CONSTITUTIONAL LAW—COMMERCE CLAUSE—AGE DISCRIMINATION IN EMPLOYMENT ACT HELD APPLICABLE TO STATES, UNDERMINING *NATIONAL LEAGUE OF CITIES V. USERY*—*EEOC v. Wyoming*, 103 S. Ct. 1054 (1983).

In 1976, the Supreme Court in *National League of Cities v. Usery*[1] invalidated a congressional regulation of commerce for the first time in forty years.[2] In that case, a divided Court struck down the application of the Fair Labor Standards Act to state and local government employees.[3] Invalidation of the Act was based upon an implied tenth amendment state immunity against federal commerce regulation.[4] This state immunity defense has not been allowed in any subsequent cases [5] and has been eroded through the use of factual distinctions.[6] Not until *EEOC v. Wyoming*,[7] however, was the Court able to directly confront *National League of Cities*. In *Wyoming*, the Supreme Court sustained the validity of the Age Discrimination in Employment Act as it applied to state and local government employees,[8] leaving *National League of Cities* a gutted shell.

I. INTRODUCTION

The Age Discrimination in Employment Act of 1967 (ADEA or Age Act), as originally passed,[9] prohibited discrimination against employees on the basis of age[10] only in the private sector.[11] In 1974,

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[1] 426 U.S. 833 (1976).

[2] The last such judicial invalidation of a congressional regulation of commerce occurred in Carter v. Carter Coal Co., 298 U.S. 238 (1936). The first commerce clause case which sustained New Deal legislation was NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). For a historical analysis of the Supreme Court's treatment of the commerce clause during the past 40 years see Tribe, *Unraveling* National League of Cities: *The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065 (1977); Schwartz, National League of Cities v. Usery—*The Commerce Power and State Sovereignty Redivivus*, 46 FORDHAM L. REV. 1115 (1978); Comment, *Commerce Power Limited to Preserve States' Role in the Federal System*, 30 RUTGERS L. REV. 152 (1976).

[3] *National League of Cities*, 426 U.S. at 833.

[4] *Id.* at 841-43.

[5] *See infra* text accompanying notes 64-92.

[6] *Id.*

[7] 103 S. Ct. 1054 (1983).

[8] *Id.*

[9] Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621-634 (1976 & Supp. V 1981)).

[10] 29 U.S.C. § 623(a) (1976), provides:

Congress amended the Act[12] to extend its coverage to employees of the federal[13] and state[14] governments.

In *EEOC v. Wyoming*,[15] the Equal Employment Opportunity Commission (EEOC) alleged a violation of ADEA as amended and brought suit against the State of Wyoming on behalf of Bill Crump, a state game warden supervisor who was involuntarily retired at age fifty-five.[16] The EEOC complaint alleged that the Wyoming State Highway Patrol and Game and Fish Warden Retirement Act,[17] which permitted the retirement of game and fish department employees at age fifty-five,[18] was invalid since its provisions were contrary to those of ADEA.[19] Wyoming claimed that the provisions of ADEA were not applicable to the states[20] on the grounds that Congress' power to pass ADEA under the commerce clause[21] was subject to the external constraints of the tenth amendment[22] as interpreted in *National League of Cities*.[23] The EEOC, on the other hand, contended that *National*

It shall be unlawful for an employer—

> (1) 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 such individual's age;
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
> (3) to reduce the wage rate of any employee in order to comply with this chapter.

Id.

[11] The term "employer" was defined to exclude the federal or state governments or their political subdivisions. 29 U.S.C. § 630(b) (1976).

[12] Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 28, 88 Stat. 55, 78-80.

[13] Section 28(b) of the 1974 amendments added a new provision, § 15, 29 U.S.C. § 633a (1976 & Supp. V 1981), to the Act to include federal employees.

[14] Section 28(a)(2) of the 1974 amendments changed the definition of employer in § 11(b) of the Act, 29 U.S.C. § 630(b) (1976), to include state governments and their political subdivisions.

[15] 514 F. Supp. 595 (D. Wyo. 1981), *rev'd and remanded*, 103 S. Ct. 1054 (1983).

[16] *Id.* at 595-96. The EEOC complaint sought injunctive and declaratory relief.

[17] WYO. STAT. §§ 31-3-102 to -121 (1977).

[18] *Id.* at § 31-3-107(c). The statute reads "[a]n employee may continue in service on a year-to-year basis after . . . age fifty-five (55), with the approval of employer and under conditions as the employer may prescribe." *Id.* Mandatory retirement is required at age 65. *Id.* at § 31-3-107(d). The Wyoming Act applies to full time law enforcement officers, *id.* at § 31-3-102(a)(iv), and Wyoming Game and Fish Wardens are considered law enforcement officers. WYO. STAT. §§ 7-2-101, 9-3-402(a)(viii), 23-6-101 (1977).

[19] *Wyoming*, 514 F. Supp. at 596.

[20] *Id.*

[21] "The Congress shall have power . . . [t]o regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3.

[22] "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." U.S. CONST. amend. X.

[23] 426 U.S. at 833; *see infra* text accompanying notes 37-63.

League of Cities merely invalidated the Fair Labor Standards Act (FLSA)[24] as it applied the minimum wage-maximum hour provisions to the states[25] and was not applicable to ADEA.[26] The EEOC further maintained that passage of the Age Act was independently supported by section five of the fourteenth amendment.[27]

The district court rejected the EEOC claim that the state immunity doctrine articulated in *National League of Cities* was meant to be narrowly construed.[28] Citing the broad language used by Justice Rehnquist in *National League of Cities*,[29] the district court focused on "whether Congress . . . has impaired, altered or displaced State policies or functions essential to its separate and independent existence."[30] District Judge Brimmer determined that game wardens provided a service traditionally rendered by the states[31] and that invalidation of the Wyoming compulsory retirement statute would financially burden the State by forcing it to maintain the personnel an additional ten years.[32] Accordingly, Judge Brimmer granted Wyoming's motion to dismiss, holding that application of ADEA to state game wardens would violate the tenth amendment.[33]

The United States Supreme Court, after noting probable jurisdiction,[34] accepted a direct appeal from the Commission.[35] In *EEOC v. Wyoming*, a divided Court reversed and remanded, distinguishing

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[24] 29 U.S.C. §§ 201-216b (1976 & Supp. V 1981).

[25] The EEOC claimed that the Supreme Court's interpretation of the tenth amendment state immunity doctrine in *National League of Cities* was narrowly drawn. The Commission cited the *National League of Cities* Court's reaffirmation of Fry v. United States, 421 U.S. 542 (1975) and United Transp. Union v. Long Island R.R., 455 U.S. 678 (1982) for support. Brief for the Equal Employment Opportunity Commission at 8, EEOC v. Wyoming, 103 S. Ct. 1054 (1983) [hereinafter cited as Brief for appellant]; *see infra* note 97.

[26] *Wyoming*, 514 F. Supp. at 597.

[27] *Id.* at 598. The EEOC argued that the congressional history of ADEA as well as the nature of the regulations in the Age Act support the view that Congress understood ADEA to be supported by both section five of the fourteenth amendment as well as by the commerce clause. Brief for appellant, *supra* note 25, at 23-27; *infra* note 183 and accompanying text.

[28] *Wyoming*, 514 F. Supp. at 598.

[29] *Id.*

[30] *Id.* at 600.

[31] *Id.* Judge Brimmer cited to the language used by Justice Rehnquist in *National League of Cities* which identified "police protection" and "parks and recreation" as being areas in which the states have traditionally provided services. *Id.* (quoting 426 U.S. at 851).

[32] *Id.*

[33] *Id.* Judge Brimmer also dismissed the EEOC's fourteenth amendment argument on the basis that nothing in the statute or in the legislative history of the Act "states that Congress was acting pursuant to its power to enforce the Fourteenth Amendment. . . ." *Id.*

[34] EEOC v. Wyoming, 454 U.S. 1140 (1983).

[35] The Commission invoked jurisdiction under 28 U.S.C. § 1252 (1976) on the basis that the question of the constitutionality of ADEA was substantial. Jurisdictional Statement at 1, 4-14,

National League of Cities on the basis that the degree of federal intrusion by ADEA in *Wyoming* was significantly less serious than that by FLSA.[36]

II. BACKGROUND: *NATIONAL LEAGUE OF CITIES v. USERY* AND ITS PROGENY

The *National League of Cities* decision[37] struck down the Fair Labor Standards Amendments of 1974[38] which extended federal minimum wage and maximum hour provisions to almost all state employees.[39] Speaking for a five to four majority,[40] Justice Rehnquist conceded that Congress had the power to preempt state law in the private sector and even to regulate purely intrastate activity where such activity affects interstate commerce.[41] The majority nevertheless held that enactment of the amendments extending the law's applicability to the public sector exceeded Congress' commerce power by intruding upon state sovereignty.[42] The *National League of Cities* Court admitted that the 1974 FLSA amendments were "undoubtedly" within Congress' commerce power,[43] but recognized an express limitation in the

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EEOC v. Wyoming, 103 S. Ct. 1054 (1983). 28 U.S.C. § 1252 provides that "[a]ny party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States . . . holding an Act of Congress unconstitutional in any civil action . . . to which the United States . . . is a party." *Id.*

[36] *Wyoming*, 103 S. Ct. at 1062.

