Tulsa Law Review

Volume 17 | Issue 4

Summer 1982

The Unconstitutionality of the Age Discrimination in Employment Act

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THE UNCONSTITUTIONALITY OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT

The Age Discrimination in Employment Act of 1967 (ADEA)[1] prohibits employers from discriminating on the basis of age against employees between the ages of forty and seventy years in connection with hiring practices, job retention, compensation, and other terms and conditions of employment.[2] Originally applicable only to private employers with twenty-five or more employees,[3] the ADEA was expanded by the enactment of the Fair Labor Standards Amendments of 1974 (FLSA amendments)[4] to include protection for employees of a state or state political subdivision, agency, or instrumentality. The ADEA was enacted pursuant to the commerce clause,[5] based on findings that "arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce."[6]

The constitutionality of the ADEA as applied to the states was put in issue as a result of the 1976 Supreme Court decision of *National League of Cities v. Usery*,[7] in which the Court determined that the FLSA amendments were unconstitutional insofar as they extended the statutory minimum wage and maximum hours provisions of the Fair Labor Standards Act (FLSA)[8] to employees of states and state political subdivisions.[9] The Court invalidated such amendments on the grounds that they operated "to directly displace the States' freedom to structure

1. 29 U.S.C. §§ 621-634 (1976 & Supp. III 1979).
2. 29 U.S.C. §§ 623(a)(1), 631(a) (1976 & Supp. III 1979).
3. 29 U.S.C. § 230(d) (1940).
4. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55 (codified as amended in scattered sections of 29 U.S.C. (1976 & Supp. III 1979)). The FLSA amendments expanded the definition of "employer" in the ADEA to include "a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owed by the Government of the United States." 29 U.S.C. § 630(b) (1976). The amendments also incorporated the states and state entities into the definition of "employer" contained within the Fair Labor Standards Act of 1938, thereby extending minimum wage and maximum hours protection to state employees. *See infra* note 8.
5. U.S. CONST. art. I, § 8, cl. 3. "The Congress shall have Power . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ."
6. 29 U.S.C. § 621(a)(4) (1976).
7. 426 U.S. 833 (1976).
8. Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (1976 & Supp. III 1979).
9. 426 U.S. at 852. Although the FLSA amendments extended both the FLSA and ADEA to the states, *National League of Cities* reviewed only the extension of the FLSA.

integral operations in areas of traditional governmental functions."[10] As a result, congressional authority under the commerce clause was implicitly held to be limited by the reserve powers granted to the states under the tenth amendment.[11] Whether Congress exceeded its authority under the commerce clause by utilizing the same amendments to apply the ADEA to the states remained unanswered, as the Court did not face the issue of the constitutionality of the FLSA amendments insofar as they extended other acts to states and their political subdivisions.

Subsequent lower court decisions dealing with that issue have unanimously upheld the validity of the ADEA as applied to the states.[12] A vast majority of those courts, however, has sidestepped the federalism issue by finding that the ADEA was passed pursuant to the enforcement power of the fourteenth amendment,[13] not pursuant to the commerce clause. The preference for such analysis is based in part on historical recognition of the fourteenth amendment as a limitation of state sovereignty, the logical implication of which is that legislation properly passed pursuant to the amendment's enforcement provision is unlikely to encounter federalism as a basis for invalidation.[14] By

10. 426 U.S. at 852. *National League of Cities* was the first case since *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), in which the Supreme Court invalidated congressional legislation regulating commerce on federalism grounds.

11. U.S. CONST. amend. X states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

12. *See* Arritt v. Grisell, 567 F.2d 1267, 1271 (4th Cir. 1977); Carpenter v. Pennsylvania Liquor Control Bd., 508 F. Supp. 148, 149-50 (E.D. Pa. 1981); EEOC v. Calumet County, 26 Fair Empl. Prac. Cas. (BNA) 20, 25-26 (E.D. Wis. 1981); Johnson v. Mayor of Baltimore, 26 Fair Empl. Prac. Cas. (BNA) 44, 47-49 (D. Md. 1981); Marshall v. Delaware River & Bay Auth., 471 F. Supp. 886, 891-93 (D. Del. 1979); EEOC v. Florrissant Valley Fire Dist., 21 Fair Empl. Prac. Cas. (BNA) 973, 975 (E.D. Mo. 1979); Marshall v. City of Philadelphia, 17 Fair Empl. Prac. Cas. (BNA) 869, 870 (E.D. Pa. 1978); Remmick v. Barnes County, 435 F. Supp. 914, 916 (D.N.D. 1977); Aaron v. Davis, 424 F. Supp. 1238, 1241 (E.D. Ark. 1976); Usery v. Board of Educ., 421 F. Supp. 718, 721 (D. Utah 1976).

13. U.S. CONST. amend. XIV, §§ 1, 5.

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . . The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

14. *See, e.g.*, *Ex parte Virginia*, 100 U.S. 339 (1880), which states the proposition succinctly:

> The prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power. It is these which Congress is empowered to enforce, and to enforce against State action, however put forth, whether that action be executive, legislative, or judicial. Such enforcement is no invasion of State sovereignty.

Id. at 346; *accord* Fitzpatrick v. Bitzer, 427 U.S. 445 (1976):

> In [section 5 of the fourteenth amendment] Congress is expressly granted authority to enforce "by appropriate legislation" the substantive provision of the Fourteenth Amend-

avoiding commerce power analysis, the lower courts were able to circumvent the principles set forth in *National League of Cities*. In examining the constitutionality of the ADEA as applied to the states, this Comment will suggest that proper analysis of the ADEA excludes consideration of Congress' enforcement power and is limited to its commerce power. Such analysis illustrates the likelihood that the ADEA will be declared invalid on grounds initially established in *National League of Cities*.

I. THE NATIONAL LEAGUE OF CITIES RATIONALE

Inquiry into the constitutionality of the ADEA as applied to the states properly begins with an analysis of the principles established in *National League of Cities*. That case expressly overruled *Maryland v. Wirtz*,[15] in which the Supreme Court upheld an amendment to the FLSA[16] which extended its wage and hour provisions to state and local government employees of health care and educational institutions and local transit operations. In *Wirtz*, the majority found untenable the argument that the Act interfered with "sovereign state functions."[17] However, Justice Douglas, whose arguments were later adopted by the majority in *National League of Cities*,[18] stated in his dissenting opinion in *Wirtz*, "what is done here is . . . such a serious invasion of state sovereignty protected by the Tenth Amendment that it is in my view not consistent with our constitutional federalism."[19]

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ment, which themselves embody significant limitations on state authority. When Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority.

Id. at 456.

15. 392 U.S. 183 (1968).

16. Fair Labor Standard Amendment of 1966, Pub. L. No. 89-601, 80 Stat. 830-832, 837 (currently codified at 29 U.S.C. § 203(s)(5) (1976 & Supp. III 1979)).

17. 392 U.S. at 193. Justice Harlan asserted that there was no rule keeping the two governments—national and state—from interfering with each other. *Id.* at 195. The Court further stated that, "[i]f a state is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the state too may be forced to conform its activities to federal regulation." *Id.* at 197.

18. The *National League of Cities* opinion was written by Justice Rehnquist, who was joined by Chief Justice Burger and Justices Stewart, Blackmun, and Powell. Justice Blackmun filed a concurring opinion.

19. 392 U.S. at 201 (Douglas, J., dissenting). Justice Douglas recognized Congress' ability to encroach incidentally upon state sovereignty in the regulation of interstate commerce, but drew the line at disruption of fiscal policy in areas traditionally regulated by the states. Cited examples of federal regulations whose infringement on state sovereignty were held to be permissible include the Federal Employer's Liability Act, 45 U.S.C. §§ 51-60 (1976) (imposed on state-owned railroads), held constitutional in Parden v. Terminal Ry., 377 U.S. 184, 192 (1964); the Safety Appli-

The extension of the FLSA to virtually all state and local government employers in 1974 set the stage for *National League of Cities*. In an opinion written by Justice Rehnquist, the Court held that the 1974 amendments impermissibly operated directly on "the States *qua* States"[20] to displace state policy choices with the policy decisions of Congress. Justice Rehnquist noted that federalism acts as a limit on Congress' ability to utilize the commerce clause when legislation substantially restructures "traditional ways with which local governments have arranged their affairs."[21]

> It is one thing to recognize the authority of Congress to enact laws regulating individual businesses necessarily subject to the dual sovereignty of the government of the Nation and of the State in which they reside. It is quite another to uphold a similar exercise of congressional authority directed, not to private citizens, but to the States as States. We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner.[22]

The majority characterized congressional infringement on state sovereignty in this instance as two-fold. First, Congress was mandating a financial burden to be placed directly on the states. "Judged solely in terms of increased costs in dollars," the FLSA had "a significant impact on the functioning of the governmental bodies involved."[23] Second,

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ance Act, 45 U.S.C. §§ 1-43 (1976) (imposed on state-owned railroads), held constitutional in United States v. California, 297 U.S. 175, 185 (1936); Tariff Act of 1922, 19 U.S.C. § 121 (repealed 1930) (imposed federal customs duties on state universities for importation of educational equipment), held constitutional in Board of Trustees v. United States, 289 U.S. 48, 58 (1933); Act of June 28, 1938, ch. 795, 52 Stat. 1215 (1938) (Congress was allowed to condemn 100,000 acres of state land to build a reservoir, Oklahoma v. Atkinson Co., 313 U.S. 508, 534 (1941)); Act of Mar. 3, 1899, ch. 425 § 10, 30 Stat. 1121, 1151 (1899) (a state was prohibited from diverting water from the Great Lakes necessary to ensure navigability, Sanitary Dist. v. United States, 266 U.S. 405, 426 (1925)).

