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Equal Employment Opportunity Commission v. Wyoming: Appomattox Courthouse Revisited

A highly divided Court again addressed the relatively new doctrine in constitutional law: state exemption from federal regulations due to the concept of federalism. Although the Court applied the tests from National League of Cities v. Usery and its progeny, the Court reached a different result which, without expressly overruling that controversial case, severely limited National League of Cities to its facts. The hope of modern states' rights advocates proved to be short lived.

At the end of the Civil War in 1865, several southern states were forced to surrender and abandon many of their notions of state sovereignty. This War was not fought merely over the immediate issue of slavery, but over the larger issue of states' rights. Even after the bloody war, the nature of the relationship between the United States and each individual state remains uncertain.¹ One key to understanding the relationship lies in the Supreme Court's interpretation of the tenth amendment.² Opportunities to view the issue are always unclear, clouded by emotional issues of slavery, child labor, racial discrimination, and age discrimination.³ The recent United States Supreme Court decision in *Equal Employment Opportunity Commission v. Wyoming*⁴ attempts to clarify the balance between Congressional power to regulate commerce⁵ and the sovereignty of the states.⁶

1. See Powell, *The Compleat Jeffersonian: Justice Rehnquist and Federalism*, 91 YALE L.J. 1317, 1320-21 (1982). Powell describes United States history as a search for the balance between federal and state power. *Id.*

2. U.S. CONST. amend. X. The tenth amendment reads: "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." *Id.*

3. See *infra* notes 16, 27, 30, 35 and accompanying text.

4. 103 S. Ct. 1054 (1983).

5. U.S. CONST. art. I, § 8. The commerce clause reads in part: "Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

6. 103 S. Ct. at 1060. The state of Wyoming argued that the application of federal regulations is "precluded by virtue of external constraints imposed on Congress' commerce powers by the Tenth Amendment." *Id.* This Note is intended to explain the resolution the Court makes on the tension between federal power and state sovereignty.

I. SCENARIO

In 1967, the United States established the Age Discrimination in Employment Act of 1967 (ADEA).⁷ States were added to the definition of "employer" in 1974.⁸ Bill Crump, a fifty-five year old District Game Division supervisor for the Wyoming Game and Fish Department, was involuntarily retired pursuant to Wyoming's law enforcement retirement statute.⁹ Crump filed a complaint with the Equal Employment Opportunity Commission (Commission).¹⁰ The Commission filed suit against the state of Wyoming and its officials in the District Court for the District of Wyoming, alleging a violation of the ADEA.¹¹ The Commission sought damages and declaratory and injunctive relief.¹²

The Commission proposed that Congress had constitutional power to enact the ADEA under the commerce clause¹³ and the fourteenth amendment.¹⁴ In response to the Commission's complaint, the state of Wyoming moved to dismiss for failure to state

7. Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34 (1976 & Supp. IV 1980) [hereinafter referred to as ADEA]. Section 623(a) of the ADEA provides: "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. . . ." 29 U.S.C. § 623(a) (1976).

8. The ADEA did not originally apply to the federal, state, or local governments. In 1974, Congress extended the definition of "employer" to include state and local governments, but not the federal government. 29 U.S.C. § 630(b) (1976). "The term 'employer' means . . . 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 owned by the Government of the United States." *Id.*

9. 103 S. Ct. at 1059 n.7. Wyoming State Highway Patrol and Game and Fish Warden Retirement Act, WYO. STAT. § 31-3-107 (1977), provides for "[a]n employee [to] continue in service on a year-to-year basis after age . . . fifty-five (55), with the approval of the employer and under conditions as the employer may prescribe." *Id.*

10. 103 S. Ct. at 1059. Thereafter, conciliation efforts were instituted between the Commission and the Game and Fish Department which proved to be unsuccessful. *Id.*

11. Equal Employment Opportunity Comm'n v. Wyoming, 514 F. Supp. 595, 595-96 (D. Wyo. 1981). The suit was filed on behalf of Bill Crump and others similarly situated. However, the Commission did not request a certification as a class action. *Id.*

12. *Id.* at 596. The Commission wanted back pay and liquidated damages suffered by Mr. Crump, as well as a reinstatement as a game warden. *Id.*

13. *See supra* note 5.

