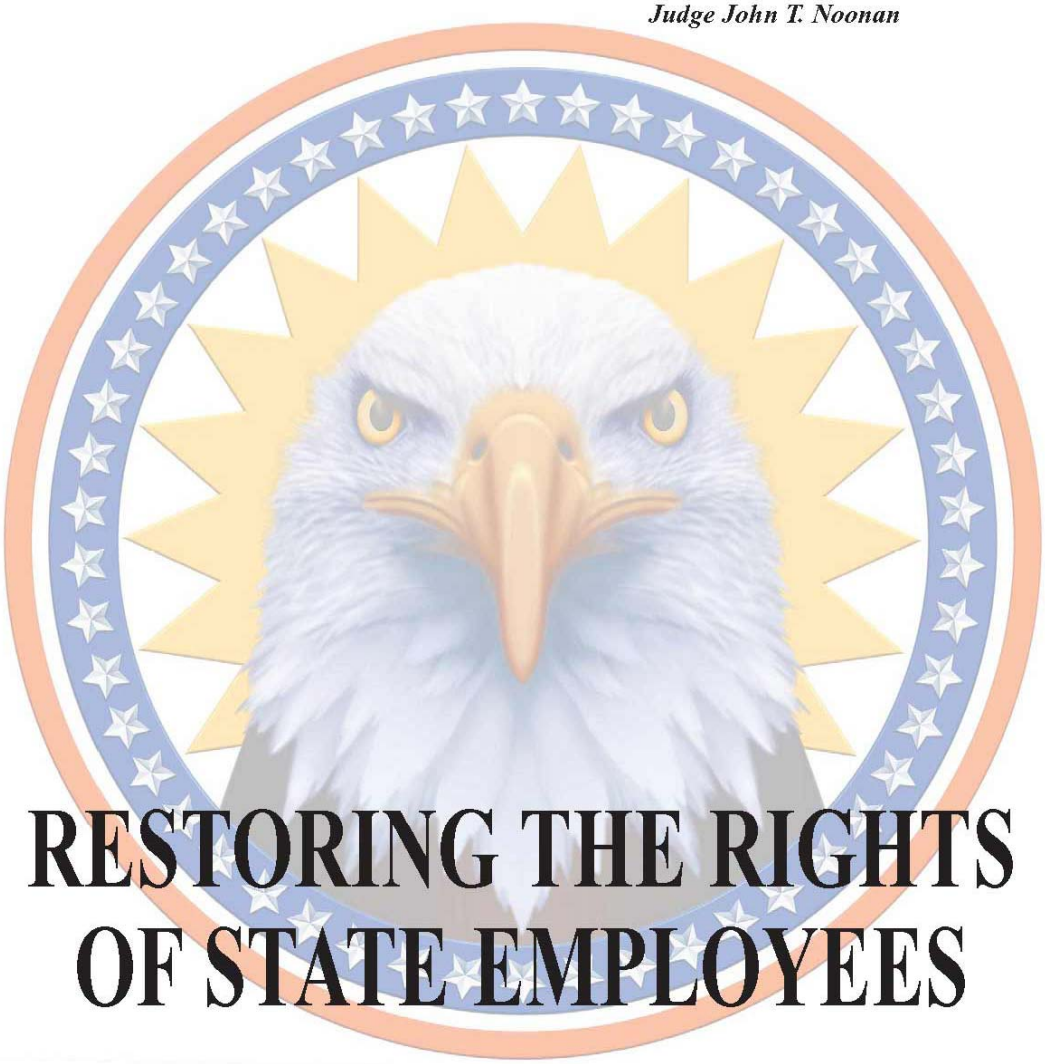
"The sovereign remedy for ills in a democracy is exploration and exposition of a problem, leaving it to the good sense of those who can effect its solution to take the necessary steps."

Judge John T. Noonan



RESTORING THE RIGHTS OF STATE EMPLOYEES

A Report from United University Professions' Human and Civil Rights Committee

Prepared by Laudelina Martinez and Sara D. Knapp, with the assistance of the committee

Albany, New York July 2003

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ACKNOWLEDGMENTS

First and foremost, the committee would like to express its gratitude to Laudelina Martinez, who did significant research for the committee and who wrote the first draft of this report, and to Sara D. Knapp for her research and writing assistance. Addressing the serious legal and political issues facing state employees was not an easy task and translating them into readable, engaging prose was a challenge. The result is a report that brings home the human consequences of the seemingly abstract concepts of state sovereignty and the 11th Amendment. We are fortunate to have had the talents of a writer whose research skills were matched by her interest in the effect of politics and legal decisions on the everyday lives of state workers. This report deserves the attention of all state employees and those who represent them. The issues deserve the attention of everyone concerned about the future of our nation.

In gathering information, as well as monitoring and interpreting U.S. Supreme Court decisions, the committee was fortunate to have guidance from a well-informed and highly regarded authority. David J. Strom, In-house Counsel for the American Federation of Teachers, has generously forwarded information to us and responded to questions. He made two presentations to the committee and interested attendees of UUP Delegate Assemblies on Sept 22, 2000, and May 11, 2001.

In interpreting New York State law and the effects of Supreme Court decisions on New York State employees, the Committee was fortunate to have been able to meet twice with James Sandner, New York State United Teachers General Counsel. Mr. Sandner met with the Committee September 24, 2001 to answer general questions and to learn about the Committee's concerns so that he could later address them. He met with the committee again on May 3, 2002. His presentation and willingness to answer questions were much appreciated. His expertise in New York State law and in labor law and contract issues was invaluable to the committee.

The committee also wishes to thank UUP President William Scheuerman for support, encouragement, helpful suggestions and for making it possible for us to meet with David Strom and James Sandner. We want to thank the UUP Executive Board for the charge and support, without which this work would not have been possible. We especially appreciate the dedication to our cause by Executive Board Member Michael Smiles, who attended nearly every committee meeting.

We thank Phil Smith and Patty Bentley, who carried our recommendations to the Negotiations Committee and to the Legislation Committee, respectively. We are grateful to Tom Kriger, UUP Director of Research/Legislation, for working with us at every turn, for strategic and

technical advice and, finally, for review and editing this report. For meeting with us and for advice on contract issues and wise observations on many things, thanks to Tina Kaplan, UUP's Director of Field Services. Thanks are also due to NYSUT's Neil Foley, Peter Martineau and Tony Wildman for meeting with us and helping us in our quest for information regarding New York's laws and collective bargaining alternatives.

EXECUTIVE SUMMARY

In 2001, the UUP Executive Board charged the Human and Civil Rights Committee to prepare a report on the impact of recent U. S. Supreme Court decisions on UUP members' rights. In a series of well-publicized cases beginning in 1999 — in which individual states were accused of failing to comply with federal laws such as the Age Discrimination in Employment Act, the Fair Labor Standards Act, and the Americans with Disabilities Act — the Rehnquist Court ruled that the states' sovereignty made them immune to monetary lawsuits under these laws.

As a result of these decisions, state employees now find their employers shielded from lawsuits alleging violations of federal statutes involving monetary damages. In addition, state workers' advocates now fear for the rights of state employees.

This report responds to the UUP Executive Board's charge. Although state employees, as individuals, do have alternatives to pursue in defending their rights, none of these is adequate given the current political climate. It is the judgment of the committee that organizations that represent public employees, such as UUP, must take immediate action to redress the ill-considered decisions of the Rehnquist Court. After careful study of these cases, the UUP Human and Civil Rights Committee makes the following recommendations to the UUP Executive Board:

1. Advocate for State Legislation: UUP should work toward state legislation to waive state immunity from lawsuits under laws such as the ADA, ADEA and FLSA.
2. Negotiate Protections for UUP Members: UUP should negotiate contractual provisions to allow members to file discrimination grievances under the UUP contract, and to define age discrimination and mental and physical disability in the contract.
3. Advocate for Federal Legislation: UUP should urge its national affiliates to support federal legislation requiring states to waive immunity in order to qualify for federal assistance.
4. Publicize These Issues and Distribute this Report: UUP should publish this report in an attractive format, distribute it as widely as possible, make it available online, and announce it in UUP publications and other union and affiliate publications. UUP should also direct its Communications Department to seek media coverage of the issues raised here.
5. Develop a Strategy for Action: UUP should organize meetings and multi-union conferences around this topic and develop strategies for action to restore UUP members' rights.
6. Allocate Funding: UUP should allocate funds to support the proposed publications and outreach.
7. Charge the Human and Civil Rights Committee: UUP should develop an educational campaign and continue to monitor and report the impact of future judicial decisions.

INTRODUCTION

United University Professions (UUP) represents nearly 29,000 academic and professional faculty at 29 institutions within the system of the State University of New York (SUNY), including System Administration, Empire State College, and the New York State Theatre Institute. UUP's general mission is to speak for faculty and other professionals at the bargaining table, and to protect their interests.