20. 426 U.S. at 847.

21. *Id.* at 849.

22. *Id.* at 845.

23. *Id.* at 846. Congress can properly impose financial obligations on the states by utilizing "conditional spending" under the spending power. U.S. CONST. art. I, § 8. For example, it is well established that Congress can financially reward a state for its participation in a selected program. *See* Oklahoma v. United States Civil Serv. Comm'n, 330 U.S. 127, 143 (1947); Helvering v. Davis, 301 U.S. 619, 640 (1937); Steward Mach. Co. v. Davis, 301 U.S. 548, 598 (1937); United States v. Butler, 297 U.S. 1, 61-62 (1936). The Court has avoided the federalism problems inherent in conditional spending by asserting that there is no infringement on sovereignty when a state knowingly avails itself of the financial burden and can revoke the agreement at any time. Thus, a state

the Court recognized Congress' usurpation of state discretion on "considered policy choices"[24] in the delivery of state and local services. As noted by Justice Rehnquist, "[q]uite apart from the substantial costs imposed upon the States and their political subdivisions, the Act displaces state policies regarding the manner in which they will structure delivery of those governmental services which their citizens require."[25]

Once it established the general premise that Congress cannot impose upon the states in the manner provided by the FLSA, the Court next attempted to offer guidance on those infringements on state sovereignty that are serious enough to render legislation invalid. The Court implicitly suggested a direct/indirect test for deciding the validity of future congressional action taken under the guise of the commerce power. Under this test, Congress cannot utilize the power "so as to force *directly* upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions [were] to be made."[26] The Court gave no further guidance on the use of this test to determine whether other legislation might impermissibly infringe on state sovereignty.

In contrast to the direct/indirect test, Justice Blackmun, in a concurring opinion, described the majority's decision as a "balancing approach."[27] Under such analysis, Congress can legitimately impose its

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is protected from unwanted federal interference with its integral operations. *See* Steward Mach. Co. v. Davis, 301 U.S. 548, 584, 587 (1937) (majority required that the condition not be linked to an irrevocable agreement, not operate without the approval of the state, and not be directed toward the attainment of an unlawful end). Conditional spending, however, can be a threat to federalism when there is little opportunity for uninfluenced decision-making by state legislators. This occurs where congressional grants so influence a state that it voluntarily allows the federal government to usurp its traditional functions. Lenient judicial standards that allow such coercion frustrate the purposes of federalism and theoretically provide an outlet for Congress to re-enact legislation found unconstitutional under other powers. Thus, if the ADEA was found unconstitutional under the commerce clause, it could be re-enacted under the spending clause and adopted by states on a "voluntary" basis, thus defeating the goals of federalism. *See generally* Comment, *Taking Federalism Seriously: Limiting State Acceptance of National Grants*, 90 YALE L.J. 1694 (1981).

24. 426 U.S. at 848.

25. *Id.* at 847. The policy choices listed by the Court included a state's decision to hire temporary personnel, persons with little or no training, or teenagers for summer employment. Although the Court avoids including employment of the aged in this list, it clearly establishes hiring practices as a prerogative of the state.

26. *Id.* at 855 (emphasis added). The direct/indirect test utilizes the basic theory asserted by Justice Douglas in his dissenting opinion in *Maryland v. Wirtz*. *See supra* notes 15-19 and accompanying text.

27. 426 U.S. at 856 (Blackmun, J., concurring). Justice Blackmun expressly stated that he joined the other four justices to comprise a majority only because he understood their opinion as one allowing legislation responding to a strong national need to act as an exception to the general rule that enjoins federal legislation enacted pursuant to the commerce power from infringing on

will upon the states when asserting a paramount federal interest, even though the legislation would otherwise be forbidden by the *National League of Cities* rationale.[28] This interpretation of the majority opinion seems correct in light of the majority's own reservations. For example, Justice Rehnquist explicitly distinguished *Fry v. United States*[29] in which the Court upheld the validity of the Economic Stabilization Act of 1970 (ESA)[30] which temporarily froze the wages of state and local government employees.[31] Initially, the ESA appears to resemble the invalidated FLSA amendments which also sought to regulate wages of state and local government employees. However, Justice Rehnquist reaffirmed the holding of *Fry* and emphasized the national need for immediate action, in the form of the ESA, because of the then-existing emergency economic conditions.[32] Furthermore, because of the limited duration of the ESA, interference with states' rights was considered mild. Finally, in freezing the wages of state employees, the federal legislation upheld in *Fry* was viewed as enacted to relieve fiscal burdens on the states rather than increasing them as the FLSA amendments did. Thus, if *Fry* is indicative of an instance when a paramount federal interest would render legislation valid despite its infringements on state sovereignty, then it is clear that the Court intended the "paramount federal interest" exception to be severely limited.

II. IMPLICATIONS OF NATIONAL LEAGUE OF CITIES

A. *The* Hodel *Decision*

National League of Cities came "to symbolize the Burger Court's concern for the rights of states in the federal system."[33] Yet Justice Rehnquist's opinion did little to clarify just how far the Court was willing to go in upholding states' rights.[34] Such clarification came in the

state sovereignty. In this way, his opinion represents "the lowest common denominator" of the majority's holding.

28. Justice Blackmun used "environmental protection" as his sole example of an instance where the federal interest would outweigh the state interest even after federal infringements on traditional state functions were proved. *Id.*

29. 421 U.S. 542 (1975).

30. Title II of the Act of Aug. 15, 1970, 12 U.S.C. § 1904. (The Act was extended five times before it expired on April 30, 1974.)

31. 421 U.S. at 548.

32. 426 U.S. at 853.

33. Tribe, *Unraveling* National League of Cities: *The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065, 1065 (1977).

34. A trend toward increased emphasis on states' rights was initiated prior to *National League of Cities*. *See, e.g.*, Fry v. United States, 421 U.S. 542, 547 n.7 (1975); Edelman v. Jordan, 415 U.S. 651, 673-74 (1974); Younger v. Harris, 401 U.S. 37, 50-51 (1971).

recent case of *Hodel v. Virginia Surface Mineral & Reclamation Association*.[35] In *Hodel*, Justice Marshall stipulated three criteria that must be satisfied before congressional legislation can be invalidated. In so doing, the Court reaffirmed the principles behind the reasoning of *National League of Cities*. The first requirement is "a showing that the challenged statutes regulates the 'States as States.' "[36] In addition, the federal regulation must "address matters that are indisputably 'attributes of state sovereignty.' "[37] Finally, "it must be apparent that the States' compliance with the federal law would directly impair their ability 'to structure integral operations in areas of traditional functions.' "[38]

Unlike the FLSA as applied to the states, the legislation facing the Court in *Hodel*, the steep-slope provisions of the Surface Mining Control and Reclamation Act of 1977,[39] was found to be a legitimate exercise of the commerce power. The Act imposed mining performance standards on coal mine operations, and the steep-slope provisions required operators to restore a mining site to its approximate original contour. The plaintiffs claimed that these provisions impermissibly displaced state policy choices concerning the regulation of land—a commodity that does not move in interstate commerce. The Court rejected this assertion, concluding that under the provisions of the Act, a state was allowed the option of submitting for the Secretary of Interior's approval a proposed permanent program that met the federal minimum standards, or alternatively, adopting the federal program with the costs of regulation to be borne by the federal government. Because of this option, the Act did not directly compel states to participate in the regulatory program, to enforce the standards of the Act, or to expend any state funds. Furthermore, the Court found that the Act regulated only private industry, and not the states as states. Accordingly, the Court held that mere displacement of state laws regulating private activity did not constitute direct regulation of the states themselves.[40] Thus, the

35. 101 S. Ct. 2352 (1981).