14. 514 F. Supp. at 597. U.S. CONST. amend. XIV, § 1. "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 the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *Id.* Enforcement of this amendment is provided in section 5. *Id.* at § 5.

a claim.¹⁵ The state first argued that Congress attempted to establish the ADEA pursuant to the commerce clause; however, the attempt failed because the ADEA is in violation of the tenth amendment.¹⁶ Second, the fourteenth amendment provides no source of congressional power to establish the ADEA.¹⁷

The district court refused to allow the Commission to sue the individual state officials, but upheld the suit against the state of Wyoming.¹⁸ The court found that Congress was relying on its commerce power to enact the ADEA.¹⁹ However, the court found the application of the ADEA to the states to be unconstitutional, violating the tenth amendment as construed by the Supreme Court in *National League of Cities v. Usery*.²⁰ The district court seemed particularly concerned with the inconsistent application of the ADEA to the states, but not to the federal government.²¹

15. 514 F. Supp. at 596. Since the ADEA is unconstitutional, the state argued, violation provides no grounds for relief. *Id.*

16. *Id.* The state relied on the 1976 Supreme Court decision in *National League of Cities v. Usery*, 426 U.S. 833 (1976), which limits federal regulation of states. See *infra* notes 43-50 and accompanying text.

17. 514 F. Supp. at 596. The state argued that the ADEA "cannot apply here where there is no impermissible violation of that amendment's equal protection provisions." *Id.*

18. *Id.* The court did not allow the Commission to sue the governor of Wyoming and the unpaid members of the State Game and Fish Commission as private individuals. *Id.* See *Smith v. Losee*, 485 F.2d 334 (10th Cir. 1973), *cert. denied*, 417 U.S. 908 (1974). The court in *Smith* held that immunity for public officials extends to school board officials, rather than only to legislators and judges as originally applied at common law. *Id.* at 341-44. However, the district court's reliance on *Smith* may be misplaced. The court in *Smith* said: "[i]t is important to stress that this is purely a damage action, and this opinion is directed only to such a cause of action." *Id.* at 340. The instant case involves equitable relief as well as damages. See *supra* note 12 and accompanying text.

19. 514 F. Supp. at 598-99. 29 U.S.C. § 621(a) (1976) provides that: "The Congress hereby finds and declares that— . . . (4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce."

20. 426 U.S. 833 (1976). The district court used the balancing test, weighing federal with state interests, from Justice Blackmun's concurring opinion in *National League of Cities*. *Id.* 514 F. Supp. at 600. The Court held: "Blackmun's concurrence on the understanding that the *National League* majority was adopting a 'balancing approach' provides the key to a correct understanding of *National League*, namely, that the Courts must use an ad hoc balancing test of weighing the national interest and policy against the State activity sought to be displaced by the federal regulation." *Id.*

21. 514 F. Supp. at 597, 600. The district court questioned: "How can there be a supervening national interest when the Nation itself requires mandatory retirement of its law enforcement personnel?" *Id.* at 600. See also *Vance v. Bradley*, 440 U.S. 93, 112 (1979) (mandatory retirement of Foreign Service personnel is valid); *Thomas v. United States Postal Inspection Serv.*, 647 F.2d 1035, 1037 (10th Cir. 1981)

The court specifically rejected the notion that the ADEA is an exercise of Congress under section five of the fourteenth amendment.²² The Commission appealed to the Supreme Court on direct appeal.²³

II. HISTORY OF THE CONFLICT

The relationship between the federal government and the states has been uncertain for a long time.²⁴ During the nineteenth century, the federal government and the states were considered co-equal sovereigns, each entity supreme in its own realm.²⁵ The Court in *Hammer v. Dagenhart*²⁶ held that the commerce power of Congress was limited by the tenth amendment, the text of dual federalism.²⁷ At the same time, Congress was limited by the external constraints of the tenth amendment; the Court narrowly construed the scope of the the commerce power. Manufacturing was not considered "commerce."²⁸ Only activity which "directly"

(maximum ages for employing postal employees may be imposed by the Postal Service). See also *supra* note 8.