In carrying out its mission, UUP maintains a high degree of member involvement through its various committees. Among these is the Human and Civil Rights Committee, whose mandate includes identifying and promoting "remedies for significant executive, legislative and judicial threats to human and civil rights," especially on matters which affect the UUP membership (committee members are listed in Appendix A).

In 2001, the UUP Executive Board charged the Committee: “To write a white paper prior to the Spring 2003 Delegate Assembly regarding the impact of the 11th Amendment to the U.S. Constitution on civil rights with specific policy recommendations as well as recommendations for distributing and publicizing the paper. The Committee will also review recent Supreme Court decisions as they affect the Americans with Disabilities Act and members of the 08 bargaining unit (Professional Services Negotiating Unit) as category of public employees.”

Committee members were alarmed at a series of recent U.S. Supreme Court decisions that prominently alter the civil rights protections of the nation’s state employees. In effect, these decisions severely limited the ability of state employees to sue their employers when certain rights, now enjoyed by others in the country, have been violated. Because UUP members are employees of the state of New York, they have been directly disadvantaged by these court decisions.

This Committee report is being written to highlight the importance of these decisions on those represented by UUP — and by extension, on other New Yorkers who work for the state — and to seek remedies in a thoughtful and effective way. The report contains possible courses of action available to those who would restore the civil rights of SUNY’s academic and professional faculty members, others working at the state’s institutions of higher education, and New York’s public employees in general. This report also constitutes part of an educational project that UUP will carry out to engage its constituents in programmatic initiatives and to raise awareness among its membership and others about these serious matters.

THE SIGNIFICANCE OF THIS REPORT FOR PUBLIC EMPLOYEES

The recent U.S. Supreme Court cases described below illustrate the dilemmas faced by state employees when states are granted immunity from lawsuits above and beyond that of ordinary citizens. Consider the
following cases:

- A group of Maine probation officers thought they were entitled to overtime pay, but their employer, the state of Maine, refused to pay them. Although these state employees were convinced the state was violating the Fair Labor Standards Act (FLSA), the Supreme Court ruled that the state could not be sued for violations of the FLSA. In the case *Alden v. Maine* (1999), the Supreme Court ruled that states could not be sued in their own courts by state employees for violations of the laws regarding overtime and other labor standards. State employees had already been barred from suing in federal court.
- Colleagues at a Florida state university discovered that the state had set up a pay structure discriminating against older employees. When they filed suit, they believed that the university was clearly violating the Age Discrimination in Employment Act (ADEA). Yet it was the faculty members who lost the right to sue over violations of the ADEA. In *Kimel v. Florida Board of Regents* (2000), the Supreme Court ruled that Congress, in passing a law prohibiting age discrimination, did not do away with the immunity states have against suits by private individuals. The Court found that the ADEA did not validly abrogate the states’ 11th Amendment immunity from suit by individuals.
- An Alabama state university employee who returned to work after treatment for breast cancer was demoted to a position paying $13,000 less than she earned in her former position. Another Alabama employee with severe asthma was assigned to work with several heavy smokers. The state refused to enforce its no-smoking policy or to reassign him. After these state employees decided to sue, their cases were combined in a suit designed to enforce provisions of the Americans with Disabilities Act (ADA). Yet they too were denied the right to sue the state. In *Board of Trustees of the Univ of Alabama v. Garrett* (2001), the Supreme Court found that, in enacting the ADA, Congress exceeded its authority by making states liable for monetary damages for disability discrimination.

In all of these cases, individual states were accused of failing to comply with federal laws, and in all the cases a 5-4 majority of justices ruled that the states were immune from monetary lawsuits under the laws in question, in what amounts to a new twist on the old doctrine of federalism. As a result of these cases, state employees find their employers shielded from

lawsuits alleging violations of federal statutes involving monetary damages, and advocates for state employees now fear for the rights of state employees.

THE CONTEXT: THE SUPREME COURT AND THE FEDERALISM DEBATE

One way to look at American history in the latter half of the twentieth century is through the resurgence of struggles for civil rights, as women, African-Americans, and other under-represented groups worked to improve their legal conditions. This encouraged other classes of Americans to seek new standing for their civil rights, among them disabled individuals, gays and lesbians, the homeless, children, students, and senior citizens. In general, representatives of these groups focused on the presidency and Congress in an effort to redress their grievances, although the Supreme Court played a major role in this rights revolution.

Beginning in the late 1930s, the Supreme Court had undergone what some analysts called a "constitutional revolution," as the Court abruptly shifted from its historic (and conservative) distrust of national power to one more consistent with the new, more vigorous role for the federal government envisioned in Roosevelt's New Deal (Lowi 49-50). In 1937, the Court reversed its longstanding distrust of federal regulatory power, upholding the constitutionality of two key components of the New Deal — the Social Security Act and the National Labor Relations Act (McCloskey and Levinson 117-19).

In 1954, with its landmark ruling in the case Brown v. Board of Education of Topeka, Kansas, the U.S. Supreme Court confirmed its central role in the movement for civil and human rights, in this case perhaps moving beyond what Congress and the presidency could accomplish in the fight for public school desegregation. When the Democratic Party continued its control of the executive branch (with one exception) until 1968, the more liberal Warren and Burger courts followed suit with a series of decisions (*Miranda v. Arizona*, *Gideon v. Wainwright*, *Roe v. Wade*) that circumscribed the powers of individual states to restrict the (sometimes newly expanded) rights of their citizens.

Following the election of Richard Nixon in 1968, however, the Republican Party regained control of the executive branch, which they would hold for 23 of the next 35 years. With it came the power to nominate Supreme Court justices. With the election of Ronald Reagan in 1980 and the ascendance of the conservative wing of the GOP, much more conservative judges, especially on the question of states' rights or federalism, became Supreme Court nominees.

Today, the conservative Rehnquist Court is sharply divided on federalism cases, although a bare majority of five justices has, as we have seen, begun to undo sixty-odd years of constitutional law by reasserting the primacy of individual states over that of the federal government and Congress. Most of the controversial decisions discussed here were rendered by a 5-4 margin in recent years. On the side of state sovereignty stand the most conservative justices, who, besides Chief Justice William Rehnquist, include Justices Anthony Scalia, Clarence Thomas, and Anthony M. Kennedy. Justice Sandra Day O'Connor is often referred to as the "swing vote" on the Court, but she has joined the aforementioned justices in promoting states' rights. Supporting the rights of individuals in this series of cases are the other four justices: Ruth Bader Ginsberg, David H. Souter, John Paul Stevens, and Stephen G. Breyer.

In 1996, with the decision in *Seminole Tribe v. State of Florida*, the Court revived the pre-New Deal concept of state sovereignty. The Court did this with a direct blow to the then-current interpretation of Article I of the Constitution. A brief word is necessary here about Article I. In this article, the Constitution provides, in ten sections, the powers and organizational framework given to Congress. Within Section 8 of Article I, the Constitution gives Congress the ability: "To regulate commerce with foreign nations, and among the several states, and with the Indian tribes." This is commonly referred to as the "Commerce Clause," and has been used to enact laws that bear on broadly conceived notions of commerce. For example, the Commerce Clause is invoked in justifying Congress' power to pass labor and employment laws.

In *Seminole Tribe v. State of Florida*, the Supreme Court declared that Congress has no power under the Commerce Clause to allow the states to be sued in federal court without the states' consent. This case came about because the Seminole Tribe sued the state of Florida in a dispute over negotiations required by the Indian Gaming Regulatory Act (IGRA). The effect of this decision went beyond the Seminole Tribe, for in using the doctrine of sovereign immunity, the

court's decision impacted, among others, millions of public employees. By shielding states and state entities, such as state universities, from suits in federal courts, the Court removed a fundamental recourse previously available to state employees.

THE THEORY OF SOVEREIGN IMMUNITY

a. The Concept of State Sovereignty
Because the states are conceived as sovereign, the same immunity against court actions that applies to the king is applied to states. A state is open to lawsuits only if it waives its immunity and is explicit in doing so.
b. The 11th Amendment
"The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."
c. Congruence and Proportionality
"There must be a congruence and proportionality between the injury to be prevented or remediated and the means adopted to that end" (Noonan 35).