36. *Id.* at 2366 (quoting 426 U.S. at 854).

37. *Id.* (quoting 426 U.S. at 845).

38. *Id.* (quoting 426 U.S. at 852). However, it appears that fulfillment of such factors does not necessarily guarantee the success of a tenth amendment challenge to federal legislation in light of the Court's statement, that "[t]here are situations in which the nature of the federal interest advanced may be such that it justifies State submission." *Id.* at 2366 n.29 (citations omitted). Such language resembles the balancing test urged by Justice Blackmun in *National League of Cities*. *See supra* text accompanying notes 27 and 28.

39. 30 U.S.C. §§ 1201-1328 (Supp. III 1979).

40. 101 S. Ct. at 2366.

Act was not found violative of state sovereignty in the manner forbidden by *National League of Cities*.

Although at first glance *Hodel* appears to restrict states' rights, the Court's unanimous reaffirmation of the principles established in *National League of Cities* makes it an essential element of federalism analysis. Specifically, *Hodel* emphasized the tenets fatal to the constitutionality of the ADEA as applied to the states. Using these tenets, it is appropriate at this point to review the commerce power analysis utilized by the lower courts in uniformly rejecting constitutional challenges to the ADEA as applied to state and local governments.[41]

B. *Treatment of the ADEA by the Lower Courts*

Only one of the lower courts addressing the issue of the constitutionality of the ADEA as applied to the states, *Usery v. Board of Education*[42] has attempted to justify the Act on the basis of Congress' commerce power. In doing so, the court did not discuss the three objective requirements asserted by Justice Marshall in *Hodel*. Instead, the *Board of Education* court moved directly to the more subjective test of balancing the state and federal interests as prescribed by Justice Blackmun in *National League of Cities* and concluded that the national interest in employment significantly outweighed the states' interest in discriminatory employment policies and practices.[43] The Court failed, however, to adequately distinguish *National League of Cities*, in which the Court found that the states' interest in avoiding the FLSA outweighed the national need for its implementation. The states' interest therein was the desire to retain state sovereignty and integrity and to provide traditional governmental services in the most efficient and economical manner. That interest remains unchanged when the challenged legislation is the ADEA, contrary to the *Board of Education* court's description of the state interest therein as the preservation of employment discrimination. Thus, the only variable upon which to distinguish the holding in *Board of Education* from that in *National League of Cities* is the nature of the federal legislation involved. In other words, only if the federal interest in achieving state employment for the aged (ADEA) was found to be substantially greater than the federal interest in maintaining minimum wages and maximum hours

41. *See supra* note 12.
42. 421 F. Supp. 718 (D. Utah 1976).
43. *Id.* at 720.

for all state employees (FLSA) could *Board of Education* be reconciled with *National League of Cities*. Such a comparison was not made. Nor did the *Board of Education* court even attempt to demonstrate with specific examples the degree and scope of the federal interest in eliminating state employment discrimination against the aged. Federalism, the underlying principle used in *National League of Cities* to invalidate the FLSA amendments, was not treated by the *Board of Education* court as anything but an analytical stumbling block. The court simply stated its conclusions, unsupported by analogy or evidence.

The remainder of the lower courts which have considered the issue concluded that similarities between the ADEA and title VII of the Civil Rights Act of 1964[44] indicated that Congress was utilizing its enforcement power under the fourteenth amendment when it passed the ADEA.[45] The courts' insistence on analyzing the ADEA under the enforcement power instead of the commerce power seems unusual in light of Congress' implicit reliance on the commerce clause in the text of the Act.[46] Such insistence indicates the courts' recognition of constitutional difficulties with the ADEA as enacted under the commerce power.

C. *Treatment of the EPA by the Lower Courts*

Lower courts reviewing the Equal Pay Act of 1963 (EPA)[47] have used the same constitutional analysis as those considering the validity of the ADEA. The EPA is similar to the ADEA in that both acts regu-

44. 42 U.S.C. §§ 2000e-2000e-17 (1976).

45. *See infra* notes 82-84 and accompanying text. The court in Remmick v. Barnes County, 435 F. Supp. 914 (D.N.D. 1977), however, acknowledged in a footnote the *Board of Education* court's balancing of state and federal interests pursuant to commerce power analysis. *Id.* at 916-17 n.3.

46. *See supra* notes 5 & 6 and accompanying text.

47. 29 U.S.C. § 206 (1976 & Supp. III 1979).

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate of which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential bassed on any other factor other than sex. . . .

Id. § 206(d)(1).

The parallels between the constitutional validity of the EPA and the ADEA are so similar that they have often been treated together for purposes of legal comment. *See, e.g.*, Note, National League of Cities v. Usery: *Its Implications for the Equal Pay Act and the Age Discrimination in Employment Act*, 10 U. MICH. J.L. REF. 239, 258-72 (1977). Furthermore, both Acts were extended to the states through the FLSA Amendments of 1974.

late employment decisions and are applicable to state employers through the FLSA amendments. For no stated reason, the EPA as applied to the states has not received the same approval among the lower courts as that enjoyed by the ADEA.[48] For example, *Howard v. Ward County*,[49] in holding the EPA unconstitutional, found that it was proper to remove states from the definition of "employer" for the purposes of the EPA pursuant to *National League of Cities*.[50] Furthermore, the district court in *Usery v. Owensboro-Daviess County Hospital*[51] refused to engage in a balancing test like that invoked in *Board of Education*[52] because the very "balance" relied upon by the Supreme Court in *National League of Cities* in declaring the FLSA amendments invalid would have to be applied to find those same amendments *valid*. The court therefore concluded that a balancing test was not appropriate.[53] The court further held that analysis of the EPA's viability under the fourteenth amendment was preempted by the Supreme Court's ruling in *National League of Cities* that states are not considered "employers" for the purposes of the ADEA. "Besides, the Supreme Court in the *League* case specifically refused to consider sources of national power other than the Commerce Clause upon which the Act and the amendments were premised."[54] Although reversed on appeal, the court's reasoning appears equally applicable to a finding that the ADEA is unconstitutional. In considering the EPA, the court specifically condemned the fourteenth amendment analysis and "balancing" test used by the court in *Board of Education* to uphold the constitutionality of the ADEA as applied to the states.

Both the *Owensboro-Daviess County Hospital* court and the *Howard* court believed that the *National League of Cities* decision mandated an analysis based solely on the commerce clause. These decisions are indicative of the difficulty that the lower courts were having in justifying the ADEA even before the Supreme Court began to

48. *Compare* Howard v. Ward County, 418 F. Supp. 494, 501 (D.N.D. 1976) (EPA held unconstitutional as applied to the states) *with* Marshall v. Owensboro-Daviess County Hosp., 581 F.2d 116, 120 (6th Cir. 1978); Usery v. Charleston County School Dist., 558 F.2d 1169, 1171-72 (4th Cir. 1977); Usery v. Allegheny County Inst. Dist., 544 F.2d 148, 155-56 (3d Cir. 1976), *cert. denied*, 430 U.S. 946 (1977) (cases holding EPA constitutional as applied to the states).

49. 418 F. Supp. 494 (D.N.D. 1976).

50. *Id.* at 500.

51. 423 F. Supp. 843 (W.D. Ky. 1976), *rev'd sub nom.* Marshall v. Owensboro-Daviess County Hosp., 581 F.2d 116 (6th Cir. 1978).

52. *See supra* text accompanying notes 42-43.

53. 423 F. Supp. at 846-47.

54. *Id.* at 846.

undercut the analysis traditionally used to sustain the Act. These Supreme Court decisions have so amplified the difficulty the lower courts had with the validity of the ADEA that it now appears the analysis used by the *Owensboro-Daviess County Hospital* court is correct.

III. NATIONAL LEAGUE OF CITIES AND THE ADEA

A. *The* Hodel *Requirements*

Analysis of the ADEA under the principles asserted in *National League of Cities*, coupled with an analysis of recent Supreme Court decisions, lends credence to the conclusion that the Act is unconstitutional as applied to the states. Such analysis begins with the application of the three requirements enunciated in *Hodel*.[55] As demonstrated below, the ADEA implicates these requirements in a manner forbidden by both *National League of Cities* and *Hodel*.

First, by including the state within its definition of "employer," the FLSA amendments imposed the ADEA upon state governments in their traditional capacities, or on the states *qua* states. Secondly, the ADEA regulates the employment of state employees, a subject characterized as an indisputable attribute of state sovereignty in *National League of Cities*. Finally, the *Hodel* majority required a showing that the legislation interfered with a state's ability to structure integral operations in areas of traditional state functions. Although it is beyond the scope of this Comment to examine all of the functions that might be significantly altered by the implementation of the ADEA, a detailed look at one such example will illustrate the Act's intrusion on state sovereignty.