22. 514 F. Supp. at 599. Section five authorizes Congress to provide for the enforcement of rights guaranteed by the fourteenth amendment. U.S. CONST. amend. XIV, § 5. See also *Pennhurst State School v. Halderman*, 451 U.S. 1 (1981), in which the Court said: "Because such legislation imposes congressional policy on a State involuntarily, and because it often intrudes on traditional state authority, we should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment." *Id.* at 16.

23. 103 S. Ct. at 1057.

24. See Powell, *supra* note 1, at 1320. Powell says: "The history of the United States is in large part the story of the American struggle to define the relationship between the states and the federal government." *Id.* He refers to John Marshall's nationalism opposed by Thomas Jefferson. *Id.* at 1321. Andrew Jackson's nationalism was countered by John C. Calhoun's nullification doctrine. Also, the Civil War was a basic states' rights conflict. *Id.*

25. See *Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 761 (1982) (construing *Kentucky v. Dennison*, 65 U.S. (24 How.) 66, 107 (1860)). In the *Kentucky* slavery case, the Court said that Congress "has no power to impose on a State officer, as such, any duty whatever, and to compel him to perform it. . . ." 65 U.S. (24 How.) at 107.

26. 247 U.S. 251 (1918).

27. *Id.* at 274. The Court held that an act of Congress prohibiting child labor in manufacturing was unconstitutional partly because the tenth amendment is a limitation on the commerce power. *Id.* A grant of federal power "was not intended to destroy the local power always existing and carefully reserved to the States in the Tenth Amendment to the Constitution." *Id.*; see generally Powell, *The Child Labor Law, the Tenth Amendment, and the Commerce Clause*, 3 TUL. L. REV. 175 (1918). See also *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895).

28. *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895). "The fact that an article is manufactured for export to another State does not of itself make it an article of interstate commerce. . . ." *Id.* at 13. *E.C. Knight Co.* involved the regulation of sugar refineries. *Id.* at 9. The Court in *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), held that coal mining was not commerce and, therefore, not subject to federal regulation. *Id.* at 303. Both of these cases relied on *Kidd v. Pearson*, 128 U.S. 1 (1888). The Court in *Kidd* held that manufacture of intoxicating beverages was

affected interstate commerce could be regulated by the national government.²⁹ Social motives behind congressional legislation attempting to regulate commerce rendered the regulation invalid.³⁰

With its decision in *United States v. Darby*,³¹ the Court broadened the commerce power.³² The Court in *Darby* held that the commerce power was "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution."³³ The scope of national power to regulate commerce expanded to include any activity if "it exerts a substantial economic effect on interstate commerce. . . ."³⁴ The promotion of social goals became a legitimate motive for an exercise of power under the commerce clause.³⁵

The tenth amendment was not considered one of the prescribed limitations on the commerce power, but rather a mere declaration of the relationship between the national and state governments.³⁶ In 1946, the Court used language which seemed to completely eradicate the dual federalism, co-equal sovereign doctrine, when

not commerce for the purpose of allowing the state to regulate that activity. *Id.* at 25-26. If the Court described liquor manufacture as commerce, "Congress would be invested, to the exclusion of the States, with the power to regulate . . . manufactures. . . ." And "the duty would devolve on Congress to regulate all of these delicate, multiform, and vital interests. . . ." *Id.* at 21. The result in *Kidd v. Pearson* is regulation. *Id.* at 26. The result in *E.C. Knight Co.*, 156 U.S. at 17-18, and *Carter Coal*, 298 U.S. at 316, is no regulation.