Several key concepts form the underpinnings of the U.S. Supreme Court's reasoning in the recent federalism decisions. Taken together, the way these concepts are applied amounts to an institutional sea change at the Court, one that severely curtails the rights of state workers. These concepts are state sovereignty, a new interpretation of the 11th Amendment, and the notions of congruence and proportionality. It may be enlightening to identify these key concepts and to briefly explain them.

a. THE CONCEPT OF STATE SOVEREIGNTY

What the framers of the Constitution understood by state sovereignty is open to question. There was discussion among the framers about this matter early on, but as with other issues, differing viewpoints ensued. According to scholars, no dominant viewpoint emerged in their discussions. The Constitution does not include the words "sovereign," "sovereignty," or "immunity." Sovereign immunity, the basis for the notion of states' rights, derives from a British doctrine in common law that protects a king from court action. It was one of the guiding principles of the Articles of Confederation, the Americans' first attempt at self-government. Under this doctrine, the king [under the Articles, this power was reserved to the states] was viewed as having certain qualities that mark him as superior to others, that is, having "certain attributes of a great and transcendent nature; by which the people are led to consider him in the light of a superior being" (Noonan 54).

In the Constitution, Congress was granted the power to make laws that apply to individuals and to states. This power was granted to Congress in two principal areas, Article I concerns, among other things, interstate commerce and patents and copyrights; the 14th Amendment concerns, among other things, due process and equal protection under the laws. As we have seen above, Section 8, Article I of the Constitution gives Congress the ability: "To regulate commerce with foreign nations, and among the several states, and with the Indian tribes." This power is commonly referred to as the "Commerce Clause," and serves as the basis for laws that bear on broadly conceived notions of commerce, especially that which occurs between the states.

The 14th Amendment, which was ratified in 1868, authorized Congress to enforce the provisions of the Bill of Rights upon the states, particularly those in the South. It was drafted soon after the Civil War, when Congress was still suspicious of the Supreme Court following the *Dred Scott* decision and when the Republican-dominated Congress sought to protect the rights of the freedmen, or recently freed slaves, in the South. In the infamous *Dred Scott* decision, the Court in 1857 had denied Congressional power to prevent slavery extending into the territories governed by federal law and denied the possibility that the descendants of slaves could ever become citizens.

With the 14th Amendment, Congress tried to force the states to provide equal protection under federal law (the Bill of Rights) to the freedmen; ratification of the Amendment, in fact, was required of the southern states as a condition of their re-admittance to the Union. As the country shifted its focus from the Civil War to industrialism in the latter years of the 19th century, however, the role of the 14th Amendment changed. Following the nomination and confirmation of more

conservative, pro-corporate justices in the 1880s and 1890s, the Supreme Court reinterpreted the 14th Amendment as a way to protect business from state and even minimal federal regulation, rather than protecting individual rights in the South. These new justices were hostile to the notion of governmental power, which, along with a resurgence of the power of large southern landholders in Congress, removed the threat of federal intervention in southern states and enshrined the doctrine of states' rights, at least as it applied to individual rights (as opposed to the rights accorded corporations), at the court for the next sixty years.

In the late 1930s, a majority of Supreme Court justices diminished the concept of state sovereignty, establishing in its place a notion of federal primacy more consistent with the growing power of the New Deal's national government. Recently, however, a slim majority of justices on the Rehnquist Court has reasserted the pre-New Deal notion of state sovereignty, in direct contradiction to sixty years of established constitutional law. In several recent Rehnquist Court decisions, this majority has argued that the states "entered the federal system with their sovereignty intact" (Noonan 2). Because the states are conceived as sovereign, the same immunity against court actions that applies to the king is applied to the states. In other words, a state is open to lawsuits under only two conditions. The first is when a suit is authorized by congressional legislation passed pursuant to Section 5 of the 14th Amendment concerning due process and equal protection under the law and where Congress has also clearly stated that it intends to use the 14th Amendment to override the states' immunity. The second is when a state has explicitly waived its immunity (Strom, 2).

Thus, federalism has shifted from its original meaning and at present refers to the position of those who support states' rights above those of the national government. The Rehnquist Court is described as favoring a federalist conception of the government. Constitutional law scholar Walter Dellinger describes it this way: "This is a continuation of a debate that began in the summer of 1787 and has never been fully resolved — the debate between a state-centered view of the American constitution and a nationalist view. The losers favoring a states' rights approach have continued to be an authentic voice throughout history, and at least for now, are in the ascendancy" (Coyle and Berkman). In the past, championing states' rights was a way of maintaining certain institutions (e.g., slavery, segregation) that denied individual rights. The adoption of the states' sovereignty doctrine by the Supreme Court may be interpreted as an ideological support for states' rights over centralized federal powers. It also represents a turning back from various late-twentieth century movements that sought to apply uniform standards to individual rights.

b. A NEW INTERPRETATION OF THE 11TH AMENDMENT

The 11th Amendment to the U.S. Constitution reads as follows:

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

When the individual states emerged from the Revolutionary War, many were saddled with rather large debts. In Georgia, a dry goods merchant named Robert Farquhar filed a claim for payment against the state government. Upon Farquhar's death, Alexander Chisholm of South Carolina, executor of Farquhar's estate, continued the claim. His lawyer, using Article III of the Constitution and a 1789 statute giving jurisdiction to the Supreme Court, pursued Chisholm's case before the Supreme Court. Although Georgia refused to appear, the five justices then sitting on the Court stated that the purpose of the Union was to establish justice, and that Georgia had accepted the jurisdiction of the federal judiciary by ratifying the Constitution. In a 4-1 decision, the court asked Georgia to respond to the suit. Georgia settled the case out of court. But the decision was not well received. Congress responded by proposing the 11th Amendment on March 4, 1794. Three-fourths of the sixteen states had ratified it by January 8, 1798.

In effect, the 11th Amendment removed a class of cases from federal jurisdiction and gave instructions on how to interpret part of Article III of the Constitution (Section 2. "The judicial power [of the Supreme Court] shall extend to all cases, in law and equity ... between a state and citizens of another state..."). In a subsequent case, *Cohens v. Virginia*, Chief Justice Marshall said that a state could not be sued without its consent, but this did not have to happen for each and every case because the states had given their consent to the Constitution. As such, Marshall

concluded, the Supreme Court had jurisdiction when a case involved the laws of the United States, thus keeping ascendancy with the federal government (Noonan 68-69).

Over the course of American history, the dominant interpretation of this amendment has swayed back and forth between the doctrines of state immunity and federal primacy. Until the recent decisions of the Rehnquist Court, the accepted definition of state immunity under the 11th Amendment held that the national government had the power to achieve the ends given to it by the Constitution. The recent vigorous pursuit of the doctrine of states as independent and shielded, however, has led to changes in the traditional interpretation of this amendment. The Rehnquist Court expanded the application of the amendment to suits against states by their own citizens in what Justice John Paul Stevens recently referred to as "the second 11th Amendment" ("Upholding Family Leave" A22). Under this new interpretation, non-consenting states may not be sued under federal law by private citizens of the same or other states in federal or state courts.

The Rehnquist Court based its interpretation of sovereign immunity on what some analysts consider an overly broad reading of the 11th Amendment. The result is that individuals or entities find few alternatives when they believe they have a legitimate claim against a state or state agency.

c. CONGRUENCE AND PROPORTIONALITY

The Rehnquist Court has also established stricter standards for evaluating the constitutionality of federal statutes, including the test of "congruence and proportionality." This concept made its appearance with *City of Boerne v. Flores* (1997). This case revolved around several conflicting interests. In the village of Boerne, Texas, the Catholic diocese decided to dismantle an old church to accommodate its growing population of parishioners. The church was located in Boerne's historic district and was a candidate for landmark status. The Historic Landmarks Commission denied permission to the parish to demolish the structure. Archbishop Flores, under whose authority the parish fell, sued the city, citing the Religious Freedom Restoration Act (RFRA), which had been signed into law in 1993. In turn, to defend itself, the City of Boerne challenged the constitutionality of RFRA.

The case reached the Supreme Court in February 1997. The following June, the Court rendered its decision by establishing a new test for legislative action by Congress. The Court stated that Congress' power under Section 5 of the 14th Amendment was remedial. In other words, Congress could act to remediate an evil, but could not *add* to the rights protected by this amendment. As the majority opinion explained: "There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end" (Noonan 35). In order for legislation to be a valid exercise of congressional power, it must address the substantive rights covered in the first four sections of the 14th Amendment. Congress cannot add new rights by enacting legislation under Section 5.

This new test opened the legislative process to increased judicial scrutiny. The Supreme Court examined the legislative hearings on RFRA. They concluded that the evidence provided was "anecdotal" and "incidental." Given the intrusive character of RFRA, the Court said, its passage was disproportionate to the evils unveiled by the hearings. Since then, this test has been applied in courts throughout the land.

THE SOVEREIGN IMMUNITY CONTROVERSY

Since the mid-1990s, many of the Supreme Court decisions have provided a narrower interpretation of the authority of Congress to enact federal legislation. In effect, many of these decisions have turned the focus away from individual rights guaranteed by certain federal statutes to a controversial defense of states' rights that is based upon what many legal scholars consider an outmoded interpretation of the Constitution. Throughout these cases, the ability of state employees to defend their rights has been reduced to a status even lower than that of the general population.