An obvious example lies in the realm of education. The delivery of public education is a traditional governmental function provided by the states and their political subdivisions.[56] The operation of the public school systems would be seriously impaired by the imposition of the ADEA. Examples of critical budgetary and economic decisions as well

55. *See supra* text accompanying notes 36-38.

56. The Supreme Court has described education as "perhaps the most important function of state and local governments." Brown v. Board of Educ., 347 U.S. 483, 493 (1954) *cited with approval in* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 29 (1973), and has ranked the provision of public schools "at the very apex of the functions of a state." Yoder v. Wisconsin, 406 U.S. 205, 213 (1972).

As the most obvious example of how implementation of the ADEA would intrude upon state sovereignty, the education example provides the greatest support for this author's argument. It is recognized that a less obvious example, one in which the federal interest is necessarily stronger, might produce a different result.

as considered policy choices that would be displaced by the ADEA are set forth below.

First, using Oklahoma as an example, most school systems have established a "salary index" method of paying classroom teachers. This method requires a teacher's salary to be based on his or her years of teaching experience and the college level degrees attained by the teacher. With each year's experience within the system, a teacher obtains an increase in salary. Obviously, the great majority of experienced teachers are going to be older and thus will require a higher salary upon being hired then their younger counterparts.[57] This fact could have a significant impact on the employment policies of a school district that seeks to provide the requisite number of qualified teachers while staying within its budgetary means. The imposition of the ADEA on the states would prohibit an employment policy of hiring younger, less expensive teachers and possibly force school districts to forego teachers or other needs to comply with federal legislation. This especially would be true in rural school districts with an insufficient ad valorem tax base.

Second, Oklahoma statutorily requires school districts to provide for the educational needs of mentally handicapped, speech-defective, and emotionally disturbed children. [58] Compliance therewith means that school districts cannot avoid hiring instructors qualified to teach in these areas. The higher education levels of these teachers command higher salaries on the salary index. In order to obtain such instructors, school districts often hire younger, inexperienced teachers to meet budgetary requirements. The ADEA would abrogate this policy.[59]

These are but two of the many employment decisions and practices made by school boards and legislators in structuring the delivery of education to their communities. Implementation of the ADEA would interfere with these decisions and many more, both within and without the school systems.

57. According to a supplement to the *Tulsa Public Schools Personnel Services Handbook* (1981), an incoming employee with a bacculaureate degree and no experience will receive about $4,000 less than a person with the same degree and six or more years of experience. Since the Tulsa Public Schools are presently one of the largest employers in Tulsa, Oklahoma, the impact of hiring a great deal of experienced teachers and administrators would be substantial.

58. OKLA. STAT. tit. 70, § 13-101 (1971 & Supp. 1980), which provides in part: "[I]t shall be the duty of each school district to provide special education for all exceptional children as herein defined who reside in that school district."

59. The bona fide occupational qualification of 29 U.S.C. § 623(f) would not excuse these policies as an exception to the general rule. For discussion, see *infra* notes 67-77 and accompanying text.

B. *Justice Blackmun's Balancing Approach*

Under the balancing approach enunciated by Justice Blackmun in *National League of Cities*, federal legislation will be upheld over state prerogatives even when such legislation usurps state authority in the manner forbidden by the requirements listed in *Hodel*, if it can be shown that the federal interest is demonstrably greater than the state interest involved.[60] Although Justice Blackmun offered no guidance on what constituted a sufficient "federal interest" or why commerce clause analysis demanded such a test, it seems that the competing interests involved therein were the constitutional principles of federalism and the national need for the federal legislation. In examining the ADEA under this test, it is helpful to utilize the guidelines set forth by Justice Rehnquist in distinguishing *Fry* from *National League of Cities*.[61] Unlike the ESA, the ADEA was created neither to deal with a national emergency nor to exist for a limited time span. Furthermore, the ADEA places burdens on state budgets rather than relieving them as the ESA was designed to do. Thus the survival of the ADEA appears dubious under such an analysis. But since it is unlikely that such guidelines were intended to be comprehensive, evidence of the federal interest must be found elsewhere.

An apparent inconsistency in federal policy that evidences a lack of urgency in abrogating age discrimination in state employment can be found in the recent case of *Thomas v. United States Postal Inspection Service*.[62] In *Thomas*, the Tenth Circuit held that in determining the constitutionality of congressional legislation that provided a mandatory retirement age of 55 for federal postal inspectors,[63] only a "rational basis" test need be applied.[64] Therefore, the court upheld the validity of the measure.[65] As a result, federal employers are free to discriminate on the basis of age so long as there is a rational reason for doing so. Since the federal government is not included within the definition of "employer" for the purposes of the ADEA, there is virtually no restric-

60. 426 U.S. at 856 (Blackmun, J., concurring). *See supra* notes 27-28 and accompanying text.

61. *See supra* text accompanying notes 29-32.

62. 647 F.2d 1035 (10th Cir. 1981).

63. 5 U.S.C. § 8335(b) (1976).

64. 647 F.2d at 1036. *See supra* text accompanying notes 108-10.

65. The *Thomas* court believed that not only did the legislation withstand constitutional scrutiny, it also made a great deal of sense. "This policy furnishes the Postal Service with a continuous staff of young, moderately young, and experienced Postal Inspectors. The system is not only a rational, but a sensible one." *Id.* at 1037.

tion on the federal government regarding this type of employment discrimination. In contrast, the states *are* included within the definition of "employer" in the text of the Act, and the lower courts have unanimously upheld the constitutionality of its applicability to the states. The significance of this inconsistency is that federal policy simultaneously commands state compliance with the ADEA while limiting federal obligations under the Act.[66] Under these circumstances it is difficult to imagine a federal agency urging the ADEA as the answer to a national need so compelling that state sovereignty must yield. Obviously, the federal interest is simply not of such magnitude.

Furthermore, in analyzing the scope of the federal interest in abrogating age discrimination in state employment it is helpful to compare the bona fide occupational qualification (BFOQ) of the ADEA[67] with that of title VII of the Civil Rights Act of 1964.[68] This comparison indicates the willingness of the federal government to allow age discrimination as opposed to race and sex discrimination. Since the application of title VII to the states has been approved by the Supreme Court,[69] any similarities between title VII and the ADEA would seem to benefit those urging the constitutionality of the ADEA as applied to the states. However, a comparison of the BFOQs of the two acts provides yet another example of how a compelling federal interest in age discrimination appears to be lacking. The ADEA's BFOQ provides a defense for those employers accused of age discrimination who can show the existence of a qualification justifying discrimination reasonably necessary to the normal operation of their business.[70] The BFOQ

66. It is helpful to compare the ADEA to title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (1976), in examining the federal interest in abrogating age discrimination in employment. The federal interest in obviating discrimination in employment on the basis of race, color, religion, sex, and national origin was demonstrated with the enactment of title VII. This interest compelled Congress to extend title VII to state and federal governments by amendment in 1972, Pub. L. No. 92-261, § 2(1) (codified at 42 U.S.C. §§ 2000e(b), 2000e-16(a) (1976)). The applicability of title VII to the states was upheld in Fitzpatrick v. Bitzer, 427 U.S. 445, 447 (1976). A comparison of the uniform application of title VII to both state and federal governments with the ADEA, which is applicable only to the states, indicates a more compelling federal interest in the principles of title VII than in those of the ADEA.

67. 29 U.S.C. § 623(f) (1976).

68. 42 U.S.C. § 2000e-2(a)(1) (1976), provides in part that it shall be an unlawful employment practice for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."

69. *See* Fitzpatrick v. Bitzer, 427 U.S. 445, 453 n.9 (1976). "There is no dispute that in enacting the 1972 Amendments to title VII to extend coverage to the States as employers, Congress exercised its power under § 5 of the Fourteenth Amendment."

70. Although such situations are rare, there are specific examples where the need for the BFOQ defense might be desirable. One example is the hiring of Blacks for movie parts.

of title VII exists for the same purpose, but is extended as a defense for discrimination based on religion, sex, or national origin.[71] Despite the inclusion of racial discrimination in the coverage of title VII, "race" was excluded from the language of the BFOQ. As a result, employers using race discrimination in employment practices do not enjoy the defense even when it can be shown that discrimination is necessary to the normal operation of their business. "The omission of the word 'race' probably was designed to avoid any suggestion that race could be a valid basis for discrimination."[72] Thus, the federal interest in race discrimination appears greater than that in either sex or age discrimination.[73]

Moreover, the courts have more narrowly construed the sex BFOQ of title VII than the age BFOQ of the ADEA, resulting in substantially fewer exceptions to the general ban on sex discrimination than on age discrimination in employment practices. In determining the scope to be given the sex BFOQ, the Supreme Court in *Dothard v. Rawlinson*[74] stated, "[w]e are persuaded—by the restrictive language of § 703(e), the relevant legislative history, and the consistent interpretation of the Equal Employment Opportunity Commission—that the bfoq exception was in fact meant to be an *extremely narrow* exception to the general prohibition of discrimination on the basis of sex."[75] The Court interpreted "extremely narrow" to mean that the BFOQ was available to an employer only where the woman's "sex-as-sex" posed difficulties. Problems presented by a woman's lack of strength, endurance, and resiliency were considered insufficient excuses for invoking the defense.