29. 156 U.S. at 16; 298 U.S. at 307.

30. *Hammer*, 247 U.S. at 273. The Court said that "[t]he Commerce Clause was not intended to give to Congress a general authority to equalize such [child labor] conditions." *Id.*

31. 312 U.S. 100 (1941). The Court expressly overruled its decision in *Hammer*. *Id.* at 116-17.

32. *Id.* at 115. *Darby* involved the application of the Fair Labor Standards Act, 29 U.S.C. §§ 201-19 (1938), to private enterprise. 312 U.S. at 108.

33. 312 U.S. at 114 (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824)).

34. *Wickard v. Filburn*, 317 U.S. 111, 125 (1942). The Court abolished the old direct/indirect test. *Id.* Even if not commerce, Congress may regulate an activity "if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'" *Id.*

35. *See Darby*, 312 U.S. at 115, where the Court said: "The motive and purpose of the present regulation are plainly to make effective the Congressional conception of public policy that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard [working] conditions" *See also* *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 261 (1964). Congressional use of the commerce power to legislate against racial discrimination in public accommodations was held valid. *Id.*

36. 312 U.S. at 123-24. The Court in *Darby* declared:

The [tenth] amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to

it declared that there is no general "doctrine implied in the Federal Constitution that 'the two governments, national and state, are each to exercise its powers so as not to interfere with the free and full exercise of the powers of the other.'"³⁷ In effect, the tenth amendment was without any substantial meaning, and dual federalism was discredited.³⁸

In 1972, the nation saw a foreshadowing of the rebirth of states' rights and the revival of the tenth amendment.³⁹ The Court in *Fry v. United States*⁴⁰ declared that although 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."⁴¹ The Court balanced federal and state in-

suggest that it was more than declaratory of the relationship between the national and state governments. . . .

From the beginning and for many years the amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end.

Id.

37. *Case v. Bowles*, 327 U.S. 92, 101 (1946). The Supreme Court upheld an application of price controls on the sale of timber by the state of Washington. *Id.* at 102. The Court rejected the state's argument that the extent to which Congress can regulate the states depends on whether the regulated functions are "essential" to the state government. *Id.* at 101. *Cf. National League of Cities*, 426 U.S. at 855. The Court was concerned that unchecked commerce power would "allow 'the National Government [to] devour the *essentials* of state sovereignty.'" *Id.* (quoting *Maryland v. Wirtz*, 392 U.S. 183, 205 (1968) (Douglas, J., dissenting) (emphasis added), *overruled in National League of Cities v. Usery*, 426 U.S. 833 (1976)).

38. See M. REAGAN & J. SANZONE, *THE NEW FEDERALISM* 11 (2d ed. 1981). Professor Reagan notes the demise of textual authority for separation between national and state governments. "Because the Tenth Amendment has no independent power to foreclose expansions of federal activities under the necessary and proper clause, there is no constitutionally binding permanent division of authority between the national and state governments in the United States." *Id.* See also Barber, *National League of Cities v. Usery: New Meaning for the Tenth Amendment?*, 1976 SUP. CT. REV. 161, 162 (1976). Professor Barber claims that "the Tenth Amendment came to have no restrictive significance. It was considered a mere expression of sentiment whose time had passed with the growth of national power . . ." *Id.*

39. See *Fry v. United States*, 421 U.S. 542 (1975). The Economic Stabilization Act of 1970, Act of Aug. 15, 1970, PUB. L. NO. 91-379, 84 Stat. 79 (Act was amended five times before expiration on April 30, 1974), gave the President authority to regulate wages. President Nixon established the Pay Board to regulate wages. 421 U.S. at 544. Petitioners, two employees of the state of Ohio, sought a writ of mandamus to compel the state to give a pay increase as provided by state law. *Id.* The law was inconsistent with the Pay Board's regulations. *Id.* Petitioners argued that the Economic Stabilization Act as applied to state employees "interfere[d] with sovereign state functions. . . ." *Id.* at 547. The Court recognized the significance of state sovereignty, but rejected the employees' argument on the basis that the regulation was not a "drastic invasion of state sovereignty." *Id.* at 548 n.7.