[37] *National League of Cities*, 426 U.S. at 833.

[38] Pub. L. No. 93-259, 88 Stat. 55 (amending 29 U.S.C. §§ 201-216b (1970 & Supp. III 1973)).

[39] The Fair Labor Standards Act of 1938, ch. 676, § 3(d), 52 Stat. 1060, specifically exempted state and local government employees from its coverage. The Supreme Court unanimously upheld the 1938 version of FLSA under Congress' commerce power in United States v. Darby, 312 U.S. 100 (1941). The 1974 amendment extended the coverage by redefining employer to include a public agency, 29 U.S.C. § 203(d) (1976), which in turn was defined as including the federal and state governments. 29 U.S.C. § 203(x)(1976). As originally passed, it was this same 1974 amendment which redefined § 11(b) of the Age Discrimination in Employment Act to also include within the definition of employer the state government and its political subdivisions, 29 U.S.C. § 630(b)(1976), and which added § 15 to ADEA to extend coverage of the Act to employees of the federal government, 29 U.S.C. § 633a (1976 & Supp. V 1981).

[40] Justice Rehnquist was joined by Chief Justice Burger and Justices Stewart, Blackmun, and Powell. Justice Brennan wrote for the dissent and was joined by Justices White and Marshall. Justice Stevens filed a separate dissent. *National League of Cities*, 426 U.S. at 833.

[41] *Id.* at 840.

[42] *Id.* at 852. The Supreme Court thereby reversed the judgment of the district court. The lower court did note that it considered the question of law substantial but felt compelled to dismiss the complaint because of the precedent set by Maryland v. Wirtz, 392 U.S. 183 (1968). National League of Cities v. Brennan, 406 F. Supp. 826, 827 (D.D.C. 1974), *rev'd and remanded sub nom.* National League of Cities v. Usery, 426 U.S. 833 (1976); *see infra* notes 50-52 and accompanying text.

[43] *National League of Cities*, 426 U.S. at 841.

tenth amendment[44] upon Congress' otherwise "plenary power."[45] The Court reasoned that such a restraint is imposed when congressional power is applied to the states in their sovereign capacities in such a manner as to "directly displace the States' freedom to structure integral operations in areas of traditional governmental functions."[46]

Drawing a line between traditional and nontraditional state activities,[47] Justice Rehnquist emphasized that the invalidation of the FLSA amendments in *National League of Cities* was consistent with previous validations of federal commerce regulation in areas of nontraditional state activities such as state-operated railroads.[48] The *National League of Cities* majority, unable to distinguish the traditional government activity at hand[49] from that in *Maryland v. Wirtz*,[50] in

[44] *Id.* at 842. In United States v. Darby, 312 U.S. 100, 124 (1941), Justice Stone stated that the tenth amendment "states but a truism that all is retained which has not been surrendered." This view was qualified in Fry v. United States, 421 U.S. 542, 547 n.7 (1975), where the majority opinion stated that "[w]hile the Tenth Amendment has been characterized as a 'truism,' . . . it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." The *National League of Cities* Court referred to this language in *Fry* to invalidate extension of FLSA to the states. 426 U.S. at 842-43.

[45] *National League of Cities*, 426 U.S. at 842. Justice Rehnquist drew a parallel between Congress' commerce power and its taxing power, both powers which are delegated in art. I, § 8. He reasoned that since the recognized state immunity to the federal taxing power is based upon state sovereignty, a similar state immunity based on state sovereignty should apply to the commerce power. *Id.* at 844 n.14. Application of the same implied constitutional limitation to both the taxing and the commerce powers has been severely criticized. *See* Comment, *supra* note 2, at 165-69.

[46] *National League of Cities*, 426 U.S. at 852. In determining whether essential activities of a state were impaired, Justice Rehnquist focused on the economic impact FLSA would have upon the state. *Id.* at 848. He concluded that the wage regulation would restrict the state's choice in determining the manner in which their employees worked and would restrict the delivery of services by reducing the employees to a number affordable under the minimum wage. *Id.*

[47] *Id.* at 851. As examples of such traditional activities performed by state and local government, Justice Rehnquist suggested "such areas as fire prevention, police protection, sanitation, public health, and parks and recreation." *Id.* For examples of nontraditional state activities, see *infra* note 48.

[48] *National League of Cities*, 426 U.S. at 854 n.18. The Court maintained that its decision in *National League of Cities* did not affect the validity of California v. Taylor, 353 U.S. 553 (1957) (Railway Labor Act); United States v. California, 297 U.S. 175 (1936) (Safety Appliance Act); or Parden v. Terminal Ry., 377 U.S. 184 (1964) (Federal Employers' Liability Act). Justice Rehnquist maintained that the application of these federal statutes to employees of state-owned railroads was not affected since the operation of a railroad was not considered a traditional state function. 426 U.S. at 854 n.18.

Use of a traditional/nontraditional dichotomy test to determine state immunity has been widely criticized as untenable. *See* Kilberg & Fort, National League of Cities v. Usery: *Its Meaning and Impact*, 45 GEO. WASH. L. REV. 613, 615 n.23 (1977); Comment, *At Federalism's Crossroads:* National League of Cities v. Usery, 57 B.U.L. REV. 178, 192-93 (1977); Comment, *supra* note 2, at 169; 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, 248-54(1977).

[49] *National League of Cities*, 426 U.S. at 855.

[50] 392 U.S. 183 (1968).

which the Court upheld two earlier FLSA amendments extending coverage to employees of state-owned hospitals and schools,[51] overruled *Wirtz*.[52] Significantly, the *National League of Cities* Court also added that it "express[ed] no view as to whether different results might obtain if Congress seeks to affect integral operations of state governments by exercising authority granted it under other sections of the Constitution such as the spending power, Art. I, § 8, cl. 1, or § 5 of the Fourteenth Amendment."[53]

Justice Rehnquist was careful to distinguish *Fry v. United States*,[54] which upheld under the commerce power a national wage freeze as it applied to state employees.[55] The *National League of Cities* Court reasoned that the wage freeze in *Fry* was a temporary emergency measure which displaced "no state choices as to how governmental operations should be structured," and acted to reduce rather than increase pressures on state budgets.[56]

Justice Blackmun, concurring, interpreted *National League of Cities* as adopting a "balancing approach" which did not rule out

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[51] In 1961, Congress amended FLSA to include not only employees individually engaged in interstate commerce but also employees in "enterprises" engaged in commerce. Fair Labor Standards Amendments of 1961, Pub. L. No. 87-30, § 2(s), 75 Stat. 65 (amending 29 U.S.C. § 203(d) (1964 & Supp. II 1966)).

In 1966, Congress removed the exemption extended to the states with respect to employees in a hospital, institution, or school. Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 102(b), 80 Stat. 830 (amending 29 U.S.C. § 203(d) (1964 & Supp. II 1966)). The *Wirtz* Court sustained the validity of these two amendments. *Wirtz*, 392 U.S. at 183.

[52] *National League of Cities*, 426 U.S. at 854-55. Justice Rehnquist in *National League of Cities* stated "there are obvious differences between the schools and hospitals involved in *Wirtz*, and the fire and police departments affected here," *id.* at 855, but then he declined to distinguish the cases on these grounds, rather finding that "each provides an integral portion of those governmental services which the States and their political subdivisions have traditionally afforded their citizens." *Id.*

[53] *Id.* at 852 n.17. The Court expressed their view four days later on the plenary power of section five of the fourteenth amendment in Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). Justice Rehnquist, again speaking for the majority, sustained the 1972 amendments of Title VII of the Civil Rights Act which extended coverage of the Act authorizing private damages actions for discrimination in employment to state and local government employees. In contrast to *National League of Cities*, the *Fitzpatrick* Court held that:

> [T]he Eleventh Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment. In that section Congress is expressly granted authority to enforce "by appropriate Legislation" the substantive provisions of the Fourteenth Amendment, 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.

Fitzpatrick v. Bitzer, 427 U.S. 455, 456 (1976) (citations omitted).

[54] 421 U.S. 542 (1975).

[55] Economic Stabilization Act of 1970, 12 U.S.C. § 1904 (1976 & Supp. V 1981).