The next section of this report presents a brief analysis of specific federal statutes and the challenges to these statutes from recent decisions by the Rehnquist Court. It is important to note that this is not a complete list, by any means, of legal challenges to federal legislation based upon the notion of sovereign immunity. Examples not considered here are patent and copyright

laws, violence against women and whistle-blowing activities. These and other cases important to state employees are listed in Appendix C.

AGE DISCRIMINATION IN EMPLOYMENT ACT (ADEA)
a. GENERAL PROVISIONS OF THIS FEDERAL STATUTE

The Age Discrimination in Employment Act (ADEA) was enacted in 1967 and extended to public employees in 1974. With this act, Congress said it was unlawful "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of the individual's age." However, Congress allowed for bona fide occupational qualifications that took age into account. The act applies to persons over 40. Since 1986, the ADEA has had no upper age limit for its coverage. It provides for the reimbursement of attorneys' fees and for liquidated damages in cases of willful discrimination.

b. BACKGROUND TO ADEA CHALLENGE

In 1995, J. Daniel Kimel, a member of the faculty at Florida State University, sued the Florida Board of Regents charging salary inequities based on age discrimination. Other faculty and librarians joined him as co-plaintiffs. Faculty from Florida International University also joined the suit. The Tallahassee Division of the District Court for North Florida did not dismiss Kimel's suit, but when it came before the 11th Circuit Court of Appeals, it was dismissed. About the same time, other circuit courts around the country were making rulings contrary to the 11th Circuit. Wanting to settle the matter, the Supreme Court chose to hear the 11th Circuit decision. The Clinton Administration supported the ADEA, as did many other groups, as a proper exercise of congressional power, testifying to the need for national legislation to prohibit age discrimination in employment.

c. SUPREME COURT DECISION

The Court's decision, released on January 12, 2000, is known as *Kimel v. Florida Board of Regents*. In a 5-4 decision, the Court ruled that Congress had overstepped its authority by allowing individuals to sue the state under the ADEA. The majority expressed the view that Congress had not identified any pattern of age discrimination by the states, and thus the ADEA was not appropriate legislation under Section 5 of the 14th Amendment. The 14th Amendment guarantees due process and equal protection. Writing for the majority, Justice Sandra O'Connor said that the statute's requirements were "disproportional to any unconstitutional conduct that conceivably could be targeted by the Act." In her assessment, the ADEA was an unwarranted response to an inconsequential problem. The elderly were not a "discrete and insular minority," O'Connor argued, to be protected against discrimination because all persons, if they live long enough, experience old age.

Critics of the ruling vehemently disagree, noting that public employees should be entitled to the same legal protections as private employees. This decision may seriously affect academic and professional faculty and others working for public institutions of higher education. In New York, the state Human Rights Law prohibits age discrimination and it does apply to the state. However, employees may sue the state only in the Court of Claims, which does not have jury trials; attorneys' fees are not reimbursed and there are no double damages in cases of willful violations. The Court of Claims also typically has a very short time period for filing claims.

FAIR LABOR STANDARDS ACT (FLSA)
a. GENERAL PROVISIONS OF THIS FEDERAL STATUTE

The federal Fair Labor Standards Act of 1938, as amended, is a labor law that applies to most jobs in the nation. The Act governs minimum wages, overtime, child labor protections, and the Equal Pay Act. In addition, the FLSA details the administrative procedures to be followed for overtime compensation. FLSA requires overtime payment at time-and-a-half for hours above a prescribed threshold for nonexempt (sometimes called hourly) employees. FLSA also exempts specified employees or groups of employees from some of its provisions. For most of these employees, there is no overtime payment compensation. It was only in 1974 that federal employees came under FLSA.

b. BACKGROUND TO FLSA CHALLENGE

In 1992, John Alden and a group of parole officers sued the state of Maine in federal court, claiming they were owed overtime pay under the FLSA. The district court judge ruled in their favor. The state began to pay them but the parties disagreed over the amount. Before this dispute was resolved, Supreme Court ruled in 1996 *Seminole Tribe v. State of Florida* that the 11th Amendment barred states from being sued without their consent. A federal district court then dismissed their suit.

The parole officers then refiled their lawsuit in a Maine state court. It was dismissed on the grounds that the state was protected by sovereign immunity. The Maine Supreme Judicial Court also ruled that the parole officers' suit was barred because the state had not waived its sovereign immunity. Alden then appealed to the Supreme Court, which granted certiorari on November 9, 1998.

c. SUPREME COURT DECISION

On June 23, 1999, the Supreme Court handed down its ruling in *Alden et al. v. Maine*. The Court's majority asserted, in a 5-4 decision, that the fundamental aspect of state sovereignty is its immunity, which it claimed was an essential principle of the 11th Amendment. Writing for the majority, Justice Kennedy said that immunity from private suits is "central" to the dignity of sovereignty. Further, he affirmed that the states' immunity from private suit in their own courts is beyond the power of Congress to abrogate by Article I legislation. Kennedy concluded that a review of the essential principles of federalism leads to the conclusion that giving Congress the power to subject nonconsenting states to private suits is inconsistent with the Constitution's structure.

As with the ADEA, public employees should be entitled to the same legal protections as private employees. This decision may seriously affect state employees who are entitled to overtime. In New York , state employees may sue the state under FLSA, but only in the Court of Claims, which typically has a very short time period for filing claims, does not allow for jury trials, nor does it reimburse attorneys' fees.

AMERICANS WITH DISABILITIES ACT (ADA)

a. GENERAL PROVISIONS OF THIS FEDERAL STATUTE

The Americans with Disabilities Act of 1990 (ADA) was enacted to prohibit discrimination on the basis of disability. Congress found that people with disabilities have experienced restrictions and limitations because of stereotypic assumptions not truly indicative of the individual ability of such people to participate in and contribute to society (Americans with Disabilities Act of 1990, sec 12101).

Passage of the ADA came after years of work by a coalition of disabled people, disability professionals, politicians and national organizations and by the work of the Congressional Task Force on the Rights and Empowerment of Americans with Disabilities, which held hearings in every state and heard testimony from thousands of witnesses, and by the results of Congressional hearings. Congress concluded that discrimination against persons with physical or mental disabilities was a pervasive, serious, society-wide problem and declared its intention to invoke congressional authority, "including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities" (Americans with Disabilities Act, sec.12101, b.)

The ADA defines "an individual with a disability" as a person who: (1) has a physical or mental impairment that substantially limits one or more of the major life activities of that individual, or (2) has a record of such an impairment, or (3) is regarded as having such an impairment. This broad definition acknowledges that discrimination may occur even if a person is merely regarded as being disabled.

The Act includes five titles:

- **Title I** prohibits employment discrimination because of a disability, in regard to job application procedures, the hiring, advancement, or discharge of employees, employee

compensation, job training, or other terms, conditions, and privileges of employment. It requires employers to provide "reasonable accommodation."

- **Title II** prohibits discrimination in public services or public transportation and requires state and local governments to make facilities and services accessible to people with disabilities.
- **Title III** prohibits discrimination in public accommodations, including restaurants, hotels, grocery stores, retail stores, and privately owned transportation systems. New construction must be accessible; existing construction must remove barriers if readily achievable.
- **Title IV** requires telecommunications companies to have relay services for telecommunication devices for the deaf (TTDs) and requires closed-captioning in television public service announcements.
- **Title V** includes miscellaneous provisions such as states shall not be immune under the 11th Amendment in federal or state court for a violation of the act. It prohibits coercion, threats or retaliation against people in asserting ADA rights and awards attorneys' fees to prevailing parties in ADA cases.

b. BACKGROUND TO ADA CHALLENGES

More than a decade after ADA's passage, unemployment among disabled people remains high. Many employers still believe that accommodating disabled workers is costly despite much evidence to the contrary and the fact that only "reasonable" accommodations are required. Although the Civil Rights Act was first intended to protect African-Americans from racial discrimination, its protection has been extended to other minorities. In contrast, although the intention of the ADA was broad protection from discrimination because of an impairment, the Court has given disability a very narrow construction.

Below are discussions of two issues raised by the Court's decisions in recent ADA suits: eligibility for ADA protection and state sovereign immunity under the ADA. Issues in other recent ADA cases are listed in Appendix C, "Selected Additional Recent Cases Affecting Civil and Human Rights."

c. FIRST CHALLENGE: A NARROW CONSTRUCTION OF "DISABILITY"

In decisions that harden employer control of the workplace at the expense of the rights of ordinary employees, employers won big and the average worker was the loser. It would be a mistake to think that disputes over the definition of disability are about people usually thought of as having disabilities. For example, in the eyes of this Court, having high blood pressure, needing to wear glasses, or having carpal tunnel syndrome (unless totally debilitating) and similar conditions are not "disabilities" and are not covered by ADA. This means that a person could legally be fired just for having these or similar conditions. If the public assumed these decisions were about somebody else, employers were well aware of what they stood to gain in these decisions.