40. 421 U.S. at 542.

41. *Id.* at 547 n.7.

terests to see if Congress' use of the commerce power was constitutionally valid.⁴²

Four years later a Supreme Court plurality of four members used the tenth amendment to limit federal regulations of states in *National League of Cities*.⁴³ The Court decided that Congress could not use the commerce power to compel states to abide by the Fair Labor Standards Act.⁴⁴ A requirement that states follow minimum wage regulations, the Court reasoned, would interfere with states' rights to structure "functions essential to separate and independent existence."⁴⁵ In addition to relying on the tenth amendment, Justice Rehnquist, author of the opinion, analogizes from other state sovereignty based limitations on federal power, such as state immunity from federal taxation⁴⁶ and state author-

42. *Id.* at 548. "Congress enacted the Economic Stabilization Act as an emergency measure to counter severe inflation that threatened the national economy." *Id.*

43. 426 U.S. 833 (1976). The Court, per Justice Rehnquist, declared that in *Fry*, the "Court recognized that an express declaration of this limitation [on Congress' power to regulate] is found in the Tenth Amendment." *Id.* at 842.

44. 29 U.S.C. §§ 201-19 (1938) [hereinafter referred to as FLSA]. The FLSA requires minimum wages to be paid to employees who are "engaged in commerce or . . . [are] employed in an enterprise engaged in commerce or in the production of goods for commerce. . . ." *Id.* at § 206(a).

45. 426 U.S. at 845 (quoting *Lane County v. Oregon*, 74 U.S. (7 Wall.) 71, 76 (1868)). The Court's argument in 1868 was essentially that the states predate the Constitution and are essential to the nature of the government in the United States. 74 U.S. (7 Wall.) at 76. Unless expressly provided otherwise in the Constitution, the states are supreme. *Id.* Furthermore, the Court said: "in many articles of the Constitution the necessary existence of the States, and, within their proper spheres, the independent authority of the States, is distinctly recognized. To them nearly the whole charge of interior regulation is committed or left; to them and to the people all powers not expressly delegated to the national government are reserved." *Id.* Justice Rehnquist's use of *Lane County* showed his acceptance of the nineteenth century doctrine of dual federalism. See *supra* note 25 and accompanying text.

46. 426 U.S. at 843. Justice Rehnquist cites *New York v. United States*, 326 U.S. 572 (1946). Justice Frankfurter stated the purpose of state immunity from federal taxation as follows:

[T]he fear that one government may cripple or obstruct the operations of the other early led to the assumption that there was reciprocal immunity of the instrumentalities of each from taxation by the other. It was assumed that there was an equivalence in the implications of taxation by a State of the governmental activities of the National Government and the taxation by the National Government of State instrumentalities. This assumed equivalence was nourished by the phrase of Chief Justice Marshall that the power to tax involves the power to destroy.

Id. at 576 (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819)). Three concurring justices also upheld state sovereignty in the taxation context by affirming that a federal tax on a state "would be an unconstitutional exertion of

ity to locate its own seat of government.⁴⁷ The Court expressly overruled two prior decisions which rejected principles of state sovereignty: *Maryland v. Wirtz*,⁴⁸ and *United States v. California*.⁴⁹ The *National League of Cities* decision was highly criticized.⁵⁰

Five years later the Court paid respect to the *National League*

power over a coexisting sovereignty within the same framework of government." 326 U.S. at 586 (Reed, J., concurring). The dissent advocated stronger states' rights positions based on the tenth amendment. *Id.* at 596 (Douglas, J., dissenting).