[56] *National League of Cities*, 426 U.S. at 852-53.

federal regulation in areas of traditional state activity when the "federal interest is demonstrably greater" than that of the states' and where state compliance is essential to the federal goal.[57] Justice Blackmun cited the majority's reasoning in upholding *Fry* to support this approach.[58]

Justice Brennan, in a bitter dissent,[59] reviewed the history of the Court's decisions and found no constitutional basis to support the majority's holding that state sovereignty is a restraint on the commerce clause.[60] The dissent reasoned that the tenth amendment provides no basis for distinguishing between private parties and the states insofar as federal commerce regulation is concerned.[61] Justice Brennan argued that the only limitation upon the commerce power as it affects state sovereignty is the political process itself.[62] The dissent further described Justice Blackmun's balancing approach as "a thinly veiled rationalization for judicial supervision of a policy judgment that our system of government reserves to Congress."[63]

Five years later in *Hodel v. Virginia Surface Mining & Reclamation Association*,[64] Justice Marshall, speaking for the majority,[65] articulated a three-prong test that a state claim for immunity from a

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[57] *Id.* at 856 (Blackmun, J., concurring). Justice Blackmun also noted that such an approach would not affect federal regulation in the area of environmental protection. *Id.*

[58] *Id.* Similarly, Justice Stevens, dissenting, assumed the Court would uphold federal legislation

> requir[ing] the State to act impartially when it hires or fires [an employee], to withhold taxes from his paycheck, to observe safety regulations when he is performing his job, to forbid him from burning too much soft coal in the capitol furnace, from dumping untreated refuse in an adjacent waterway, from overloading a state-owned garbage truck, or from driving either the truck or the governor's limousine over 55 miles an hour.

Id. at 880 (Stevens, J., dissenting). Justice Stevens could not distinguish these federal regulations from the provisions of FLSA. *Id.* at 881 (Stevens, J., dissenting).

[59] Justices White and Marshall joined in Justice Brennan's dissent. *Id.* at 856.

[60] *Id.* at 858-69 (Brennan, J., dissenting).

[61] *Id.* at 861-63, 868 n.9 (Brennan, J., dissenting). Rather the dissent argued that the tenth amendment merely recognizes that Congress may not go beyond the limit of its delegated powers and hence prevent the states from exercising their reserved powers. *Id.* at 862 (Brennan, J., dissenting).

[62] *Id.* at 857-58 (Brennan, J., dissenting).

[63] *Id.* at 876 (Brennan, J., dissenting). Justice Brennan also criticized as "conceptually unworkable" the traditional/nontraditional state activities test and the majority's "inability to articulate any meaningful distinctions among state-operated railroads, state-operated schools and hospitals, and state-operated police and fire departments." *Id.* at 880 (Brennan, J., dissenting) (citations omitted).

[64] 452 U.S. 264 (1981).

[65] Only Justice Rehnquist did not join the majority opinion but filed a separate opinion concurring in the judgment. While joining the majority opinion, Chief Justice Burger and Justice Powell also filed concurring opinions. *Id.*

federal commerce regulation must meet to survive under the reasoning of *National League of Cities*.[66] The *Hodel* Court summarized the requirements of state immunity to be that the federal statute: 1) regulate the " 'States as States' "; 2) pertain to definite " 'attribute[s] of state sovereignty' "; and 3) directly hinder the state's capacity " 'to structure integral operations in areas of traditional governmental functions.' "[67] Referring to Justice Blackmun's "balancing approach," Justice Marshall added that even if the requirements of this three-pronged test were met, "[t]here are situations in which the nature of the federal interest advanced may be such that it justifies state submission."[68]

In *Hodel*, the constitutionality of the Surface Mining Control and Reclamation Act of 1977[69] was challenged as a violation of the *National League of Cities* doctrine.[70] The Surface Mining Act prescribed environmental performance standards for coal mine operators[71] which were to be enforced either by the state (if it so elected)[72] or by the Secretary of the Interior.[73] Without reaching the balancing step, the Court maintained that the first requirement of the test had not been satisfied and therefore the tenth amendment challenge to the Act could not succeed.[74] The Court found the provisions of the Act to be directed at private individuals rather than the "States as States" and thus considered it immaterial whether the Act interfered with the states' "traditional governmental function" of regulating land use.[75] The *Hodel* Court reasserted that Congress may displace or preempt the police powers of the state insofar as they regulate private activities affecting interstate commerce.[76]

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[66] *Id.* at 286-87.

[67] *Id.* (quoting *National League of Cities*, 426 U.S. at 854, 845, 852).

[68] *Id.* at 288 n.29.

[69] Pub. L. No. 95-87, § 515, 91 Stat. 445.

[70] *Hodel*, 452 U.S. at 268. The district court ruled that § 515(d) and (e) of the Surface Mining Act, 30 U.S.C. § 1265(d)-(e) (Supp. V 1981), were in violation of the tenth amendment under the principle of *National League of Cities*. Virginia Surface Min. & Reclamation Ass'n v. Andrus, 483 F. Supp. 425, 435 (W.D. Va. 1980), *aff'd in part, rev'd in part and remanded sub nom.* Hodel v. Virginia Surface Min. & Reclamation Ass'n, 452 U.S. 264 (1981).

[71] 30 U.S.C. § 1265(d)-(e) (Supp. V 1981). These provisions are concerned with surface mining on "steep slopes." A sister case, Hodel v. Indiana, 452 U.S. 314 (1981), decided the same day, was concerned with 15 other substantive provisions of the Act. These so-called "prime farmland" provisions were also held constitutional on the same basis as the "steep slope" provisions.

[72] 30 U.S.C. § 1253 (Supp. V 1981).

[73] *Id.* at § 1254.

[74] *Hodel*, 452 U.S. at 288.

[75] *Id.* at 288-93.

[76] *Id.* The Court maintained that since Congress could displace the states entirely in the area of surface coal mining, Congress could also permit the states a role in the regulation. *Id.* at 290.

One year after *Hodel*, a tenth amendment challenge was brought in *United Transportation Union v. Long Island R.R.*,[77] in which a railway union argued that its dispute with the state-owned railroad was covered under the Federal Railway Labor Act,[78] which permitted strikes after a thirty-day cooling off period.[79] The Long Island Railroad claimed immunity from the federal Act under the principle of *National League of Cities*[80] and maintained that the union was subject to New York's Taylor Law,[81] which prohibits strikes by public employees.[82] Speaking for a unanimous Court, Chief Justice Burger recited the *Hodel* three-prong test and held that the third requirement of the test had not been satisfied.[83] The Court reasoned that "[o]peration of railroads is not among the functions *traditionally* performed by state and local governments. Federal regulation of state-owned railroads simply does not impair a state's ability to function as a state."[84]

Also in 1982, in *Federal Energy Regulatory Commission v. Mississippi (FERC)*,[85] the State of Mississippi and the Mississippi Public Service Commission challenged certain provisions of the Public Utility Regulatory Policies Act of 1978 (PURPA).[86] Titles I and III of PURPA required state utility regulatory commissions to consider certain federal rate standards[87] and section 210 of Title II required the state public service commissions to resolve disputes arising under the Act.[88]

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[77] 455 U.S. 678 (1982).

[78] 45 U.S.C. § 151 (1976).

[79] *United Transp. Union*, 455 U.S. at 680-81.

[80] *Id.* at 683.

[81] N.Y. CIV. SERV. LAW §§ 200-214 (McKinney's 1983).

[82] *United Transp. Union*, 455 U.S. at 680-81. The district court ruled that the railroad was subject to the Railway Labor Act and held that the union was entitled to a declaratory judgment. United Transp. Union v. Long Island R.R., 509 F. Supp. 1300 (E.D.N.Y.), *rev'd*, 634 F.2d 19 (2d Cir. 1980), *rev'd and remanded*, 455 U.S. 678 (1982). The Court of Appeals for the Second Circuit reversed, under the rationale of *National League of Cities*, holding that the operation of a railroad was an "integral governmental function" and that the federal interest, in this context, is not "demonstrably greater" than that of New York State. United Transp. Union v. Long Island R.R., 634 F.2d 19 (2d Cir. 1980), *rev'd and remanded*, 455 U.S. 678 (1982).

[83] *United Transp. Union*, 455 U.S. at 684.

[84] *Id.* at 686 (emphasis in original). The Court pointed out that when the State acquired the railroad, it did so with the understanding that the railroad was subject to federal regulation. *Id.* at 689. Moreover, just as traditional state functions may not be usurped by the federal government, the state government may not erode areas of federal authority by acquiring functions formerly carried out in the private sector. *Id.* at 687.

[85] 456 U.S. 742 (1982).

[86] Titles I and III and § 210 of Title II of the Act were challenged, 16 U.S.C. §§ 2611-2644 (Supp. V 1981), 15 U.S.C. §§ 3201-3211 (Supp. V 1981), 16 U.S.C. § 824a-3 (Supp. V 1981).

[87] *FERC*, 456 U.S. at 745. Titles I and III of PURPA provided that the states mandatorily consider the specific federal rate designs. *Id.* at 746. The states however were not required to adopt the federal rate scheme. *Id.* at 749-50.