Amicus briefs on the side of the employers were filed by business interests or corporate groups. The American Trucking Association called shrinking the definition of disability under ADA "keeping the lid on ADA litigation." And no wonder, employers don't want to be bothered by having to make accommodations or, even worse, by annoying and costly lawsuits if they fire a pesky worker who requests special treatment. The national business community saw the Williams case (see Page 15) as a way to eliminate lawsuits they see as expensive and able to be stopped altogether if they could just limit the number of people allowed to use the law in the first place. "This is the Americans with Disabilities Act, not the Americans with Injuries Act," said one industry spokesperson (Center for an Accessible Society).

Twins Karen Sutton and Kimberly Hinton were airline pilots who sought employment at United Airlines. Both were commercial pilots with regional commuter airlines and both had extensive experience that demonstrated their qualifications to be pilots. United denied them employment because their uncorrected vision did not meet United's standards of 20/100 in each eye, although with glasses or contact lenses their vision was 20/20. The Court held that because their impairments were corrected with mitigating measures, in this case eyeglasses, the pilots did not have disabilities within the meaning of ADA and therefore the airline could refuse to hire them (*Sutton v. United Airlines*).

Hallie Kirkingburg, a truck driver for more than twnety years, had a condition known as "lazy eye," making him almost blind in his left eye. When he tried to return to work at Albertsons, Inc., a grocery-store chain in Portland, Oregon, following an extended leave of absence due to a work-related injury, his employer refused to rehire him because of his "lazy" eye. Although he performed well on a road test, received a Federal Highway Administration waiver allowing him to continue driving, and had a clean driving record, Albertsons refused to reinstate him as a driver. As with Sutton, the Court decided that mitigating measures must be taken into account in judging whether an individual has a disability. In this case, it was that his brain had developed subconscious mechanisms for coping with impairment and thus his body compensated for his disability. The court said there was only a "difference," not a "significant restriction," between how Kirkingburg sees and how the majority sees, thus it does not constitute an impairment under the ADA and therefore he had no right to ADA protections and hence no right to return to his job (*Albertsons v. Kirkingburg*).

Vaughn Murphy, a mechanic for United Parcel Service (UPS) had high blood pressure and was first hired after erroneously being certified as meeting Department of Transportation health requirements. Later, UPS fired Murphy because of his condition. He contended that he was entitled to "reasonable measures," namely, the opportunity to adjust his medication and lower his blood pressure. When he sued under ADA, UPS argued that Murphy was not disabled because he could lower his blood pressure with medication. The Court agreed with UPS and ruled that since hypertension could be controlled with medication, the truck driver is not disabled under ADA. Because of this, the company could legally fire him because of his (controlled) blood pressure (*Murphy v. United Parcel Service*).

Ella Williams worked on an assembly line for Toyota. In 1993, after three months on the job, Williams developed carpal tunnel syndrome in both wrists, and back and neck pain. She was moved to a job as a paint inspector, still on the assembly line. A doctor said she needed to restrict her arm movement, so she was assigned only three of the five tasks usually required of paint inspectors. This worked well for three years. Toyota then expanded her job responsibilities, requiring her to raise her arms and use a sponge to wipe the cars. When her condition was exacerbated by the new tasks, Williams asked the company to be reassigned to her previous tasks, but Toyota refused. She stopped coming to work in late 1996, and was fired on January 27, 1997.

That same year, Williams filed suit claiming Toyota failed to accommodate her disability. The company argued that because she could do other work, she was only partially impaired, thus not entitled to the protection of ADA. In the 2002 decision, the justices excluded even more people from ADA protection by further narrowing the definition of disability under ADA. The Court ruled unanimously that Williams was not eligible to use ADA to request an accommodation because her condition did not qualify as a "disability." Justice Sandra Day O'Connor wrote that Williams's condition did not constitute a "disability" because she could still perform tasks "central to daily life," such as cooking her meals or brushing her teeth (*Toyota Motor Mfg., Ky, Inc. v. Williams, Ella*).

d. EFFECTS OF THE COURT DECISION ON ORDINARY WORKERS

In the three 1999 decisions, collectively called the "Sutton decision," the Supreme Court insisted that the determination of whether an individual is disabled under the ADA should be made with reference to measures, such as medication, eyeglasses or contact lenses, that mitigate the individual's impairment. Ruling that the ADA does not apply to individuals whose conditions are correctable puts plaintiffs in a Catch-22 situation. If the condition is not corrected, the employer can refuse to hire, claiming that it will interfere with job performance; if the condition is corrected, it is deemed not to be a disability and the person has no right to protection and is not entitled to accommodation. For example, an employer will not violate the ADA by refusing to hire a person because he or she has epilepsy, a heart condition or diabetes, if medication keeps the condition completely under control.

A fourth decision in 2002, *Toyota v. Williams*, restricted protection even further by excluding anyone whose work disability doesn't also limit the employee's ability to perform tasks central to daily life. Now employers are not required to accommodate most workers with conditions such as repetitive stress injuries which, according to the Bureau of Labor Statistics,

accounted for more than 1.7 million workplace injuries reported in 2000 (Johnson 2003). Workers with injuries, intimidated by the employer's unfettered right to fire them, may be afraid to request accommodations that they need to recover or avoid exacerbating their conditions. Discrimination protection is treated like a scarce benefit for which one must be qualified rather than as a civil right. A person in a wheelchair, whom Justice O'Connor would call "truly disabled," may be eligible to have his desk raised on blocks (a reasonable accommodation), while a person with carpal tunnel syndrome (CTS) may not have a right to an ergonomic keyboard unless her CTS also prevents her from brushing her teeth. These court decisions have taken away legal remedies for millions of workers who face job discrimination because of a physical impairment. But, as Johnson writes, "if people face irrational discrimination because of the disability, shouldn't they have the protection of law?" (Johnson, 2002).

In his dissent in Sutton, Justice John Paul Stevens wrote: "I believe that, in order to be faithful to the remedial purpose of the [ADA] Act, we should give it a generous, rather than a miserly, construction" (*Sutton v. United Air Lines*).

e. SECOND CHALLENGE: STATE SOVEREIGNTY

Patricia Garrett, a registered nurse, had worked at the University of Alabama Hospital for seventeen years when, in 1994, she was diagnosed with breast cancer. At the time, she was director of nursing in the neonatal section. After cancer treatment, she was pressured by her supervisor to leave her job. Garrett was demoted and forced to accept a lower-paid position at a convalescent hospital. She sued her employer, alleging that the university discriminated against her because of her disability, in violation of the ADA and of the Rehabilitation Act of 1973. She also claimed that her demotion was retaliatory, therefore violating the Family Medical Leave Act.

Milton Ash, a security officer in the Alabama Department of Youth Services, had chronic asthma and other medical problems. He asked his department to accommodate his medical needs, i.e., by enforcing the no-smoking ban in the area where he worked. The department did not respond, so he lodged a complaint with the Equal Employment Opportunity Commission (EEOC). The employer then lowered his performance ratings. Ash sued. Both Ash and Garrett sued for monetary damages, but Alabama claimed immunity under the 11th Amendment. The two suits against Alabama state agencies were consolidated in *Board of Trustees of University of Alabama v. Garrett*.

f. STATE SOVEREIGNTY UNDER ADA: THE COURT'S DECISION

Using the same 11th Amendment arguments he had used successfully in the Kimel case about the ADEA, University of Alabama attorney Jeffrey Sutton told the Court that there was insufficient history of discrimination by states against people with disabilities to warrant Congress overriding state sovereign immunity. He argued that unless there were evidence of widespread patterns and practices of unconstitutional conduct by the states, the remedial legislation was not congruent or proportional.

More than 100 scholars had submitted a detailed brief to the Court outlining the history of state-sanctioned discrimination against persons with disabilities. The brief listed hundreds of state laws and instances illustrating the pervasiveness of state-sponsored discrimination against people with disabilities from the nineteenth century through the present (Johnson). A brief was even submitted by more than a dozen state Attorneys General testifying that the ADA was a valid exercise of Congressional power under the 14th Amendment. They argued that there is a need for a uniform federal law protecting the rights of people with disabilities and said that the ADA complements states' efforts to combat discrimination on the basis of disability (Schwartz; Landau, 169-213).

