at 1963

[63] 509 U.S. at 657.

[64] 116 S. Ct. at 1963.

[65] *Id.* at 1951. *See* 509 U.S. at 646.

[66] 116 S. Ct. at 1951.

[67] *See Davis v. Bandemer*, 478 U.S. 109, 132 (1986) ("[U]nconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole.")

[68] 115 S. Ct. at 2488.

[69] 116 S. Ct. 2342 (1996).

[70] 116 S. Ct. 2353 (1996).

[71] 116 S. Ct. at 2345.

[72] *Id.*

[73] *Id.*

[74] *Id.*

[75] *Id.* at 2345-6.

[76] *Id.* at 2346. *See Umbehr v. McClure*, 840 F. Supp. 837, 839 (D.Kan. 1993).

[77] 116 S. Ct. at 2346. *See Umbehr v. McClure*, 44 F.3d 876, 883 (C.A.10 1995).

[78] *Id.*

[79] *Id.*

[80] *Id.* at 2347.

[81] *See Perry v. Sinderman*, 408 U.S. 593, 597 (1972) (holding that government "may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech" even if the person has no entitlement to the benefit); *Wieman v. Updegraff*, 344 U.S. 183 (1952) (holding that government employees may not be terminated for refusing to take a political affiliation oath); *Keyishian v. Board of Regents of Univ. of State of N.Y.*, 385 U.S. 589 (1967) (holding that government employees may not be terminated for publicly criticizing their employer's policies); *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410 (1979) (holding that government employees cannot be dismissed for criticizing prominent public figures).

[82] 116 S. Ct. at 2347. To be protected, the speech must be related to a matter of public concern. The Court previously has held that an employee's speech regarding purely private employment matters is not constitutionally protected. *Connick v. Myers*, 461 U.S. 138, 146 (1983).

[83] 116 S. Ct. at 2347.

[84] *Id. See Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274, 287 (1977).

[85] 116 S. Ct. at 2347.

[86] *Id.*

[87] 391 U.S. 563 (1968).

[88] *Id.* at 568.

[89] 116 S. Ct. at 2348.

[90] *Id.* at 2349.

[91] *Id.* at 2348.

[92] *Id.*

[93] *Id.* Justice O'Connor pointed out, however, that the government employer is entitled to deference only when it acts in accordance with its interest as a contractor. If the government employer exercises the power to terminate in its capacity as a citizen, in response to the independent contractor's political speech, the decision to terminate will be subjected to heightened judicial scrutiny. *Id.* at 2349.

[94] *Id.* at 2348.

[95] *Id.* at 2349.

[96] *Id.* at 2355.

[97] *Id.* at 2356.

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] *Id.*

[103] *Id.*

[104] 427 U.S. 347 (1976).

[105] *Id.* at 359 ("The threat of dismissal for failure to provide [support for the employer's favored political party] unquestionably inhibits protected belief and association, and dismissal for failure to provide support only penalizes its exercise.").

[106] 445 U.S. 507 (1980).

[107] *Id.* at 515 ("[I]f the First Amendment protects a public employee from discharge based on what he has said, it must also protect him from discharge based on what he believes.").

[108] *Id.* at 518.

[109] 116 S. Ct. at 2355.

[110] *Id.* at 2359.

[111] *Id.* at 2360.

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] 65 U.S.L.W. 2274 (Oct. 29, 1996).

[116] ARIZ. CONST. Art. XXVIII § 1 (1996).

[117] *Id.* § 3(1)(a) (1996).

[118] *Id.* § 4 (1996).

[119] 1997 U.S. LEXIS 1455 (March 3, 1997).

[120] *Id.* at *1, *2.

[121] *Id.* at *3.

[122] *Id.* at *3.

[123] *Id.* at *3.

[124] *Id.* at *5.

[125] *Id.* at *66.

[126] 87 Stat. 355, 29 U.S.C. § 791 *et seq.* (1988).

[127] Section 504(a) of the Act provides that "no otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service." *Id.* at § 794(a).

[128] 65 U.S.L.W. 2397 (Dec. 17, 1996).

[129] 116 S. Ct. 2092 (1996).

[130] *Id.* at 2100.

[131] The United States Merchant Marine Academy is a federal service academy administered by the Maritime Administration, an organization within the Department of Transportation. *Id.* at 2095.

[132] *Id.*

[133] *Id.*

[134] *Id.*

[135] *Id.*

[136] *Id.*

[137] 309 U.S. App. D.C. 396, 41 F.3d 1551 (1994).

[138] 116 S. Ct. at 2095-6. The appellate court denied compensatory damages due to the absence of an "unequivocal expression" in § 504(a) of congressional intent to waive sovereign immunity as to monetary damages, and the well-established rule that such waivers may not be implied. *Id.* at 2096. *See, e.g., United States v. Nordic Village, Inc.*, 503 U.S. 30, 33-34, 37 (1992); *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95 (1990).

[139] 116 S. Ct. at 2096.

[140] *Id.*

[141] Brian P. Cain, *Military Medical Malpractice and the Feres Doctrine*, 20 GA. L. REV. 497, 499 (Winter 1986).

[142] *Id. See Federal Housing Administration v. Burr*, 309 U.S. 242, 244 (1940) (holding that "the United States cannot be sued without its consent").

[143] 116 S. Ct. at 2096. *See, e.g., Nordic Village*, 503 U.S. 30, 33-34, 37.

[144] 116 S. Ct. at 2096. *See, e.g., Irwin*, 498 U.S. 89, 95.

[145] 116 S. Ct. at 2097. *See, e.g., Nordic Village*, at 37.

[146] 116 S. Ct. at 2096.

[147] *Id. See, e.g., United States v. Williams*, 115 S. Ct. 1611, 1616 (1995); *Library of Congress v. Shaw*, 478 U.S. 310, 318 (1986); *Lehman v. Nakshian*, 453 U.S. 156, 161 (1981).

[148] 116 S. Ct. at 2097.

[149] 29 U.S.C. § 794(a)(2) (1988).

[150] *Id.* at § 794.

[151] 116 S. Ct. at 2097.

[152] *Id.*

[153] *Id.* at 2098.

[154] *Id.*

[155] This argument was rejected because § 1003 is "susceptible of at least two interpretations other than the across-the-board levelling of liability and remedies that Lane proposes." *Id.* at 2100. Thus, Justice O'Connor concluded that § 1003 "is not so free from ambiguity that we can comfortably conclude, based thereon, that Congress intended to subject the Federal Government to awards of monetary damages for violations of § 504(a) of the Act." *Id.*

[156] *Id.*

[157] 65 U.S.L.W. 2397 (Dec. 17, 1996).