[88] *Id.* at 750-51. Congress' attempt to utilize state regulatory machinery to promote federal goals presented an issue of first impression. *Id.* at 758-59. In an unreported opinion, the district

Justice Blackmun, writing for the *FERC* majority,[89] did not explicitly refer to the *Hodel* test[90] but concluded that since Congress may entirely preempt the private sector in the public utilities area, "PURPA should not be invalid simply because, out of deference to state authority, Congress adopted a less intrusive scheme and allowed the States to continue regulating in the area on the condition that they *consider* the suggested federal standards."[91] Upholding the section 210 requirement that state authorities adjudicate disputes arising under the statute, the Court found that "[d]ispute resolution of this kind is the very type of activity customarily engaged in by the Mississippi Public Service Commission."[92]

III. *Wyoming* Court's View: *National League of Cities* Distinguished

In *EEOC v. Wyoming*, as in *National League of Cities*, the Supreme Court was again faced with the issue of tenth amendment state immunity against a congressional commerce clause regulation in the area of state employment.[93] Justice Brennan, speaking for a five-justice majority,[94] interpreted *National League of Cities* to stand for "a functional doctrine . . . whose ultimate purpose is not to create a sacred province of state autonomy, but to ensure that the unique

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court ruled that Congress had exceeded the scope of its commerce powers in enacting PURPA. *Id.* at 752.

[89] Justice Blackmun was joined by Justices Brennan, White, Marshall, and Stevens. Justice Powell concurred in part and dissented in part. Justice O'Connor, joined by Chief Justice Burger and Justice Rehnquist, concurred in the judgment in part and dissented in part. *Id.* at 742.

[90] Justice Blackmun made no reference to the *Hodel* test in the text but rather mentioned it in a footnote. *Id.* at 763 n.28. This omission seems significant since the dissent comments that "[t]he Court sidesteps this analysis." *Id.* at 781 (O'Connor, J., dissenting).

[91] *Id.* at 765 (emphasis in original). Justice Blackmun emphasized that this does not mean that a tenth amendment challenge to congressional interference with the state's structuring of employer-employee relationships, as in *National League of Cities*, is foreclosed. *Id.* at 769 n.32.

[92] *Id.* at 760. The Court noted that "state courts have a unique role in enforcing the body of federal law . . . ." *Id.* at 760 (citing Testa v. Katt, 330 U.S. 386, 394 (1947)). By analogy, the *Federal Energy Regulatory Commission (FERC)* Court reasoned that the Mississippi Commission must respect federal policy and the jurisdiction it is granted over disputes under PURPA. *Id.* at 760-61.

[93] *Wyoming*, 103 S. Ct. at 1054. The 1974 FLSA amendments extended coverage of ADEA to state and local employees. Pub. L. No. 93-259, § 28(a),(b), 88 Stat. 55, 78-80 (amending 29 U.S.C. §§ 630(b), 633a (1970)); *see supra* notes 12-14 & 39. Although *FERC*, *United Transportation Union*, and *Hodel* all involved tenth amendment state immunity challenges against commerce clause regulation, none involved state employment decisions and therefore were readily distinguishable on their facts from *National League of Cities*. *See supra* notes 64-92.

[94] Justices White, Marshall, Blackmun, and Stevens joined in Justice Brennan's opinion. *Wyoming*, 103 S. Ct. at 1054.

benefits of a federal system in which the States enjoy a 'separate and independent existence' not be lost through undue federal interference in certain core state functions."[95]

The Court summarized the *Hodel* test and conceded that the first requirement, that the challenged statute regulate the "States as States," was met here.[96] Justice Brennan observed that the meaning of the second requirement, which questions whether the regulation involves matters that are an " 'undoubted attribute of state sovereignty,' " was not entirely clear.[97] The *Wyoming* Court, however, stated that it was unnecessary to resolve the second prong of the test, since the third requirement was not satisfied in that the Age Act did not " 'directly impair' the State's ability to 'structure integral operations in areas of traditional governmental functions.' "[98]

In so holding, the Supreme Court distinguished *Wyoming* on the basis that "the degree of federal intrusion" caused by the provisions of ADEA was "sufficiently less serious than it was in *National League of Cities.*"[99] While observing that state park management has been recognized as a "traditional state function," the Court nevertheless maintained that the state was not being forced to abandon its goal of maintaining the physical preparedness of its game wardens but only being required to achieve this goal in a more careful and individualized way.[100] Moreover, in contrast to *National League of Cities*, the state's choice of means for carrying out its goal was "not being overridden entirely" since the state could continue in its practice if it could

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[95] *Id.* at 1060 (quoting Lane County v. Oregon, 74 U.S. (7 Wall) 71, 76 (1869)). The *Wyoming* Court cited *FERC, United Transportation Union* and *Hodel* to support this "functional doctrine" idea. *Id.*

[96] *Id.* at 1061. Justice Brennan emphasized that the first requirement of the *Hodel* test, which requires the challenged statute to regulate the "States as States," "marks it as a specialized immunity doctrine rather than a broad limitation on federal authority." *Id.* at 1061 n.10.

[97] *Id.* at 1061 n.11 (quoting *National League of Cities*, 426 U.S. at 845). The *Wyoming* majority noted that neither *National League of Cities* nor subsequent cases involving the tenth amendment state immunity had clearly defined this concept. Justice Brennan also added that not "every state employment decision aimed simply at advancing a generalized interest in efficient management—even the efficient management of traditional state functions—should be considered to be an exercise of 'an undoubted attribute of state sovereignty.' " *Id.*

[98] *Id.* at 1061-62. The Court noted that even if ADEA did not survive the third requirement of the *Hodel* test, "it might still" survive the balancing test. In response to Wyoming's position that ADEA should not survive the balancing test because no substantial federal interest existed, as evidenced by federal retirement statutes nearly identical to the Wyoming statute, the Court answered that the degree of federal interest was not lessened by the "ebbs and flows of political decisionmaking." *Id.* at 1064 n.17.

[99] *Id.* at 1062.

[100] *Id.*

show that age is a "bona fide occupational qualification" for game wardens.[101]

The majority focused upon the financial impact of a federal regulation as having the most substantial and tangible effects on a state's ability to structure its operations.[102] Any increased costs caused by ADEA in terms of higher wages and benefits to be paid to older workers, the Court reasoned, might be offset by the additional pension contributions paid by the older workers together with the likelihood that such workers, after retiring, would receive pension benefits for fewer years.[103] Since the Court concluded that extension of ADEA to state and local governments was a valid exercise of Congress' commerce power, it declined to decide whether ADEA could have been upheld under section five of the fourteenth amendment.[104]

In a concurring opinion, Justice Stevens reasoned that, because of broad, sweeping economic change during the past century which has resulted in interdependence between employment in the private and public sectors, a proper reading of the Constitution would hold that congressional regulation of the labor market may require regulation of both sectors.[105] He based this contention on the historical observation that the Founding Fathers' "principle purpose" when drafting the Constitution was to grant the commerce power to the federal government and to eliminate trade barriers among the states.[106] Justice Stevens maintained that no provision in the Constitution, including the tenth amendment, supported the state immunity limitation on Congress' commerce power as articulated in *National League of Cit-*

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[101] *Id.*

[102] *Id.* at 1062-63. The *Wyoming* Court cited the *National League of Cities* definition that the "test of such financial effect" does not depend upon " 'particularized assessments of actual impact,' which may vary . . . but on a more generalized inquiry, essentially legal rather than factual . . . ." *Id.* at 1063 (quoting *National League of Cities*, 426 U.S. at 851-52).

[103] *Id.* To offset any higher costs for health benefits for older employees, Congress included a provision in ADEA which required that the health benefits of older employees not necessarily be identical to those of younger employees. 29 U.S.C. § 623(f)(2) (Supp. V 1981).

The *Wyoming* Court noted that in some cases there might be nonfinancial collateral goals which might be affected by the federal regulation; however, Wyoming claimed no such goals for their mandatory retirement statute. *Wyoming*, 103 S. Ct. at 1063-64.

[104] *Wyoming*, 103 S. Ct. at 1064. In a footnote, the Court reaffirmed that the same tenth amendment restraints do not apply when Congress acts pursuant to section five of the fourteenth amendment. *Id.* at 1064 n.18. The Supreme Court also noted that the district court incorrectly disposed of the section five argument on the basis that Congress did not expressly articulate any intention to use that power. *See supra* note 33. The majority maintained that the validity of congressional regulations is not dependent upon a recitation of the powers under which Congress acts. *Wyoming*, 103 S. Ct. at 1064 n.18; *see also* Brief for appellant, *supra* note 25, at 21-22.

[105] *Wyoming*, 103 S. Ct. at 1066-67 (Stevens, J., concurring).

[106] *Id.* at 1064-66 (Stevens, J., concurring).

ies.[107] Concluding that this restraint on the commerce clause was "pure judicial fiat," Justice Stevens called for the overruling of *National League of Cities.*[108]

Chief Justice Burger, in a lengthy dissent,[109] contended that application of ADEA against the states was supported by neither the commerce clause nor section five of the fourteenth amendment.[110] Examining the constitutionality of ADEA under the commerce clause, the dissent concluded that the provisions of ADEA met all three requirements of the *Hodel* test.[111] Not only did the Chief Justice find ADEA to regulate the "States as States,"[112] but he also found it to address matters that are attributes of state sovereignty.[113] The dissent stressed that parks and recreation services were recognized in *National League of Cities* as traditional areas of state activities immunized by the tenth amendment.[114] Turning to the third *Hodel* requirement, Chief Justice Burger focused upon the additional financial burdens imposed upon the states by the Age Act (i.e., those costs arising from increased wages, pension benefits, and disability and health insurance paid for by the employer retaining the older employee)[115] and concluded that the Act impaired "the state's ability to structure its integral governmental operations."[116] Nor did the dissent find that ADEA survived Justice Blackmun's balancing test.[117] The Chief Justice reasoned that the state's interest in exercising its police power over its parks and recreation services outweighed the federal interest of not

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[107] *Id.* at 1067 (Stevens, J., concurring).