"Despite the Court's language, it is very unlikely that a construc-

71. 42 U.S.C. § 2000e-2(e) (1976).

72. Note, *Sex as a Bona Fide Occupational Qualification*, 1968 UTAH L. REV. 395, 401.

73. The Civil Rights Act's primary impetus was racial discrimination. *See* Miller, *Sex Discrimination and Title VII of the Civil Rights Act of 1964*, 51 MINN. L. REV. 877, 877-80 (1967).

74. 433 U.S. 321 (1977).

75. *Id.* at 334 (emphasis added) (footnotes omitted). The facts of this case are particularly helpful in determining the Court's definition of "extremely narrow." The Alabama state prison system issued a regulation barring the employment of women as guards in "contact" positions in the maximum security prisons. Because of the "rampant violence" and "jungle atmosphere" in those prisons, and in particular the random distribution of the 20% of male prisoners who were sex offenders, a female guard would be especially vulnerable to attack *as a woman*. Justice Stewart, writing for the majority, stated, "[T]he use of women as guards in 'contact' positions under the existing conditions in the Alabama maximum-security male penitentiaries would pose a substantial security problem, directly linked to the sex of the prison guard." *Id.* at 336. The Alabama state prison system, then, was relieved of liability not because it could prove that most women were physically incapable of performing the job, but because it proved that women per se were incapable of performing the job.

tion of BFOQ limited to 'age-as-age' will develop."[76] Several lower court rulings have applied a rational basis test in deciding whether discrimination was a necessary element to the operation of a business.[77] Thus, it seems that federal courts are much less willing to allow gender discrimination than age discrimination in employment practices. A necessary corollary to this observation is that the federal interest must be higher in preventing gender discrimination than in preventing age discrimination and thus the federal interest in the ADEA will not likely outweigh the state interest when confronted in a balancing test.

Another point illustrating the lack of federal interest in the ADEA is that the desire to terminate age discrimination in employment practices was apparently not great enough in 1964 to warrant inclusion in title VII.[78] The hesitancy of Congress to include protection for the aged in the Act is understandable in light of the fact that unemployment among the aged is traditionally not as high as with the other groups included in the Act, and indeed, not even as high as the population at large. For example, in 1974, the year the ADEA was extended to the states, the unemployment rate for the entire labor force was 4.9%.[79] Comparing this statistic with the percentage of those unemployed in the 40-65 age bracket, 2-3%, it becomes obvious that in enacting the ADEA, Congress was not combatting an unemployment problem at all. In contrast, in the years just prior to the enactment of title VII, non-whites, the group providing the impetus for the enactment of the Act, made up approximately 11% of the civilian work force, but constituted approximately 22% of the unemployed.[80] These statis-

76. 3 A. LARSON, EMPLOYMENT DISCRIMINATION: RACE, AGE, RELIGION, HANDICAP AND OTHER § 100.12, at 21-51 (1981).

77. *See, e.g.*, Martin v. Tamaki, 607 F.2d 307, 309 (9th Cir. 1979) (compulsory retirement system for city employees was found to be rationally related to legitimate objectives); Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224, 238 (5th Cir. 1976) (bus company allowed great discretion in determining safety standards which justified company policy of refusing to consider applications of individuals between 40 and 65 for employment as bus drivers); Hodgson v. Greyhound Lines, Inc., 499 F.2d 859, 865 (7th Cir. 1974) (intercity bus carrier, in utilizing the BFOQ to justify policy of not considering applicants over 35, required only to show that a rational basis existed for belief that termination of this policy would increase likelihood of risk of harm to passengers).

78. As a result of Congress' failure to include protection for the aged in title VII, some courts have refused to be guided by the law applicable to title VII cases, choosing instead to look to the ADEA's own unique history. *See, e.g.*, Laugesen v. Anaconda Co., 510 F.2d 307, 312 (6th Cir. 1975) ("That the law is embodied in a separate act and has its own unique history at least counsel the examiner to consider the particular problems sought to be reached by the statute.").

79. BUREAU OF LABOR STATISTICS, U.S. DEPT. OF LABOR, EMPLOYMENT AND EARNINGS 21-22 (1974).

80. For a detailed breakdown of the unemployment statistics for 1962, see 1964 U.S. CODE CONG. & AD. NEWS 2513-14.

tics clearly demonstrate the compelling need for legislation protecting non-whites from discrimination in employment.

Similarly, the 1974 statistics illustrate the questionable need for the ADEA as opposed to legislation which is designed to meet a compelling national need such as the ESA in *Fry*.[81] Absent such a need, it is difficult to envision the ADEA surviving the *National League of Cities* balancing test in which national and state interests are pitted against one another. As a result, it is very unlikely that the ADEA can be validly imposed on the states pursuant to Congress' commerce power. Therefore, analysis of the ADEA is reduced to an investigation of its validity as enacted pursuant to the enforcement power of the fourteenth amendment.

IV. The ADEA and the Enforcement Power of the Fourteenth Amendment

As previously stated, the majority of the lower courts that have reviewed the application of the ADEA to the states have recognized the analytical difficulties presented by sustaining the Act under the commerce power and instead have chosen to analogize the Act to title VII, which was enacted pursuant to the enforcement provision of the fourteenth amendment.[82] The substantive provisions of this amendment "are by express terms directed at the States."[83] The Supreme Court has long recognized a shift in federal/state relations on fourteenth amendment issues that allows federal interests to impose on traditional state prerogatives.[84] The question, then, is what limitations exist on Congress' power to enact legislation under the enforcement provision?

A. *Congressional Power under* Morgan

Congressional power under the enforcement provision is "plenary within the terms of the constitutional grant."[85] However, legislation that does not "enforce, by appropriate legislation" the provisions of the equal protection clause may not be justified by the power granted in

81. *See supra* text accompanying notes 29-32.
82. *See supra* notes 66-73 and accompanying text.
83. Fitzpatrick v. Bitzer, 427 U.S. 445, 453 (1976).
84. *See* Rome v. United States, 446 U.S. 156, 179 (1980); Oregon v. Mitchell, 400 U.S. 112, 134 (1970); Katzenbach v. Morgan, 384 U.S. 641, 658 (1966); United States v. Guest, 383 U.S. 745, 759 (1966); South Carolina v. Katzenbach, 383 U.S. 301, 325 (1966); *Ex parte* Virginia, 100 U.S. 339, 370 (1880).
85. Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976).

section 5 of the amendment.[86] Inquiry into which branch of government has the authority to recognize those rights inherent in the equal protection clause necessarily begins with *Marbury v. Madison*,[87] which recognized the power of the judiciary to disregard legislation when it is found to conflict with the Constitution.[88]

A broad reading of *Marbury* suggests the Supreme Court is the ultimate interpreter of the Constitution, with congressional activity limited by the bounds of that interpretation. The majority in *Cooper v. Aaron*[89] adopted such a reading, asserting that "the federal judiciary is supreme in the exposition of the law of the Constitution."[90] However, as the issue remains unresolved, one queries "whether, consistent with the concept of judicial review assumed in *Marbury* and subsequently developed, the Supreme Court can itself tolerate interpretations of the Constitution other than its own, even in cases where it has jurisdiction to review."[91] With regard to the equal protection clause, if the Court indeed possesses such ultimate authority, the ability of Congress to legislate on the rights contained within the clause is contingent upon previous judicial recognition of those rights.

However, in 1966 the Court in *South Carolina v. Katzenbach*[92] laid a foundation that enabled Congress to fashion its own remedies in the terms of those acknowledged rights. Writing for the majority, Chief Justice Warren stated:

> We . . . reject South Carolina's argument that Congress may appropriately do no more than to forbid violations of the Fif-

86. U.S. CONST. amend. XIV, § 5.

87. 5 U.S. (1 Cranch) 368 (1803).

88. Justice Marshall stated:

> It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution, or conformably to the constitution, disregarding the law, the court must determine which of these conflicting rules governs the case. This is the very essence of judicial duty.
>
> If, then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and no such ordinary act, must govern the case to which they both apply.