Notwithstanding these and other arguments, other briefs, much new evidence and the evidence gathered by Congress before enacting the ADA, the Court's 5-4 decision on February 21, 2001 denied state employees the right (still available to private-sector employees) to sue employers over failure to comply with Title I of ADA. The Court held unconstitutional the ADA provision that permitted monetary damage suits against "unconsenting states." After citing the 11th Amendment, Chief Justice Rehnquist wrote that "our cases have extended the Amendment's applicability to suits by citizens against their own States" and "the ultimate guarantee of the

Eleventh Amendment is that nonconsenting States may not be sued by private individuals in federal court" (*Board of Trustees of University of Alabama v. Garrett*).

First, Chief Justice Rehnquist declared that the requirements for private individuals to recover monetary damages against the states were not met. The Court majority said that Congress had failed to show that the states themselves had engaged in a pattern of "irrational employment discrimination." Second, in the majority opinion, the rights and remedies created by the ADA against the states go beyond what is congruent and proportional to the targeted violation. He said there is no conflict with the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose. For example, he said, it would be entirely rational (and therefore constitutional) for a state employer to conserve scarce financial resources by hiring employees able to use existing facilities (apparently ignoring the fact that only "reasonable" accommodations are required by ADA). Rehnquist said that in the ADA requirement that employers make facilities accessible to and usable by disabled individuals, the accommodation duty far exceeds what is constitutionally required (*Board of Trustees of University of Alabama v. Garrett*).

With regard to these two points, the minority pointed out that a legislature routinely draws general conclusions since it is not a "court of law." Justice Breyer, in his dissent, attached a list of twelve hearings Congress held for two years prior to the passage of ADA and thirty-nine pages of state-by-state examples of official acts of discrimination that the Congressional Task Force had gathered before approval of ADA. Justice Rehnquist characterized this information as "anecdotal accounts" not entitled to the status of "legislative findings."

Justice Breyer, dissenting, wrote that the Court "improperly invades a power" that the Constitution gives to Congress. Under the 14th Amendment, Section 5, Congress has the power to enforce through "appropriate legislation" this Amendment's guarantee of equal protection. He noted that the Court's decision saps Section 5 of "independent force." The dissent concluded that the majority, in failing to accord the appropriate degree of deference to Congress's legislative judgments, violated the constitutional principle of separation of powers. Beyond its impact on state workers, who are entitled under the ADA to reasonable accommodations for their disabilities, the decision was important for what it portends, both for other types of cases under the disabilities act and for other civil rights statutes (Greenhouse, 2001).

Summary

The process begun by the Rehnquist Court presents a challenge to state employees. Briefly, the present situation is this: States cannot be sued for damages in state court or federal court under the ADA, ADEA, or FLSA unless they have consented to be sued. State entities, particularly public colleges and universities, now regularly invoke sovereign immunity when there is legal action against them. As a result, even certain anti-discrimination laws are now being challenged by state systems of higher education. Two such laws are: Title VII of the Civil Rights Act, which prohibits discrimination in employment based on race, gender, color, religion, sex or national origin; and Section 504 of the Rehabilitation Act, which prohibits discrimination against individuals with disabilities by federal contractors which includes colleges and universities receiving federal aid. The Supreme Court has agreed to hear an 11th Amendment case involving Title II of the ADA in the 2003-2004 term. Other recent decisions potentially threatening civil rights are listed in Appendix C, "Selected Additional Recent Cases Affecting Civil and Human Rights."

RECOMMENDATIONS

Although state employees, as individuals, do have means of redress, none of these alternatives is completely adequate to protect the rights of state employees given the current political climate. It is the judgment of the committee that organizations that represent public employees, such as UUP, must take immediate action to redress the ill-considered decisions of the Rehnquist Court. After careful study of these cases, the UUP Human and Civil Rights Committee makes the following recommendations to the UUP Executive Board:

1. Advocate for state legislation to waive state immunity: The Committee recommends support or sponsorship of legislation to waive state immunity under the ADA, ADEA, and FLSA, preferably without the limitations on ADA created by the decisions in Sutton and Williams.

The Supreme Court recognizes that states, in an exercise of their sovereignty, may waive their immunity against suits under specific laws, but the consent must be explicitly stated. In the wake of court decisions diminishing individual rights and expanding states' sovereignty, several states moved to consider bills that waived their immunity. In 2001-02, the New York State Legislature considered, but did not pass, a bill supported by New York's public employee unions that would have waived New York State immunity under the ADA.

In 2001, Minnesota consented to waive its immunity with regard to several federal statutes: FLSA, FMLA, ADEA, and ADA. The text of that law is shown in Appendix B, "Minnesota Law Waiving Sovereign Immunity." A waiver offers a broad and decisive remedy. It could lend itself to forming coalitions with support from many groups, such as advocates for labor, disability rights and older Americans. However, seeking a waiver may be an uncertain political process, and winning consent from both houses and the governor may not be easy. Although the costs would be no greater than they were before the Supreme Court decisions, especially if the state did not violate the laws, in tight economic times, the players might be uneasy about approving an action that could be perceived as even remotely likely to bring added costs to the state.

2. Negotiate protections for UUP members: Some of the rights lost by state employees through Supreme Court rulings could be approached through contract negotiations.

The Committee recommends that UUP negotiate an option to grieve discrimination under the contract and define age discrimination and mental and physical disability in the contract. Such an option should not preclude employees from litigation. The Committee supports the recommendations proposed by others to deal with overtime. Almost any issue may be raised during negotiations although, unless it concerns terms and conditions of employment, either side may refuse to discuss it. In speaking favorably about this remedy, one can point to its simplicity in giving state employees some control through the negotiating team. Because collective bargaining establishes "orderly and clearly defined procedures" for the resolution of problems and grievances, state employees are clear on what recourse they have. Probably the strongest argument for arbitration is that it provides faster resolution than litigation.

On the negative side, contract remedies have disadvantages. Conditions negotiated in one contract may be discontinued in later contracts. There are significant differences between arbitration and court proceedings. Arbitrators are not bound by precedent so an arbitrator's interpretation of a federal employment law may not be consistent with court decisions (Landau 169-213).

3. Advocate for federal legislation: The Committee recommends support of federal legislation linking state receipt of federal dollars to state waiver of immunity under the ADA, the ADEA or the FLSA, and support of legislative proposals to strengthen the ADA.

Federal laws reflect national priorities and provide uniform standards across the nation and fulfill the promise of the preamble to the Constitution. Federal laws protect civil rights, occupational safety and the environment by curbing the "race-to-the-bottom" that occurs when states compete for business by offering the most corporate-friendly environments. The Supreme Court's federalism decisions uniformly protect state governments but leave citizens with only piecemeal protection against predatory actions by state governments. Abandoning protection to state laws or union contracts means that basic rights must be disputed in each of the fifty state legislatures or negotiated where employees are fortunate enough to have union representation. Even if enacted, state laws may be vigorously or indifferently enforced. It is both appropriate and essential for civil rights laws, labor laws, and environmental laws to be national in scope. For these and other reasons, Congress enacted the ADA, ADEA, and FLSA.

The Committee recommends that UUP urge its national affiliates to support legislation requiring states to waive immunity to qualify for federal funds and legislative proposals to strengthen the ADA. One means of overcoming the Supreme Court's state sovereignty decisions is to make laws that tie benefits to compliance. The Constitution gives Congress power to "lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common

Defense and general Welfare of the United States." Pursuant to this power, Congress may "further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives" (Landau 169-21).

At least one authority concludes that conditioning federal funds on state waivers of immunity is the best strategy for state employees because "protecting the federal employment rights of state employees is politically palatable, making Congress more likely to enact such provisions, and because the constitutional standard governing Congress's conditional spending power is not difficult to meet" (Landau 169-213). Approximately five million state employees are protected by federal statutes such as the FLSA, ADEA, and ADA (Landau 169-213).

4. Publicize these issues and distribute this report: The Committee recommends that UUP publish this report in an attractive format, distribute it as widely as possible, make it available online, and announce it in UUP publications and other union and affiliate publications.

Individuals need to be informed about their options. It is important that members know the issues in order to build support for appropriate action to restore rights within the constraints imposed by the Court. Therefore, we recommend that UUP publish and distribute this report as widely as possible including, but not limited to, UUP constituents, UUP affiliates and other New York public employee unions, as well as to other groups such as advocates for older Americans, disability rights, civil liberties, and labor. We suggest that availability of this report be announced in publications such as AFT *On Campus*, *Academe* and the publications of other public employee unions. We recommend that the Communications Department publicize the issues in The Voice and seek publicity in outside media, and that the union raise these issues in forthcoming state and national elections.

5. Develop a strategy for action: The Committee recommends that UUP organize meetings and multi-union conferences around this topic and develop strategies to restore rights.