[108] *Id.*

[109] Justices Powell, Rehnquist, and O'Connor joined in Chief Justice Burger's dissent. *Id.* at 1068.

[110] *Id.* (Burger, C.J., dissenting).

[111] *Id.* at 1072 (Burger, C.J., dissenting).

[112] *Id.* at 1069 (Burger, C.J., dissenting).

[113] *Id.* at 1069-70 (Burger, C.J., dissenting). The State of Wyoming claimed that the establishment of a retirement plan in the present case like the establishment of wages and hours in *National League of Cities* is an "employment term," the determination of which is an "attribute of sovereignty." Brief for State of Wyoming, Et Al. at 18, EEOC v. Wyoming, 103 S. Ct. 1054 (1983) [hereinafter cited as Brief for appellee].

[114] *Wyoming*, 103 S. Ct. at 1069 (Burger, C.J., dissenting).

[115] *Id.* at 1070 (Burger, C.J., dissenting). The dissent also noted the nonfinancial burdens imposed by ADEA such as the hindrance upon the states in employing those most physically fit and the impediment on promotional opportunities caused by retaining older workers. *Id.* at 1071 (Burger, C.J., dissenting). Chief Justice Burger reasoned that "[l]ack of such opportunities tends to undermine younger employees' incentive to strive for excellence, and impedes the state from fulfilling affirmative action objectives." *Id.*

[116] *Id.* at 1072 (Burger, C.J., dissenting).

[117] *Id.*; *see supra* notes 57-58 and accompanying text.

burdening the social security system and other maintenance programs.[118]

Chief Justice Burger found further support for his position in the fact that Congress had inserted exemptions into the Age Act for members of the Armed Forces,[119] Foreign Service,[120] and federal law enforcement officers,[121] and had also allowed the Civil Service Commission to establish " '[r]easonable exemptions to the provisions of this section.'"[122] The dissent found it hypocritical and "difficult to grasp" that the goals of cost reduction and increased promotional opportunities were recognized on the federal level but not on the state level.[123] The fact that ADEA contained a "bona fide occupational qualification" (BFOQ)[124] exception did not appear to the Chief Justice as a practical solution to the problems caused by ADEA.[125] The dissent pointed to the fact that, without statutory guidelines, the courts which have dealt with the problem of defining a BFOQ have developed a high evidentiary standard[126] which requires an employer to establish that substantially all members within a class are unable to

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[118] *Wyoming*, 103 S. Ct. at 1072 (Burger, C.J., dissenting). The State of Wyoming argued that this state interest to assure the physical preparedness of law enforcement officers was supported by the decisions of the Court in Vance v. Bradley, 400 U.S. 93 (1979) (mandatory retirement of Foreign Service officers at age 60) and Massachusetts Bd. of Retirem. v. Murgia, 427 U.S. 307 (1977) (mandatory retirement at age 50 of state law enforcement officers). Brief for appellee, *supra* note 113, at 18.

[119] 10 U.S.C. § 1251 (1982).

[120] 22 U.S.C. § 4052 (Supp. IV 1980).

[121] 29 U.S.C. § 633a(a) (Supp. V 1981).

[122] 103 S. Ct. at 1069-70 (Burger, C.J., dissenting) (quoting 29 U.S.C. § 633a(b) (1976 & Supp. V 1981)).

[123] *Id.* at 1071 (Burger, C.J., dissenting).

[124] 29 U.S.C. § 623(f) (1976 & Supp. V 1981) provides:

> It shall not be unlawful for an employer, employment agency, or labor organization—
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> (1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age;
>
> (2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual; or
>
> (3) to discharge or otherwise discipline an individual for good cause.

Id.

[125] *Wyoming*, 103 S. Ct. at 1071 (Burger, C.J., dissenting).

[126] *Id.* Wyoming claimed that the BFOQ exemption was inadequate since it merely resulted in a "battle of experts" at trial. Brief for appellee, *supra* note 113, at 15-16. Even though classifications according to age have not been held "suspect" by the Supreme Court, Wyoming maintained that the BFOQ "evidentiary hurdle is so stringent that the effect of its use is to elevate age discrimination to a strict scrutiny analysis." *Id.* at 17. Nevertheless, the Commission claimed that

perform a job efficiently. In the alternative, employers must prove they have individually examined members over a certain age limit for purposes of dismissal.[127]

The Chief Justice, turning to the congressional equal protection power under section five of the fourteenth amendment, observed that neither the Court nor Congress had determined that discrimination based upon age violated the fourteenth amendment.[128] Referring to the mandatory retirement schemes which were upheld against equal protection challenges in *Massachusetts Board of Retirement v. Murgia*[129] and *Vance v. Bradley*,[130] the dissent recited the judicial determination that "[i]t [is] not necessary [to be] convinced that equal protection guarantees extend to classes defined by age because governmental employment is not a fundamental right and those who are mandatorily retired are not a suspect class."[131] Under the rational basis standard, *Murgia* was upheld on the basis that early retirement helped assure the physical preparedness of the state's police force and *Bradley* was upheld because mandatory retirement assured optimal performance and increased promotional opportunities in the Foreign Service.[132] Chief Justice Burger concluded that Wyoming's mandatory retirement statute should similarly be upheld under a fourteenth amendment challenge.[133]

ADEA "does not interfere with the state's power to prescribe reasonable qualifications" for state employees, 29 U.S.C. § 623(f)(1) (1976 & Supp. V 1981), nor with the state's power to discharge unfit employees, 29 U.S.C. § 623(f)(3) (Supp. V 1981), nor with the power to discharge employees "too old to perform adequately," 29 U.S.C. § 623(f)(1) (1976 & Supp. V 1981). Brief for appellant, *supra* note 25, at 10.

[127] *Wyoming*, 103 S. Ct. at 1072 (Burger, C.J., dissenting). This response was directed essentially at the 29 U.S.C. § 623(f)(1) (1976 & Supp. V 1981) BFOQ. *See supra* note 124. Addressing 29 U.S.C. § 623(f)(2) (Supp. V 1981) of the BFOQ, the dissent similarly contended that it would be overly burdensome to have Wyoming enact legislation reducing its disability and health insurance on older employees and probably unfair to these older employees to do so. *Wyoming*, 103 S. Ct. at 1071 (Burger, C.J., dissenting); *see supra* note 124.

[128] *Wyoming*, 103 S. Ct. at 1072-73 (Burger, C.J., dissenting).

[129] 427 U.S. 307 (1976) (Massachusett's statute requiring mandatory retirement of state police upheld against fourteenth amendment equal protection challenge).

[130] 440 U.S. 93 (1979) (Foreign Service rule requiring retirement at age 60 upheld against fifth amendment equal protection challenge).

[131] *Wyoming*, 103 S. Ct. at 1073 (Burger, C.J., dissenting).

[132] *Id.*

[133] *Id.* Chief Justice Burger maintained that while there is some flexibility in interpreting the scope of the fourteenth amendment, there is a limit "to which Congress may substitute its own judgment for that of the states and assume this Court's 'role of final arbiter.' " *Id.* at 1074 (Burger, C.J., dissenting) (quoting Oregon v. Mitchell, 400 U.S. 112, 205 (1970) (Harlan, J., dissenting)). The Chief Justice contended that "it cannot be said that in applying the Age Act to the states Congress has acted to enforce equal protection guarantees as they have been defined by this Court." *Id.* at 1073 (Burger, C.J., dissenting).

Justice Powell, in a separate dissent,[134] took issue with Justice Stevens' concurring opinion which construed the granting of the commerce power to the federal government as the central purpose of the Constitution.[135] Justice Powell maintained that the establishment of a national government in a federal system was a far more important goal to the Founders than the elimination of trade barriers.[136] In addition, the dissent found the tenth amendment, like the other amendments in the Bill of Rights, to be an explicit restraint upon national power.[137]

IV. ANALYSIS: *NATIONAL LEAGUE OF CITIES* ANNIHILATED

National League of Cities appears to have been an aberration in which the Court attempted to draw an unworkable state sovereignty line.[138] The *National League of Cities* Court confused more than it clarified[139] when it chose not to apply the rational basis test[140] but

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[134] Justice Powell was joined by Justice O'Connor. *Id.* at 1075.

[135] *Id.* at 1075-76 (Powell, J., dissenting).