Id. at 389.

89. 358 U.S. 1 (1958).

90. *Id.* at 18.

91. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-4, at 28 (1978).

92. 383 U.S. 301 (1966). Although the Court in *Katzenbach* was dealing with the enforcement provision of the fifteenth amendment, U.S. CONST. amend. XV, § 2, the analysis is the same as that used in fourteenth amendment cases.

> teenth Amendment in general terms—that the task of fashioning specific remedies or of applying them to particular localities must necessarily be left entirely to the courts. Congress is not circumscribed by any such artificial rules under § 2 of the Fifteenth Amendment.[93]

The Court limited this new recognition of congressional power by forbidding Congress to overstep its constitutional bounds by attacking problems not comprehended by the fourteenth or fifteenth amendments.[94] To this point, then, Congress was still restricted to enforcing the amendment in accordance with terms recognized by the courts.

A further broadening of Congress' ability to enforce the fourteenth amendment came in *Katzenbach v. Morgan*,[95] in which the Court upheld a provision of the Voting Rights Act of 1965[96] which mandated that those persons who had completed the sixth grade in a school that instructed in a language other than English could not be denied the right to vote because of an inability to speak English.[97] Justice Brennan, writing for the majority, initially sustained the Act on grounds that Congress might have viewed the removal of a New York voting prerequisite of English literacy as a measure adapted to protecting Puerto Ricans from unconstitutional discrimination.[98] However, in a second branch of the opinion, Justice Brennan recognized the authority of Congress to enact legislation based on its own constitutional determinations, even though they might substantively conflict with the findings of the Court.[99] In doing so, Justice Brennan stated, "we perceive a basis upon which Congress might predicate a judgment that the application of New York's English literacy requirement . . . constituted an

93. *Id.* at 327.

94. *Id.* at 326-27. In providing this limitation, the Court reaffirmed United States v. Reese, 92 U.S. 214 (1875), and James v. Bowman, 190 U.S. 127 (1902). In *Reese*, the Court considered a statute providing punishment for any person who by force, bribery, threats, etc., hindered, delayed, or obstructed any citizen from voting. The Court held this statute unconstitutional because it punished offenders who wrongfully refused voters on grounds other than the voter's race, color, or previous conditions of servitude. 92 U.S. at 218. In *James*, congressional legislation enacted pursuant to the enforcement provisions of the fifteenth amendment was struck down on grounds that it sought to provide sanctions against an individual and did not comport with the state action limitations of the amendment. 190 U.S. at 139-40.

95. 384 U.S. 641 (1966).

96. 42 U.S.C. § 1973b(e) (1976).

97. 384 U.S. at 657-58.

98. *Id.* at 652-53.

99. In a footnote, Justice Brennan claimed that congressional power under section 5 was limited to the enforcement of the guarantees of the amendment, and as such, Congress had no power to restrict or dilute these guarantees. 384 U.S. at 651 n.10. At first glance, this statement seems to limit congressional authority. However, it becomes somewhat ambiguous upon the realization that the expansion of one group's rights necessarily contracts the rights of another.

invidious discrimination in violation of the Equal Protection Clause."[100]

The second branch of the *Morgan* rationale, which indicates that Congress can make substantive changes in the constitutional findings of the Court, undoubtedly calls for a reevaluation of the basic principles established in *Marbury*. However, since the Court dictated its holding in the first branch of its opinion, the weight to be given to the latter part of the opinion in future decisions is unclear.[101]

The greatest guidance in interpreting *Morgan* came in the later case of *Oregon v. Mitchell*.[102] There a splintered Court concluded that the 18-year-old provisions of the Voting Rights Acts Amendments of 1970[103] were valid as applied to federal elections, but could not be imposed on the states in state elections.[104] Despite the lack of a majority opinion, five justices asserted that congressional authority to recognize the right to vote among 18-year-olds in all elections, federal and state, did not exist. This substantially undercut the *Morgan* rationale that allowed Congress the power to give substantive content to the meaning of due process and equal protection. As a result, limitations on congressional power under the enforcement provision remained unclear.

Such lack of clarity prompted one legal commentator to describe the situation as "a constitutional law disaster area."[105] Nevertheless, certain conclusions can be drawn regarding the effect of *Oregon* on *Morgan*. It seems that if indeed congressional substantive interpretation exists at all, the Court is more willing to defer to Congress on

100. 384 U.S. at 656. This conclusion allowed congressional findings to fly in the face of principles established in *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45 (1959), wherein a unanimous Court held that, absent the intention to use literacy tests to pepetuate discrimination, such tests were not unconstitutional. *Id.* at 53.

101. Professor Cox interprets *Morgan* to mean that Congress possesses superiority over the Supreme Court as a fact finder only. *See* Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 104 (1966); Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199, 229-30 (1971). In this sense, *Morgan* is "neither more nor less a radical decision than *South Carolina v. Katzbenbach*." L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-14, at 268 (1978).

102. 400 U.S. 112 (1970).

103. Pub. L. No. 91-285, 84 Stat. 314 (codified as amended in scattered sections of 42 U.S.C. (1976)).

104. Justices Stewart, Burger, Blackmun, and Harlan concluded that Congress had no authority in either state or federal elections to confer the right to vote on 18 to 21-year-olds because only the states had the power to set voting qualifications. Justices Brennan, White, Marshall, and Douglas concluded that Congress had such authority in both federal and state elections. Justice Black believed that Congress could confer such voting privileges in federal elections, but had no authority to mandate such requirements in state elections.

105. Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603, 609 (1975).

matters concerning racial discrimination,[106] a category traditionally given heightened scrutiny, than on matters of discrimination towards groups not yet established as "discreet and insular minorities."[107] As stated by Justice Black, "the Enforcement Clause of the Fourteenth Amendment [was not] intended to permit Congress to prohibit every discrimination between groups of people. On the other hand, the Civil War Amendments were unquestionably designed to condemn and forbid every distinction, however trifling, on account of race."[108]

Significantly, Justice Black was the only member of the *Oregon* Court to allow "race" to figure into his analysis. The other justices based their decisions on rigid principles applicable to all situations regardless of the group alleging a violation of equal protection. But the mandate of *Oregon* is clear—Congress does not have the power to direct states to confer the right to vote on 18 to 21-year-olds based on a finding that such group is being denied equal protection. As a result, if Congress is left with *any* power to impose legislation on the states through its independent substantive interpretation of section 1 of the fourteenth amendment, the boundaries of that power must be defined through factual differences between *Morgan* and *Oregon*. The most obvious difference is that *Morgan* addressed racial discrimination and *Oregon* did not. Justice Black, the only justice who seriously sought to distinguish the two cases, pointed to race as the distinguishing factor.

If Congress is indeed void of power to independently interpret substantive rights contained in the fourteenth amendment (at least outside of the racial context, as indicated by *Oregon*), then the ADEA is unconstitutional absent a showing that it was a remedy designed to enforce a fundamental right implicit in the fourteenth amendment. In other words, for the ADEA to withstand constitutional challenge, the Court must either conclude that Congress may substantively interpret the fourteenth amendment in areas outside of "race," or alternatively, that the ADEA is only a remedy fashioned in terms of rights already recognized by the Court.

In examining the authority of Congress to substantively interpret the fourteenth amendment, it is necessary to analyze two recent Supreme Court decisions addressing the issue. *City of Rome v. United*

106. Professor Cohen disagrees with this observation and contends that the cases cannot be reconciled on the grounds that *Morgan* involved racial discrimination in voting and *Oregon* did not. *See id.* at 617.

107. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (plurality opinion).

108. 400 U.S. at 127 (opinion of Black, J.).

States[109] and *Fullilove v. Klutznick*[110] both addressed racial discrimination, and both stopped short of invoking the second branch of the Court's rationale in *Morgan*.[111] The Court in *Rome* examined portions of the Voting Rights Act of 1965 and concluded that Congress was acting under its "remedial" powers in prohibiting changes in the City of Rome's voting system that would have a disparate discriminatory impact on Negroes' voting power.[112] The majority held that since only *intentional* discrimination in legislation had been determined by the Court to be a violation of the Constitution,[113] Congress must have concluded that in order to enforce the ban on *intentional* discrimination, it was necessary to prohibit legislation having a discriminatory *effect*.[114] In so ruling, the Court appeared to treat the congressional enforcement power as a "remedial" power broad enough to go beyond explicit findings of the Court but not so broad as to directly conflict with them or to create new constitutional rights.

In a dissenting opinion, Justice Rehnquist recognized that the ma-

109. 446 U.S. 156 (1980).

110. 448 U.S. 448 (1980).