The Committee suggests that this report be used as a basis for conferences with other unions, such as: AFT national higher education; state conferences of state employee unions such as PEF, CSEA, PSC and New York State Union of Police Associations, Police Benevolent Association (PBA) of the New York State Troopers; NYSUT Community College Leadership Conference (though community colleges use of state sovereignty depends on how much state funding they receive); AFL-CIO public employee unions; and AFT Higher Education Civil and Human Rights Section. One recommendation for a conference speaker might be David Strom, In-house Counsel, American Federation of Teachers. Other speakers might include: people who have written about the topic, such as Judge John Noonan or Brent Landau; legislators interested in the topic; someone from the New York Independent Living Centers; and someone from the State Division of Human Rights.

6. Allocate funding: The Committee recommends that UUP allocate funds to support the proposed publications, action, and conferences.

7. Charge the Human and Civil Rights Committee: The Committee recommends that UUP charge the Committee to develop an educational campaign and to continue to monitor and report the impact of judicial decisions and other threats to the civil and human rights of members.

The Committee might be charged with holding meetings on the topic of this report for UUP members and at the conferences of other organizations, attending regional or chapter meetings to speak about the issues, and finding additional outlets for this information. As of July 2003, the Supreme Court has granted certiorari to a case challenging congressional authority to grant individuals the right to seek damages from states under Title II of the ADA. It is anticipated that a similar challenge to Section 504 of the Rehabilitation Act of 1973 will also go before the Court in the near future. State colleges and universities are regularly invoking sovereign immunity when legal action is taken against them. Given the direction of the current Supreme Court and of many federal court nominees, it is likely that more civil rights legislation will be challenged. The Commit-tee recommends that it be charged to continue to monitor and report on these developments.

REMEDIES NOW AVAILABLE TO STATE EMPLOYEES

Given the Supreme Court's elimination or narrowing of certain rights, especially for state employees, what are the options available to individual members of the Professional Services Negotiating Unit? In other words, are there ways to counteract the Court's erosive effect on individual rights in favor of states' immunity? With some qualifications, the answer is yes.

UUP's Human and Civil Rights Committee has identified several currently available remedies. These remedies are available to state employees and others to defend rights formerly protected under specific provisions of federal statutes. What follows is a brief discussion of these remedies, which are open to public employees and citizens in general:

1. Federal enforcement of existing federal law: Laws such as the FLSA, ADEA, and ADA can all be enforced by the federal government. The Department of Labor litigates a few cases under FLSA, and the Equal Employment Opportunity Commission or the Department of Justice can sue states under the ADA. But because of their very limited resources, these agencies take only egregious cases with broad impact. Although the state immunity doctrine creates a need for increased federal enforcement, such enforcement is unlikely to prove adequate as a remedy for aggrieved state employees, and inadequate enforcement does not deter violators (Landau 169-213). This remedy is inadequate for all but a few aggrieved state employees.

2. Injunctive relief: Individuals may sue individual states for injunctive relief, meaning that a state can be compelled to act lawfully, but there can be no monetary damages for claims under the ADA, ADEA or FLSA. This would prevent a state agency or university from discriminating, but would not repay money lost because of past discrimination. Injunctive relief may prevent future violations, but does not remedy past ones.

3. Enforcement of Rehabilitation Act, Section 504: Section 504 of the 1973 Rehabilitation Act prohibits federally funded programs from discriminating on the basis of disability. Its provision is selectively enforced by the Department of Justice and is supposed to be enforced by the federal agencies' funding programs. Since the Garrett decision, state employees hoped that 504 might be an alternative to ADA, but recent federal court decisions raise questions about this. In Garrett, Alabama was sued under both ADA and Section 504. The Supreme Court denied the right to sue under ADA and the 504 claims were remanded to lower courts. In 2002, the District Court held that Alabama did not waive immunity under 504 by accepting federal financial assistance conditioned upon waiver. District Judge Acker wrote that the case would probably show up again on the Supreme Court's calendar.

In a February 2003 report, the National Council on Disability (NCD) looked at the Section 504 enforcement activities of five key federal agencies: the Department of Education, the Department of Labor, the Department of Health and Human Services, the Department of State, and the Department of Justice. The report states: "One of the weakest points in terms of Section 504 enforcement lies in the fact that none of the agencies examined for this report has initiated funding terminations to enforce Section 504 against grantees that violate the law" (National Council on Disability, *Rehabilitating Section 504*).

4. Lawsuits against individual officials: Private individuals may sue individual state officials to prevent them from future acts that injure the rights of the plaintiff. Under certain circumstances, where an official clearly acts outside the scope of that person's duties and violates the law without the approval of superiors, damages claims may be made against that individual (Strom 11). This option, however, is costly and time consuming.

5. Claims under federal law may be made in the New York State Court of Claims: In New York State, almost any federal law can be enforced against the state in the Court of Claims, but this may not be as easy as it sounds. For example, the Court of Claims has a very short time period for filing claims, sometimes six months, typically ninety days for tort claims.

6. Claims may be made under New York State law: The New York State Human Rights Law bans discrimination because of age or disability but does not have all the provisions of ADEA and ADA. This law does not award prevailing party attorney's fees, except in cases of housing discrimination. On the other hand, the Human Rights Division offers to mediate conciliation agreements between the parties. This has both the advantages and disadvantages of mediation and is reported to be slow due to a backlog.

CONCLUSION

Where the Rehnquist Court will take us, as it continues down this road, is hard to say. In its most recent federalism decision, members of the Rehnquist Court voted 6-3 to deny a claim by the state of Nevada for constitutional immunity from lawsuits brought under the Family and Medical Leave Act. A *New York Times* reporter called the majority opinion, written by Chief Justice Rehnquist, as "a surprising break with [the Rehnquist Court's] march toward states' rights" (Greenhouse, 2003, 1). Whether this case suggests a new direction for the Court remains to be seen. Overall, the landscape for the civil rights of public employees in not favorable. This study tries to make more accessible to UUP members who, as state employees, have lost much in this legal exercise some key elements of this discourse. As Judge John Noonan points out: "The sovereign remedy for ills in a democracy is exploration and exposition of a problem, leaving it to the good sense of those who can effect its solution to take the necessary steps" (Noonan 143).

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APPENDICES

A. Committee Membership
B. Minnesota Law Waiving Sovereign Immunity
C. Selected Additional Recent Cases Affecting Civil and Human Rights
D. Bibliography on Supreme Court Federalism Decisions and State Employees

APPENDIX A
COMMITTEE ON HUMAN AND CIVIL RIGHTS PAST AND PRESENT MEMBERS

The UUP Human and Civil Rights Committee was formed in 1999 as the Committee on Civil Rights and the 11th Amendment. In 2001, the Committee’s name was changed to the Committee on Human and Civil Rights. Most of the original committee membership continues.

Steven E. Abraham	Oswego
Nuala McGann Drescher	Buffalo State
Edward Drummond	Stony Brook HSC
William E. Gohlman	Geneseo
Nancy Kassop	New Paltz
Sara D. Knapp	Albany
Fred R. Miller	Oneonta
Jerome O’Callaghan	Cortland
William D. Roth	Albany
Carlos M. Vidal	Stony Brook HSC
Ezra Zubrow	Buffalo Center

APPENDIX B
Minnesota State Law Waiving Sovereign Immunity
Section: 1.05
Chapter Title: SOVEREIGNTY, JURISDICTION, EMERGENCY OPERATION, GENERAL POLICIES
Section Headnote: Waiver of immunity for violations of certain federal statutes

1.05 Waiver of immunity for violations of certain federal statutes.
Subdivision 1. Age Discrimination in Employment Act.
An employee, former employee, or prospective employee of the state who is aggrieved by the state's violation of the Age Discrimination in Employment Act of 1967, United States Code, title 29, section 621, et seq., as amended, may bring a civil action against the state in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of the act.

Subd. 2. Fair Labor Standards Act. An employee of the state who is aggrieved by the state's violation of the Fair Labor Standards Act of 1938, United States Code, title 29, section 201, et seq., as amended, may bring a civil action against the state in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of the act.

Subd. 3. Family and Medical Leave Act. An employee, former employee, or prospective employee of the state who is aggrieved by the state's violation of the Family and Medical Leave Act, United States Code, title 29, sections 2601 to 2654, as amended, may bring a civil action against the state in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of the act.

Subd. 4. Americans with Disabilities Act. An employee, former employee, or prospective employee of the state who is aggrieved by the state's violation of the Americans with Disabilities Act of 1990, United States Code, title 42, section 12101, as amended, may bring a civil action against the state in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of the act.