[136] *Id.* at 1086 (Powell, J., dissenting). In support of his position, Justice Powell cited to the delegation of powers in the Constitution, art. I, § 8, in which the commerce clause comes after the "Power To lay and collect Taxes . . ." and after the power to "provide for the common Defence and general Welfare. . . ." *Id.* at 1076-77 (Powell, J., dissenting). The commerce clause, the dissent continued, is thus grouped together with many other powers and occupies no position of particular importance. *Id.* at 1077 (Powell, J., dissenting). Justice Powell did not disagree that the commerce power should not have grown to accommodate the unforeseen changes in society. Rather, he disagreed with Justice Stevens' opinion that it was the Founder's intent to have the commerce clause occupy such a prominent position. *Id.* at 1086 (Powell, J., dissenting).

[137] *Id.* at 1080 (Powell, J., dissenting). Justice Powell maintained that recognition that the states retained certain sovereign powers was reaffirmed in *United Transportation Union*, where operation of a railroad was not considered a state's "constitutionally preserved sovereign function," 455 U.S. at 683, and in *FERC*, where the issue of whether PURPA "constituted an invasion of state sovereignty in violation of the Tenth Amendment," 456 U.S. at 752, was considered. *Wyoming*, 103 S. Ct. at 1080 (Powell, J., dissenting).

[138] It has been suggested that the sudden shift in the Supreme Court's direction in *National League of Cities* together with its overruling of *Wirtz* was caused by a change in the identity of the members of the Court. *See* Florida Dep't of Health & Rehab. Servs. v. Florida Nursing Home Ass'n, 450 U.S. 147, 153 (1981) (Stevens, J., concurring) (citing J. NOWAK, J. YOUNG & R. ROTUNDA, HANDBOOK ON CONSTITUTIONAL LAW 159-63 (1978)); N.Y. Times, Mar. 14, 1983, at A14.

[139] Several commentators have noted that the various formulations offered by Justice Rehnquist to support his invalidation of the 1974 FLSA amendments are far from clear. *See* Tribe, *supra* note 2, at 1090 ("If [the *National League of Cities*] decision is justifiable, it is not because of any inherent rights of states. . . ."); Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in* National League of Cities v. Usery, 86 YALE L. J. 1165, 1166 (1977) ("But each of those [state sovereignty] interpretations is ruled out by some or another aspect of the *NLC* decision itself."); Schwartz, *supra* note 2, at 1133 ("Perhaps the *National League of Cities* opinion was only employing Humpty Dumpty's method in using the language of state sovereignty." [citing L. CARROLL, THROUGH THE LOOKING GLASS, ch. 6, " 'When I use a

rather to take a more active role[141] in adjudicating federal commerce clause legislation by giving substance to the tenth amendment.[142] The language of the tenth amendment[143] offers little support for distinguishing between congressional commerce regulation directed at the private sector and similar regulation directed at the public sector.[144] Further, the *National League of Cities* Court's use of a "traditional state activities" analysis[145] to determine the sphere of state activities immunized[146] has been criticized as being both an usurpation of con-

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word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean—neither more nor less.' "]); Comment, *supra* note 48, at 197 ("Instead of being the future touchstone of tenth amendment analysis, *National League of Cities* may prove so unworkable as to result in a second death knell for vigorous judicial enforcement of the tenth amendment.").

[140] The rational basis test recognizes the plenary nature of Congress' commerce power. The two requirements of the test have been summarized to be "(1) whether Congress had a rational basis for finding that [a particular problem] affected commerce, and (2) if it had such a basis, whether the means it selected to eliminate that evil are reasonable and appropriate." Heart of Atlanta Motel v. United States, 379 U.S. 241, 258 (1964). Satisfaction of these two requirements ends the judicial inquiry. *See id.* at 259. Earlier cases indicated that Congress, being composed of representatives from the states, is structured to have special competence in dealing with federal-state intergovernmental conflicts. Under this theory, states must resort to the political process to check excessive federal power rather than to the Court. *See generally* New York v. United States, 326 U.S. 572, 581-82 (1946) (opinion of Frankfurter, J.); United States v. Darby, 312 U.S. 100, 114-15 (1941); United States v. Butler, 297 U.S. 1, 78-80 (1936) (Stone, J., dissenting).

[141] Higher levels of judicial scrutiny which involve "compelling interest tests" are usually rationalized on the basis that minorities do not have the necessary political representation to protect their "fundamental liberties." *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938); *see also* Shapiro v. Thompson, 394 U.S. 618 (1969); Loving v. Virginia, 388 U.S. 1 (1967). It has been argued that such an elevated level of scrutiny is inappropriate and is difficult to apply when a state is involved. *See* Comment, *supra* note 48, at 191-96.

[142] *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 5-20 to 5-22, at 300-18 (1978); J. NOWAK, J. YOUNG & R. ROTUNDA, HANDBOOK ON CONSTITUTIONAL LAW 160-63 (1978) [hereinafter cited as J. NOWAK].

[143] *See supra* note 22.

[144] At least one commentator has noted that the language of the amendment would seem to reserve the same area of autonomy "to the States" and "to the people." *See* L. TRIBE, *supra* note 142, at 308 n.9. In *Wirtz*, the Court appeared to be in agreement with this view when Justice Harlan stated that:

> valid general regulations of commerce do not cease to be regulations of commerce because a State is involved. If 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. This was settled by the unanimous decision in United States v. California.

Wirtz, 392 U.S. at 196-97 (citations omitted). Although the *National League of Cities* Court overruled *Wirtz*, Justice Rehnquist distinguished United States v. California, 297 U.S. 175 (1936). *See supra* note 48.

[145] The *National League of Cities* Court chose to use a "traditional state activities" test rather than to draw the line between activities uniquely carried out by the state, such as police and fire protection, and those in competition with the private sector, such as schools and hospitals. It has been suggested that the "competition" test would have avoided overruling *Wirtz* and would avoid the ambiguities of affording no immunity to state-operated railroads while protecting state-operated schools and hospitals. *See* Note, *supra* note 48, at 253-54.

[146] The *National League of Cities* Court did not clarify whether state activities are absolutely protected from commerce clause regulation or are only protected to the extent that such regula-

gressional authority[147] and an unworkable test for the courts.[148] Because of the ambiguities inherent in the *National League of Cities* test, courts which have had to apply the tenth amendment state immunity doctrine have adopted Justice Blackmun's balancing approach.[149]

The *Hodel* Court delivered the first blow to *National League of Cities* by formulating the three-part test plus balancing.[150] The effect of the *Hodel* test,[151] formulated by Justice Marshall, a dissenter in *National League of Cities*, was to make it more difficult for a state claim of immunity to succeed against a federal commerce regulation by requiring it to overcome these evidentiary "hurdles."[152] Yet the *Hodel* decision was disappointing in that a complex question embracing states' traditional regulation of land use was resolved very simply by relying upon the need for direct regulation of the states in the surface coal mining area and by citing the "wealth of precedent

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tions "significantly alter or displace the States' abilities to structure employer-employee relationships." 426 U.S. at 851; *see* Note, *supra* note 48, at 249-50.

Further, while defining the determination of wages and hours of governmental employees to be "[o]ne undoubted attribute of state sovereignty," *National League of Cities*, 426 U.S. at 845, the Court did not define what other areas of the "employer-employee relationship" might be included in the sphere of state sovereignty. *See* J. NOWAK, *supra* note 142, at 161.

[147] *See* Note, *supra* note 48, at 254.

[148] "What might have been viewed in an earlier day as an improvident or even dangerous extension of state activities may today be deemed indispensable." New York v. United States, 326 U.S. 572, 591 (1946) (Douglas, J., dissenting). One commentator has noted that "a town's water supply, a sewage disposal system and a public transportation company have been characterized as traditional state functions" while "supplying gas or electricity, the New York Port Authority and a city's elevated railway have been held nontraditional functions." Comment, *supra* note 48, at 192 (citations omitted); *see also* Kilberg & Fort, *supra* note 48, at 615 n.23; Schwartz, *supra* note 2, at 1128-29. Aside from being a difficult distinction to make, the distinction itself has been criticized as illogical. *See* Tribe, *supra* note 2, at 1072-76.

[149] *See, e.g.*, Woods v. Homes & Structures, Inc., 489 F. Supp. 1270, 1296-97 (D. Kan. 1980); Colorado v. Veterans Admin., 430 F. Supp. 551, 559 (D. Colo. 1977), *modified*, 602 F.2d 926 (10th Cir. 1979), *cert. denied*, 444 U.S. 1014 (1980). Other courts have combined both the majority traditional governmental function displacement test with the balancing test. *See, e.g.*, Public Serv. Co. v. Federal Energy Regulatory Comm'n, 587 F.2d 716, 721 (5th Cir.), *cert. denied*, 444 U.S. 879 (1979); Usery v. Edward J. Meyer Memorial Hosp., 428 F. Supp. 1368, 1369-70 (W.D.N.Y. 1977). Several commentators have noted that since Justice Blackmun cast the fifth vote in *National League of Cities*, no standard more severe than his "balancing approach" to state immunity would develop. *See* J. NOWAK, *supra* note 142, at 162-63; Kilberg & Fort, *supra* note 48, at 616 n.26.