111. *See supra* notes 99-101 and accompanying text.

112. 446 U.S. at 177-78.

113. *See* Arlington Heights v. Metropolitan Hous. Corp., 429 U.S. 252, 270 (1977) (nonprofit developer failed to prove discriminatory intent or purpose on the part of a planning commission which refused to rezone a single-family district to a multi-family district in order to make way for a racially integrated housing proposal); Washington v. Davis, 426 U.S. 229, 245-49 (1976) (two Black police officers failed to prove discriminatory intent or purpose on the part of municipal officers who implemented a personnel test to ascertain whether police recruits had acquired a particular level of verbal skill); Jefferson v. Hackney, 406 U.S. 535, 549 (1972) (in alleging a disproportionately large number of minority groups in a welfare program for families with dependent children, appellants failed to demonstrate discriminatory intent or purpose in a system that provided fewer funds for this program than for other assistance programs); Palmer v. Thompson, 403 U.S. 217, 226-27 (1971) (Black citizens failed to prove discriminatory intent or purpose on part of city council which closed several city-owned pools rather than operate them on an integrated basis); Yick Wo v. Hopkins, 118 U.S. 356, 373 (1886) (Chinese laundry owners proved discriminatory intent on part of municipal authorities who enacted an ordinance which gave arbitrary power to municipal officers to give or deny consent for the establishment of public laundries); Strauder v. West Virginia, 100 U.S. 303, 309-10 (1879) (Black defendant demonstrated discriminatory intent present in enacting West Virginia laws that made Blacks ineligible for both grand and petit jury service); *see also* Personnel Adm'r v. Feeney, 442 U.S. 256, 281 (1979) (requiring that discriminatory purpose be proved in an equal protection claim involving "gender").

114. 446 U.S. at 177. In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the Court construed title VII to prohibit an employer from subjecting prospective employees to an intelligence test when the effect was to disadvantage black applicants. The Court ruled that "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation." *Id.* at 432 (emphasis in original). However, the Court in Washington v. Davis, 426 U.S. 229 (1976), reaffirmed the premise that the Constitution still required proof of discriminatory intent to uphold an equal protection claim. *Id.* at 239 ("[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact.") (emphasis in original).

jority limited the congressional enforcement power to fashioning broad remedies for specific rights, but insisted that in this case Congress had gone beyond its remedial power in determining that an enforcement of the constitutional ban on intentionally discriminatory legislation required the prohibition of voting structures having a disparate impact on racial minorities. According to Justice Rehnquist, this congressional conclusion worked to "create a code of municipal law for the regulation of private rights" more than it worked to "provide modes of redress against the operation of State laws [which] are subversive of the fundamental rights specified in the [a]mendment."[115] Thus, both the majority and dissenting opinions recognized Congress' enforcement power as remedial only, with the Justices disagreeing only on whether, under these facts, Congress had exceeded the bounds of this power.

The Court in *Fullilove* also implied that the congressional enforcement power was no more than remedial in nature. In upholding the constitutional validity of the "minority business enterprise" provision of the Public Works Employment Act of 1977,[116] the majority held that Congress had acted properly in concluding that "minority business [had] been denied effective participation in public contracting opportunities by procurement practices that perpetuated the effects of prior discrimination."[117] Thus, the provision was found to be an appropriate remedy for enforcing the fourteenth amendment's prohibition against purposeful discrimination.[118]

While these decisions do not explicitly overrule the second branch of the *Morgan* decision, their unwillingness to recognize the congressional enforcement power as anything but remedial indicates that Congress' power to substantively interpret rights in the fourteenth amendment is nonexistent. Furthermore, since both of these cases dealt with racial discrimination, it appears that, contrary to the second branch of the Court's holding in *Morgan*, Congress probably does not have the power to substantively interpret the amendment even in a racial context. If indeed that is the case, congressional power to enact the

115. 446 U.S. at 220 (quoting the *Civil Rights Cases*, 109 U.S. 3, 11 (1883)).

116. Pub. L. 95-28, 91 Stat. 116 (1977) (amending the Local Public Works Capital Development and Investment Act of 1976, 42 U.S.C. §§ 6701-6710 (1976)). The provision requires that, absent an administrative waiver, at least 10% of federal funds granted for local public works projects must be used to procure services or supplies from businesses owned by minority group members, defined as United States citizens "who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos and Aleuts."

117. 448 U.S. at 477-78.

118. *Id.* at 478.

ADEA must hinge on whether there is a judicially acknowledged right implied in the equal protection clause capable of being enforced through remedial legislation.

B. *Congress' Remedial Power Under the Enforcement Clause*

Title VII provides a helpful analogy in analyzing whether the ADEA is a valid remedy for a right implicit in the fourteenth amendment. Most of the lower courts finding the ADEA constitutional[119] compared the ADEA to title VII and concluded that the common objective of the acts, eliminating employment discrimination,[120] indicated that the ADEA had been passed under the enforcement power of the fourteenth amendment just as title VII was. A closer look reveals the error in this analysis.

Title VII was enacted to deal with employment discrimination in the areas of race and gender, both of which have received heightened scrutiny[121] in constitutional analysis by the Supreme Court.[122] In other words, any state legislation discriminating on account of race or gender will be struck down absent a showing by the state that the legislation is tailored to implement important state interests.[123] Legislation discrimi-

119. *See supra* note 12.

120. *See, e.g.*, Usery v. Board of Educ., 421 F. Supp. 718 (D. Utah 1976).

> In light of the similar statutory and constitutional objectives of Title VII and Section 623(a) of the ADEA to prohibit arbitrary and discriminatory employment criteria based on race, color, religion, sex, national origin, or age and in the absence of a clear expression by Congress in the ADEA of the constitutional foundation for this legislation in the Commerce Clause or the Fourteenth Amendment, this court interprets the ADEA's age discrimination limitations on state employers in 29 U.S.C.A. § 623(a) (1975) as constitutionally permissible under either the Commerce Clause or the Fourteenth Amendment.

Id. at 721.

121. "[S]trict scrutiny acknowledges that . . . political choices . . . burdening fundamental rights, or suggesting prejudice against racial or other minorities—must be subjected to close analysis in order to preserve substantive values of equality and liberty." L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-6, at 1000 (1978). "Heightened scrutiny" is the term used in this Comment to indicate a standard between that of minimum rationality and strict scrutiny. Although race receives strict scrutiny in equal protection analysis, *see, e.g.*, Hunter v. Erickson, 393 US. 385 (1969), gender has been given a "middle tier" analysis somewhere between strict scrutiny and minimum rationality, *see, e.g.*, Craig v. Boren, 429 U.S. 190 (1976).

122. Title VII also prohibits discrimination in employment on the basis of religion. However, constitutional analysis of religious discrimination is usually reviewed under the first amendment's "free exercise" clause where religion receives its own form of "heightened scrutiny." *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 406-09 (1963) (heightened scrutiny utilized to invalidate a South Carolina decision denying appellant, a Seventh Day Adventist, employment benefits for failure to take available employment subsequent to discharge for failure to work on Saturday, the day of Sabbath, because of similarity of available employment). Therefore, this Comment's equal protection analysis of the groups protected by title VII and the ADEA does not include religious minorities.

123. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 16-6, 16-13, 16-14 (1978).

nating against a class that has not benefited from the Court's heightened scrutiny must be only rationally related to the ends being sought. Utilization of this rational basis test by the Court usually indicates that the indicted legislation will be upheld as not violative of the equal protection clause.[124]

Thus, if title VII was enacted by Congress to combat race and gender employment discrimination, and the Court gives race and gender heightened scrutiny under the fourteenth amendment, then title VII as applied to the states is legislation designed to prevent acts that also constitute equal protection violations. However, if, unlike the race and gender classifications within title VII, the classification within the ADEA is not entitled to any heightened scrutiny under the equal protection clause, then the ADEA is granting rights not found in the Constitution. As was previously discussed, Congress apparently lacks the authority to substantively interpret the fourteenth amendment independent of the courts. Thus, it becomes important to determine whether age discrimination is entitled to heightened scrutiny. If it is not, then Congress clearly overstepped its bounds in enacting the ADEA.

Examples of the Court's treatment of the aged under the equal protection clause can be found in *Massachusetts Board of Retirement v. Murgia*[125] and *Vance v. Bradley*.[126] In both cases the Court asserted that age discrimination was not entitled to heightened scrutiny, applying instead a rational basis test. The Court in *Massachusetts Board of Retirement* found that employment discrimination by local governments violated neither a fundamental right[127] nor required heightened scrutiny for purposes of equal protection analysis.[128] With specific reference to discrimination based on age, the Court stated:

> While the treatment of the aged in this Nation has not been wholly free of discrimination, such persons, unlike, say, those

124. *Id.* § 16-24.