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http://www.revisor.leg.state.mn.us: 8181/SEARCH/BASIS/mnstat/public/www/DDD/1.05/105<#

APPENDIX C
Selected Recent Cases Affecting Civil and Human Rights

Civil remedy for bias-related violence lost

Although bias-related violence potentially could affect almost half the UUP membership, it was not addressed in this report because it does not affect state employees per se. In United States v. Morrison et al, 2000, the Supreme Court ruled that the private right of action for victims of gender-motivated violence, a provision of the Violence Against Women Act, was not a valid exercise of Congress's power under either the commerce clause or under the enforcement clause of the 14th Amendment. The cases were: *U.S. v. Morrison* 529 U.S. 598 (2000) and *Brzonkala v. Morrison* 529 U.S. 1044 (1999).

In 2002, the Human and Civil Rights Committee recommended support of state legislation providing a civil remedy for violence or intimidation motivated by race, religion, national origin, sex, disability, age, or sexual orientation.

May individuals sue states under the ADA Title II for access to public buildings?

In a case to be heard in the 2003-2004 session, two paraplegic Tennesseans, denied access to courtrooms because the court buildings were inaccessible to their wheelchairs, sought injunctive relief and damages under Title II of the Americans with Disabilities Act. The Court held

that Title II of the ADA, as applied to cases imoplicating the fundamental right of access to the courts, constitutes a valid exercise of Congress' enforcement power under the 14th Amendment. 124 S. Ct. 1978 (2004).

Plaintiffs must prove discrimination was motivated by discriminatory animus or ill will toward disability

A case from the U.S. Court of Appeals, Second Circuit, which may have a bearing on future discrimination cases was *Garcia v. SUNY Health Sciences Center of Brooklyn* (2001). Among other things, the Court said that a private suit for money damages under Title II of the ADA, which prohibits discrimination by a public entity against a qualified individual with a disability in the benefits or activities of the public entity, may only be maintained against a state if the plaintiff can establish that the Title II violation was motivated by either discriminatory animus or ill will due to disability. *Garcia v. SUNY Health Sciences Center of Brooklyn*, 2001. 280 F.3d 98, 2001.

Employers may refuse to hire if the job presents a risk to a person's health

The Supreme Court delivered a unanimous decision in *Chevron U.S.A. v. Echazabal* 536 U.S. 73 (2002). The question was whether the ADA, which speaks only of endangering the safety of others, permitted an EEOC regulation authorizing an employer to refuse to hire an individual because, as a result of his disability, the job would pose a direct threat to his own health or safety. The Court ruled that ADA does permit such a regulation.

Business owners called the decision a victory. Chevron's position was supported by the Bush Administration. Disability rights advocates worried that the ruling against Echazabal would allow employers to reject qualified workers with disabilities by saying it was for their own good. They said workers should be able to decide if the job was too dangerous for them.

Individuals may sue states for damages under the Family and Medical Leave Act

On May 27, 2003, the Court issued its opinion, authored by Chief Justice William Rehnquist, that state employees may recover damages in federal court if a state fails to comply with the FMLA's family-care provision. The majority determined that Congress had expressly abrogated the state's 11th Amendment immunity in enacting the FMLA because there was significant evidence of a long and extensive history of sex discrimination in the administration of leave benefits by states. *Nevada Department of Human Resources, et al. v. Hibbs, William, et al.* 538 U.S. 721 (2003).

States have immunity from regulation by federal agencies

On May 28, 2002, the Supreme Court ruled that states have immunity from regulation by federal agencies. This ruling extends state sovereign immunity beyond the previous 11th Amendment decisions to actions of executive branch agencies and it threatens the safety and health of state employees. The majority opinion, written by Justice Clarence Thomas, interpreted the 11th Amendment to shield states from proceedings in which federal agencies would rule on private complaints. In doing so, the majority embraced an open-ended concept of state immunity that sees it as an aspect of the states' "dignity" as "sovereign entities," rather than anchored in the actual constitutional text. In his dissent to this case, Justice Breyer wrote that this decision, " ... may undermine enforcement against state employers of many laws designed to protect worker health and safety." *Federal Maritime Commission v. South Carolina State Ports Authority*. 535 U.S. 743 (2002).

No punitive damages under Section 504 of the Rehabilitation Act

On June 17, 2002, the Court held 9-0 that cities, boards and agencies that accept federal money are not liable for punitive damages for accommodations violations under the Americans with Disabilities Act or the federal Rehabilitation Act. The reasoning behind this decision, delivered by Justice Scalia, was that Spending Clause legislation is analogous to contract law and punitive damages are generally not available for breach of contract. Stevens, together with

Ginsburg and Breyer, concurred in the judgment but took exception to the majority opinion. He noted that "the Court's novel reliance on what has been, at most, a useful analogy to contract law has potentially far-reaching consequences that go well beyond the issues briefed and argued." The decision may have implications for other laws based on the Spending Clause. *Barnes, Kay, et al. v. Gorman, Jeffrey*. 536 U.S. 181 (2002).

Plaintiffs in discrimination cases must prove intent

In a 5-4 decision on April 24, 2001, the Supreme Court ruled that Congress had limited the kind of private lawsuits that can be brought under a provision of the Civil Rights Act of 1964 to enforce a ban on discrimination in programs that receive federal money. The Court said that suits could be brought only for intentional discrimination on the basis of race and national origin, and not over policies that only have a discriminatory impact. It is believed that the decision will also apply to Title IX of the Education Amendments of 1972, which prohibits sex discrimination in programs that receive federal money. *Alexander, James, et al. v. Sandoval, Martha*. 532 U.S. 275 (2001).

Company seniority systems may have more power than the ADA

The Supreme Court ruled, on April 29, 2002, that although an employer's showing that a requested accommodation conflicts with seniority rules is ordinarily sufficient to show that an "accommodation" is not "reasonable," the employee should still be able to present evidence of special circumstances that would make a seniority rule exception reasonable in a particular case. The justices said that employees with disabilities are not always entitled to jobs intended for workers with more seniority. *US Airways v. Barnett*. 535 U.S. 391 (2002).

Agreement to arbitrate doesn't prevent the EEOC from suing for discrimination on behalf of an employee

On Jan. 15, 2002, the Court held 6-3 that Baker's agreement with Waffle House to arbitrate his employment disputes doesn't prevent the EEOC from suing for discrimination on his behalf. *EEOC v. Waffle House*. 534 U.S. 279 (2002).

Whistleblower Statute excludes *qui tam* suits against states

On May 22, 2000, the Supreme Court affirmed, by a 7-2 majority, a private individual's standing to bring *qui tam* suits under the False Claims Act (FCA) but precluded naming states and state agencies as defendants in such cases. FCA cases can be brought in federal court either by the government or by a private person (a whistleblower) suing on behalf of the government. The latter is termed a *qui tam* action, ("who sues on behalf of the King as well as for himself"). It can be brought under a statute that establishes penalties for certain acts or omissions brought by an informer in which a portion of the penalties, fines or awards can be awarded to a whistleblower.

The Court never reached the broader 11th Amendment issue of whether a private individual could sue a state under the FCA. Rather, writing for the majority, Justice Scalia concluded that the False Claims Act does not include states as "persons" who can be sued under the law and he also found a lack of any congressional intent to permit individuals to sue states in such cases. The case was *Vermont Agency of Natural Resources v. United States ex rel. Stevens*. 529 U.S. 765 (2000).

APPENDIX D
Supreme Court Decisions and the Rights of State Employees:
a bibliography of commentary and analysis compiled by Sara D. Knapp

Introduction

Foremost among the victims of the results of the Rehnquist Court's interpretation of the 11th Amendment are state employees. This bibliography is a sample of books and journal articles, most of which are intended for the general reader, about the effects of some of the Supreme Court's federalism decisions. The bibliography is arranged in six sections: Historical and Legal Context; *Alden v. Maine*; *Kimel v. Florida Board of Regents*; *Board of Trustees of the*

University of Alabama at Birmingham v. Garrett; State Employee Rights; Web sites for More Information on Supreme Court Cases.

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VI. Websites for More Information on Supreme Court Cases

The Medill School of Journalism at Northwestern University's site, "On the Docket," includes information, dates for oral arguments and analysis of forthcoming Supreme Court cases, links to lists of cases from previous years and links to many other sources. http://www.medill.nwu.edu/docket/

Findlaw For Legal Professionals lists; Cases including briefs, opinions and orders; Resources including calendar, court rules, filing guides, news; History, including Justices, landmark cases; and a newsletter of Supreme Court case summaries. It also provides summaries of opinions from other federal courts and links to many other sources. http://supreme.lp.findlaw.com/

The Supreme Court has its own site which includes information about the Court, the docket, oral arguments, case handling guides, opinions, information about visiting the Court and other information. http://www.supremecourtus.gov/

Cornell University's Legal Information Institute covers cases scheduled for argument during the present term and from the current date forward. It also offers access to an archive containing nearly all of the opinions of the Court issued since May of 1990 and links to many other sources. http://supct.law.cornell.edu/supct/