[150] *See* Comment, *The Supreme Court Rejects Constitutional Challenges to the Surface Mining Control and Reclamation Act of 1977:* Hodel v. Virginia Surface Mining and Reclamation Association, Hodel v. Indiana, 48 BROOKLYN L. REV. 137, 158 (1981).

[151] Since Justice Marshall dissented in *National League of Cities*, it would appear that his motive in articulating a test is to solidify the requirements and hence increase the difficulties for a state claim to succeed.

[152] In *Wyoming*, Justice Brennan referred to the *Hodel* test as "hurdles." *Wyoming*, 103 S. Ct. at 1060.

[which] attests to congressional authority to displace or pre-empt state laws regulating private activity affecting interstate commerce."[153]

The Court in *United Transportation Union* provided little additional clarification of the *National League of Cities* decision by holding that "[f]ederal regulation of state-owned railroads simply does not impair a state's ability to function as a state."[154] The *National League of Cities* Court already had reaffirmed *United States v. California,* in which federal regulation of a state-owned railroad was similarly sustained on the basis that state-operated railroads were outside a state's traditional function.[155]

FERC marked a significant turning point in the evolution of the *National League of Cities* doctrine.[156] In that case, Justice Blackmun avoided using the *Hodel* test and instead utilized only his balancing approach.[157] In so doing, Justice Blackmun deemphasized state sovereignty and ignored the fact that the federal Act regulated the "States as States" in the capacity of state utility commissions.[158] In concluding that the adjudication of federal disputes by the state utility commissions was an activity usually engaged in by the state authorities,[159] the *FERC* majority was balancing the minimal displacement of state activities against a significant federal interest in energy conservation.[160]

In *Wyoming* the Court eviscerated *National League of Cities* by sustaining application of ADEA to the states.[161] Significantly, Justice

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[153] *Hodel,* 452 U.S. at 290; *see* Comment, *supra* note 150, at 174.

[154] *United Transp. Union,* 455 U.S. at 686. The third requirement of the test thereby was not satisfied.

[155] *National League of Cities,* 426 U.S. at 854 n.18. The *California* Court had held that a state-operated railroad is subject to the Federal Appliance Act. United States v. California, 297 U.S. 175, 185 (1936). The Supreme Court has also held that a state-owned railroad must comply with the Interstate Commerce Act. California v. Taylor, 353 U.S. 553, 564 & n.10 (1957).

[156] *Hodel* and *United Transportation Union* were both judgments by a unanimous Court and each failed the three-prong test for predictable reasons. *See supra* notes 67-84 and accompanying text. In contrast, *FERC* was a five-four decision. *See supra* note 89. Hence, Justice Blackmun controlled the opinion via his balancing approach. *See supra* note 149.

[157] The lack of emphasis on state sovereignty immunity and the sidestepping of the *Hodel* three-prong test were noted by Justice O'Connor in her dissent. *FERC,* 456 U.S. at 781-82 & n.9.

[158] *Id.* at 769.

[159] *Id.* at 760.

[160] *See National League of Cities,* 426 U.S. at 856 (Blackmun, J., concurring).

[161] In *FERC,* the majority distinguished *National League of Cities* on the basis that it involved "the State's ability 'to structure employer-employee relationships,' . . . while providing 'those governmental services which [its] citizens require.' " *FERC,* 456 U.S. at 769 n.32, 782 n.9 (quoting *National League of Cities,* 426 U.S. at 851, 847). *FERC,* the Court maintained, "hold[s] only that Congress may impose conditions on the State's regulation of private conduct in a pre-emptible area." *Id.* Hence, *Wyoming* squarely addressed the issue of employer-employee relationships as involved in *National League of Cities. See* Brief for appellee, *supra* note 113, at

Brennan chose to address the constitutionality of ADEA's extension to the states based upon Congress' commerce power[162] rather than on section five of the fourteenth amendment.[163] In so doing, he directly confronted *National League of Cities*.[164]

Perhaps out of need to retain Justice Blackmun's vote,[165] Justice Brennan, although superficially employing the *Hodel* test,[166] used a balancing approach[167] and distinguished, rather than overruled, *National League of Cities*.[168] Justice Brennan's assertion that "the degree of federal intrusion in this case is sufficiently less serious than it was in *National League of Cities*" and hence fails the third prong of the test[169] strongly suggests that the same result would be reached through a pure balancing approach.[170]

Distinguishing *National League of Cities* on the basis that the financial impact of FLSA on the states would result in the loss of important state programs[171] is unconvincing. The financial impacts of FLSA[172] and ADEA[173] upon the states were analyzed by the *National League of Cities* and *Wyoming* majorities respectively and, in each

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11, 18; Supplemental Brief for State of Wyoming, Et Al. at 3, EEOC v. Wyoming, 103 S. Ct. 1054 (1983). Nevertheless, the *Wyoming* Court attempted to distinguish *National League of Cities*. *Wyoming*, 103 S. Ct. at 1062.

[162] *Wyoming*, 103 S. Ct. at 1060, 1064.

[163] Upholding application of ADEA to the states on fourteenth amendment grounds would appear to be easier than basing it on commerce power. *See, e.g.*, City of Rome v. United States, 446 U.S. 156, 179 (1980) ("[T]he Civil War Amendments . . . were specifically designed as an expansion of federal power and an intrusion on state sovereignty."); Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) ("[T]he Eleventh Amendment, and the principle of state sovereignty which it embodies, . . . are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment."); South Carolina v. Katzenbach, 383 U.S. 301, 325 (1966) ("[T]he Fifteenth Amendment supersedes contrary exertions of state power."); Katzenbach v. Morgan, 384 U.S. 641, 646 (1966) (Supreme Court held § 4(e) of the Voting Rights Act of 1965 "is a proper exercise of the powers granted to Congress by § 5 of the Fourteenth Amendment" and thereby reversed lower court ruling which held that Act "usurped powers reserved to the States by the Tenth Amendment"); *see also* Comment, *supra* note 48, at 190-91.

[164] Justice Brennan appeared to have intentions of undercutting *National League of Cities* in Fitzpatrick v. Bitzer where he maintained that the 1972 amendments of Title VII of the Civil Rights Act were valid not only under the fourteenth amendment, as the majority held, but also under the commerce power. Fitzpatrick v. Bitzer, 427 U.S. 445, 457-58 (1976) (Brennan, J., concurring).

[165] *See* N.Y. Times, Mar. 3, 1983, at A20, col. 3.

[166] *Wyoming*, 103 S. Ct. at 1060-62, 1064 n.17.

[167] *See supra* text accompanying notes 57-58.

[168] *Wyoming*, 103 S. Ct. at 1062-64; *see also* N.Y. Times, Mar. 3, 1983, at A20, col. 3.

[169] *Wyoming*, 103 S. Ct. at 1062.

[170] *See id.* at 1064 n.17.

[171] *Id.* at 1062-63.

[172] *National League of Cities*, 426 U.S. at 846.

[173] *Wyoming*, 103 S. Ct. at 1062-63, 1070-71 (Burger, C.J., dissenting).

case, no definitive conclusion could be reached.[174] Moreover, the *National League of Cities* Court conceded that "particularized assessments of actual impact are [not] crucial to resolution of the issue. . . . [A]pplication [of the FLSA amendments] will nonetheless significantly alter or displace the State's abilities to structure employer-employee relationships. . . ."[175] Significantly, the State of Wyoming argued precisely this point—that ADEA would alter the state's employer-employee relations since "[t]he establishment of retirement systems for state employees is nothing more or less than the setting of an employment term."[176] Justice Brennan nevertheless chose to emphasize the "*degree* of federal intrusion" upon the employment relationship rather than the intrusion itself.[177] Although it can be argued that ADEA is more intrusive than FLSA by forcing a state to retain undesired employees rather than allowing states to select whichever employees it wants simply at minimum wage,[178] Justice Brennan saw the intrusion mitigated by the BFOQ exemption.[179]

In his dissent, which focused on the commerce clause support of ADEA, Chief Justice Burger understandably recognized that the facts of *National League of Cities* could not easily be distinguished from those in *Wyoming*.[180] Chief Justice Burger's argument that the fourteenth amendment provides no congressional authority for passage of ADEA,[181] however, is more difficult to comprehend. According to the Chief Justice, "Congress has [not] acted to enforce equal protection guarantees as they have been defined by this Court."[182] Yet the language of section five of the fourteenth amendment gives Congress "power to enforce, by appropriate legislation, the provisions of [the

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[174] *See National League of Cities*, 426 U.S. at 851; *Wyoming*, 103 S. Ct. at 1063, 1070 (Burger, C.J., dissenting).

[175] *National League of Cities*, 426 U.S. at 851. The restriction of choices in the state's employment relations and the nonfinancial hardships were also analyzed for FLSA, *see id.* at 848, and for ADEA, *see Wyoming*, 103 S. Ct. at 1071 (Burger, C.J., dissenting). The *National League of Cities* Court similarly concluded that the federal regulation "would forbid such [employment] choices by the States." *National League of Cities*, 426 U.S. at 848.