125. 427 U.S. 307 (1976).

126. 440 U.S. 93 (1979).

127. The other strand of equal protection analysis concerns state infringment on fundamental rights. If legislative or administrative classifications result in inequalities of rights fundamental to the Constitution (i.e., the receipt of welfare benefits, *see, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 631-33 (1969)), then the courts will apply strict scrutiny to the classification. Thus, an elderly person might claim a violation of equal protection of his fundamental right of employment and demand that strict scrutiny be applied to a state policy or law that discriminates against the elderly in employment decisions. However, the Court has inferred that the right to employment is not "fundamental" for equal protection purposes. *See* Dandridge v. Williams, 397 U.S. 471, 486-87 (1970).

128. 427 U.S. at 312-13.

> who have been discriminated against on the basis of race or national origin, have not experienced a "history of purposeful unequal treatment" or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities.[129]

The principles established in *Massachusetts Board of Retirement* were affirmed in *Vance*. There the Court held that section 1002 of the Foreign Service Act of 1946,[130] which mandated retirement at age sixty for participants in the Foreign Service Retirement System,[131] was not unconstitutional as reviewed under a rational basis test.[132] The Court emphasized that Congress' intent was not to punish the aged by rewarding "youth *qua* youth," but rather to "stimulat[e] the highest performance in the ranks of the Foreign Service by assuring that opportunities for promotion would be available."[133] The Court felt that superior achievement was a legitimate goal under the rational basis test.

As these two cases clearly demonstrate that the aged are not a group in need of heightened scrutiny under the equal protection clause, Congress could not have been enforcing the fourteenth amendment when it enacted the ADEA. Only by unilaterally creating a new constitutional right for the aged could Congress validly claim that the Act enforces the fourteenth amendment. Since recent case law indicates that Congress has no power to independently create such rights,[134] congressional constitutional authority to enact the ADEA under the enforcement power of the fourteenth amendment is doubtful.[135]

C. *Congress' Ability to Utilize the Enforcement Power After* Pennhurst

After *National League of Cities*, there was some speculation in the lower courts of whether analysis of Congress' "enforcement" power

129. *Id.* at 313.
130. 22 U.S.C. §§ 801-1204 (1976 & Supp. 1980).
131. Participation in the Foreign Service Retirement System is defined in 22 U.S.C. § 4043 (Supp. IV 1980).
132. 440 U.S. at 108-09.
133. *Id.* at 101.
134. *See supra* notes 102-18 and accompanying text.
135. The preceding analysis concludes that Congress had no authority to enact the ADEA. Thus, Congress could not validly impose the Act on either the states or the private sector by enforcing the fourteenth amendment. It must be remembered, however, that Congress can properly rely on the commerce power in enacting legislation applicable to the private sector because in that situation federalism does not act as an external constraint.

was appropriate in reviewing the ADEA and the EPA.[136] The district court in *Owensboro-Daviess County Hospital*[137] asserted that such analysis was improper because in *National League of Cities* the Supreme Court reviewed the viability of the FLSA amendments solely under the commerce clause upon which the amendments were specifically premised.[138] Similarly, the district court felt that the EPA, which was also enacted pursuant to the commerce clause, should be reviewed solely under commerce clause analysis.

In reversing the district court, the Sixth Circuit Court of Appeals asserted that "[t]he absence of any express reference to the Fourteenth Amendment in the 1974 amendments is of no consequence. It was not necessary for Congress to expressly rely on § 5 in exercising its power because such power clearly existed."[139] The appellate court found support for this statement in *Morgan* where the Supreme Court insisted that its only duty in reviewing the Voting Rights Act of 1965 was to "perceive a basis upon which the Congress might resolve the conflict as it did."[140] The Sixth Circuit then upheld the EPA as a proper exercise of the enforcement power of the fifteenth amendment.[141]

The question of whether legislation should be reviewed under the enforcement power absent a specific statement by Congress of reliance on the power in enacting the legislation was again presented to the Court in *Pennhurst State School v. Halderman*.[142] There the majority held that in deciding whether a portion of the Developmentally Disabled Assistance and Bill of Rights Act of 1975[143] was enacted pursuant to the spending power or the enforcement power, the spending power should be assumed to prevail in the absence of stated congressional intent. The Court reasoned, "[b]ecause . . . legislation [enacted under the enforcement power] imposes congressional policy on a State involuntarily, and because it often intrudes on traditional state author-

136. For a discussion of the constitutionality of the EPA and its implications on the ADEA, see *supra* notes 47-54 and accompanying text.

137. 423 F. Supp. 843 (W.D. Ky. 1976), *rev'd sub nom.* Marshall v. Owensboro-Daviess County Hosp., 581 F.2d 116 (6th Cir. 1978).

138. *Id.* at 846.

139. 581 F.2d 116, 120 (6th Cir. 1978); *accord* Usery v. Allegheny County Inst. Dist., 544 F.2d 148, 155 (3d Cir. 1976), *cert. denied*, 430 U.S. 946 (1977).

140. 384 U.S. at 653 (1966). The issue whether Congress must specifically rely on the enforcement power to utilize it was not specifically raised in *Morgan*. The Voting Rights Act of 1965 explicitly relies on the enforcement power in the text of the Act.

141. 581 F.2d at 119-20.

142. 101 S. Ct. 1531 (1981).

143. 42 U.S.C. §§ 6000-6081 (1976).

ity, we should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment."[144] Furthermore, Justice White, in an opinion joined by Justices Brennan and Marshall that dissented in part, agreed with the majority that "it should not be lightly assumed that Congress acted pursuant to its power under § 5 in passing the Act,"[145] and added that, before legislation would be attributed to the enforcement power, a "conclusive basis" for such a determination had to be shown.[146] Thus, a unanimous Court agreed that absent explicit statements of congressional intent, legislation should not be linked to the enforcement power.

In light of *Pennhurst*, then, analysis of the ADEA under the fourteenth amendment enforcement power is incorrect absent an explicit finding of congressional reliance on such power in its enactment of the FLSA amendments. As indicated earlier, the ADEA specifically refers to the commerce clause.[147] There is no legislative history indicating an intent to invoke the authority of section 5 nor any congressional findings that employment discrimination by state and local governments on account of age violates the equal protection clause.[148] In addition, the FLSA amendments were conclusively construed to have been enacted solely under the commerce clause in *National Leagues of Cities*.[149] As a result, the Court's decision in *Pennhurst* preempts analysis of the constitutional validity of the ADEA under section 5 of the fourteenth amendment.

V. CONCLUSION

Two district court cases, *EEOC v. Wyoming*,[150] presently on appeal to the Supreme Court, and *Taylor v. Dept. of Fish & Game of Montana*,[151] currently stand as the sole judicial support for the conclusion that the ADEA as applied to the states is unconstitutional. However, as the only courts to address the issue in light of recent Supreme Court decisions, they deserve considerable deference. Indeed, earlier deci-

144. 101 S. Ct. at 1539.
145. *Id.* at 1549 (White, J., dissenting in part).
146. *Id.*
147. *See supra* notes 5 & 6 and accompanying text.
148. A finding by Congress that the ADEA was enacted pursuant to the enforcement power seems especially important in light of the fact that the ADEA, unlike the statute in *Pennhurst*, is arguably not enforcing any right inherent in the Constitution.
149. *See supra* text accompanying notes 20-22.
150. 514 F. Supp. 595 (D. Wyo. 1981), *prob. juris. noted*, 50 U.S.L.W. 3547 (Jan. 11, 1982).
151. 523 F. Supp. 514 (D. Mont. 1981).

sions affirming the ADEA's validity as applied to the states must now be viewed as the product of obsolete constitutional law.

The decision handed down in *EEOC v. Wyoming* is analytically correct in holding that congressional power to rely on the enforcement clause in enacting the ADEA is wholly lacking. Additionally, judicial review of the ADEA under the enforcement power is preempted by Congress' failure to explicitly and conclusively attribute the enactment of the ADEA to section 5 of the fourteenth amendment. If the ADEA was not, therefore, enacted pursuant to the enforcement power, judicial review must be based on congressional power under the commerce clause.

Commerce clause analysis indicates that just as the minimum wage and maximum hour provisions of the FLSA amendments interfered with essential state functions and infringed on state sovereignty, so does the ADEA. Furthermore, the federal government has demonstrated that its interest in abrogating employment discrimination towards the aged is not sufficiently vital to outweigh the states' interest in performing their traditional sovereign functions. These facts, coupled with the recent evolution in constitutional law, indicate that sustaining the validity of the ADEA as applied to the states would require refuting existing constitutional doctrine.

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