[176] Brief for appellee, *supra* note 113, at 18.

[177] *Wyoming*, 103 S. Ct. at 1062 (emphasis added). See also *id.* at 1061 n.11 where Justice Brennan states that not "every state employment decision" should "be understood . . . to be an exercise of an 'undoubted attribute of state sovereignty.' " *See supra* note 146.

[178] *See* N.Y. Times, Mar. 3, 1983, at A20, col. 2.

[179] *Wyoming*, 103 S. Ct. at 1062.

[180] *Id.* at 1068-72 (Burger, C.J., dissenting).

[181] *Id.* at 1072-75 (Burger, C.J., dissenting).

[182] *Id.* at 1073 (Burger, C.J., dissenting). Chief Justice Burger also stated that "no one—not the Court, not the Congress—has determined that mandatory retirement plans violate any rights protected by [the fourteenth amendment]." *Id.* (footnote omitted). Then he added the curious footnote stating that "[t]he ability of Congress to define independently protected classes is an issue that need not be resolved here because I think that the Age Act *is* unconstitutional even if it

fourteenth amendment]."[183] Nowhere does the Constitution indicate that Congress is limited in its section five powers to those classes defined by the Court to be in special need of equal protection guarantees.[184] On the contrary, the Court has interpreted section five to be a plenary power[185] subject only to a rational basis test.[186] As a result, Congress may not merely prohibit a per se violation of the amendment,[187] but may also prohibit conduct which might reasonably be expected to result in such a violation.[188]

The standards the Court employs to evaluate claims made against the states under the equal protection clause do not apply to

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is assumed that Congress has this power." *Id.* at 1073 n.6 (Burger, C.J., dissenting) (emphasis added). It would appear that Congress *is* independently defining age as a protected class pursuant to section five of the fourteenth amendment and that this is *precisely* the issue.

[183] U.S. CONST. amend. XIV, § 5; see also section one of the fourteenth amendment which provides that a state shall not enact any laws that "deny to any person within its jurisdiction the equal protection of the laws."

[184] *See infra* notes 185-90 and accompanying text.

[185] *See Ex parte* Virginia, 100 U.S. 339 (1879).

> Whatever legislation is appropriate, that is, adapted to carry out the objects the Amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against state denial or invasion, if not prohibited, is brought within the domain of congressional power.

Id. at 345-46; Katzenbach v. Morgan, 384 U.S. 641, 650 (1966) ("By including § 5 the draftsmen sought to grant to Congress, by a specific provision applicable to the Fourteenth Amendment, the same broad powers expressed in the Necessary and Proper Clause, Art I, § 8, cl 18."); *accord* City of Rome v. United States, 446 U.S. 156, 177 (1980); South Carolina v. Katzenbach, 383 U.S. 301, 324-27 (1966).

[186] The Court in Katzenbach v. Morgan, 384 U.S. 641 (1966), stated:

> It was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations—the risk or pervasiveness of the discrimination in governmental services, the effectiveness of eliminating the state restriction on the right to vote as a means of dealing with the evil, the adequacy or availability of alternative remedies, and the nature and significance of the state interests that would be affected. . . . It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did.

Id. at 653; *accord* South Carolina v. Katzenbach, 383 U.S. 301, 326-27 (1966); City of Rome v. United States, 446 U.S. 156, 177 (1980).

[187] *See, e.g.*, Oregon v. Mitchell, 400 U.S. 112, 133-34 (1970); Katzenbach v. Morgan, 384 U.S. 641, 648-49 (1966); *accord* City of Rome v. United States, 446 U.S. 156, 173-78 (1980); South Carolina v. Katzenbach, 383 U.S. 301, 333-34 (1966).

[188] *See* Katzenbach v. Morgan, 384 U.S. 641, 652-53 (1966); *accord* City of Rome v. United States, 446 U.S. 156, 177 (1980); Oregon v. Mitchell, 400 U.S. 112, 216 (1970) (Harlan, J., concurring in part, dissenting in part). Congress may also require conduct it reasonably considers necessary to correct past misconduct. *See, e.g.*, Fullilove v. Klutznick, 448 U.S. 448, 476-78 (1980) (opinion of Burger, C.J.); *id.* at 503-04 (Powell, J., concurring). While the Court has maintained that state behavior which results in a discriminatory impact, without discriminatory intent, is not in violation of the equal protection clause, Congress is authorized by section five to prohibit such behavior if such prohibition would be "appropriate legislation" to enforce the

Congress. Such judicial determinations provide no basis to limit congressional enforcement power under section five.[189] The appropriate judicial inquiry in determining the validity of ADEA is whether Congress rationally believed that arbitrary age discrimination by the state was in violation of the equal protection clause, and if so, whether the Age Act is a "reasonable and appropriate" means of enforcing the provisions of the amendment.[190] The legislative history of ADEA provides ample support for Congress rationally to believe that ADEA was "appropriate legislation" to enforce the fourteenth amendment,[191] and the judicial history of ADEA indicates that enactment was an appropriate exercise of section five power.[192]

Assuming that Congress has the power to extend coverage of ADEA to the states, the wisdom of enacting the Age Act with numerous exceptions for federal employees without affording the states similar flexibility[193] is questionable.[194] An equitable solution would be for Congress to insert into the BFOQ exception state employee exemp-

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substantive provisions of the amendment. *See* Washington v. Davis, 426 U.S. 229 (1976) (state employment test which has racially disproportionate impact held not violative of equal protection clause); Massachusetts v. Feeney, 434 U.S. 884 (1977) (veteran's employment preference held not violative of equal protection clause even though it has a disproportionate impact on women); Massachusetts Bd. of Retirem. v. Murgia, 427 U.S. 307 (1976) (state mandatory retirement statute for state police officers sustained).

[189] Defining "suspect classes" on the basis that these groups have inadequate political representation to enforce their equal protection guarantees has relevance in judicial actions against the states. *See Wyoming*, 103 S. Ct. at 1073-74; *supra* note 188. Such judicial classifications have no relevance to independent congressional determinations of classes to be protected by section five "appropriate legislation." *See supra* notes 185-88.

[190] *See supra* notes 185-89; see also Heart of Atlanta Motel v. United States, 379 U.S. 241, 258-59 (1964) for rational basis test applied to plenary commerce power. " '[A]ppropriate legislation' to enforce the Equal Protection Clause" has been defined by the Court to be legislation which "may be regarded as an enactment to enforce the Equal Protection Clause, . . . is 'plainly adapted to that end' and . . . is not prohibited by but is consistent with 'the letter and the spirit of the constitution.' " Katzenbach v. Morgan, 384 U.S. 641, 651 (1966) (citing McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819)).

[191] See Justice Brennan's review of the legislative history of ADEA and its connection with the Civil Rights Act of 1964. *Wyoming*, 103 S. Ct. at 1957-59; Brief for appellant, *supra* note 25, at 31-34.

[192] *See Wyoming*, 103 S. Ct. at 1059 & n.6; Brief for appellant, *supra* note 25, at 36-37; *see also* Kilberg & Fort, *supra* note 48, at 621-23; Note, *supra* note 48, at 266-72.

[193] *Wyoming*, 103 S. Ct. at 1071. The State of Wyoming in fact argued that its retirement statute should survive a balancing approach since the many federal exceptions to ADEA attested to the fact that Congress had "no supervening federal interest" in barring early retirement. Brief for appellee, *supra* note 113, at 19.

[194] The majority responded to this point by indicating that once Congress has indicated the strength of its interest, it is not for the Court to psychoanalyze the sincerity of Congress' interest in subsequent "political decisionmaking." *Wyoming*, 103 S. Ct. at 1064, n.17.

tions for the same types of occupations recognized as warranting early retirement at the federal level.[195]

Wyoming appears to be the culmination of a series of cases which have increasingly isolated *National League of Cities*.[196] Not only has *Wyoming* confronted the issue of a federal statute directly regulating the state's employer-employee relationship,[197] but it has done so on commerce clause terms.[198] While the majority avoided explicitly overruling the 1976 decision by narrowly distinguishing it on its fact pattern,[199] it effectively has overruled *National League of Cities*.[200] Yet, because *National League of Cities* and *Wyoming* were both five to four decisions, the direction of the Court in this important area is difficult to predict.

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[195] Since most state mandatory retirement laws are directed at the area of law enforcement, an area recognized by the federal government to warrant early retirement, there would appear to be few points of conflict. *See Wyoming*, 103 S. Ct. at 1069-70 & n.2.

[196] *See supra* notes 69-92 and accompanying text.

[197] *See supra* notes 93-104 and accompanying text.

[198] *See supra* notes 161-64 and accompanying text.

[199] *Wyoming*, 103 S. Ct. at 1062-64. But see *id.* at 1067 (Stevens, J., dissenting), where Justice Stevens is not so restrained.

[200] *See* N.Y. Times, Mar. 3, 1983, at A20 and July 10, 1983, at 18.