47. 426 U.S. at 845. Justice Rehnquist quotes *Coyle v. Oklahoma*, 221 U.S. 559, 565 (1911), which states: "The power to locate its own seat of government and to determine when and how it shall be changed from one place to another, and to appropriate its own public funds for that purpose, are essentially and peculiarly state powers. That one of the original thirteen States could now be shorn of such powers by an act of Congress would not be for a moment entertained." *Id.*

48. 392 U.S. at 183 (overruled in *National League of Cities v. Usery*, 426 U.S. 833 (1976)). *Wirtz* also involved the application of the FLSA's minimum wage requirements for state employees in hospitals and schools. 392 U.S. at 187. The Court held: "If a State is engaging in economic activities that are validly regulated by the Federal Government, . . . the State too may be forced to conform its activities to federal regulation." *Id.* at 197.

49. 297 U.S. 175 (1936) (overruled in *National League of Cities*, 426 U.S. 833). The Court held that a state operating a railroad is not immune from federal regulations of railroads. 297 U.S. at 185. The Court in *National League of Cities* held the following language to be wrong:

[We] look to the activities in which the states have traditionally engaged as marking the boundary of the restriction upon the federal taxing power. But there is no such limitation upon the plenary power to regulate commerce. The state can no more deny the power if its exercise has been authorized by Congress than can an individual.

426 U.S. at 854 (quoting 297 U.S. at 185).

50. See Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in National League of Cities v. Usery*, 86 YALE L.J. 1165 (1977). Professor Michelman states that "the 'state sovereignty' invoked and canonized in the [*National League of Cities*] opinion is a falsification of the considerations (that is, of social justice and inchoate welfare rights) that alone might provide an ultimately satisfying explanation for the result in that case—a falsification in the sense not only of obscuring those considerations but also of twisting them . . ." *Id.* at 1192. In explaining a functional approach to federal and state relations, Michelman expresses the idea that federalism is based on the notion that states are best able to provide certain services. *Id.* at 1173. Also, state officials are accountable to the people for those (fire, police, and health) services. *Id.* at 1173-74. Archibald Cox criticizes the decision by claiming it is "thoroughly inconsistent with the constitutional trends and decisions of the past forty years. . . . [It is] likely that *National League of Cities* will come to be seen as no more than an unprincipled exception to the general rule of federal supremacy." Cox, *Federalism and Individual Rights under the Burger Court*, 73 NW. U.L. REV. 1, 22 (1978).

Professor Tushnet is concerned about the "arbitrary" quality of the *National League of Cities* federalism. Tushnet, *The Dilemmas of Liberal Constitutionalism*, 42 OHIO ST. L.J. 411, 421 (1981). He criticizes the arbitrary doctrine of federalism which:

allows the Court to state that constitutional limits on the exercise of judicial or congressional or legislative power exist, but in a form that provides no definition of those limits. Federalism is defended by patently arbitrary rules that simultaneously assert the existence of limits and provide no guarantees that in the next case the Court will defend federalism at all.

Id.

of *Cities* concern for state sovereignty, but upheld the federal regulation in *Hodel v. Virginia Surface Mining & Reclamation Association*.⁵¹ The Court extracted from *National League of Cities* a three-pronged test to determine if an exercise of the commerce power violates state sovereignty.⁵² The first prong is the requirement that the challenged regulation must regulate the "States as States."⁵³ The second prong requires that the "federal regulation must address matters that are indisputably 'attribute[s] of state sovereignty.'"⁵⁴ The third prong mandates that the "States' compliance with the federal law would directly impair their ability 'to structure integral operations in areas of traditional governmental functions.'"⁵⁵ Although all three requirements may have been

51. 452 U.S. 264 (1981). The Court upheld the application of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201-1328 (1976 & Supp. III 1979), against claims of exceeding the commerce power or "transgress[ing] affirmative limitations on the exercise of that power contained in the . . . Tenth [Amendment]." 452 U.S. at 268. The Court discusses *National League of Cities* and applies its reasoning, but distinguishes the facts of *Hodel* on the basis that the regulation was of private businesses rather than of states. *Id.* at 286.

52. 452 U.S. at 287-88. The Court held that a claim that congressional commerce power legislation can be held invalid under the reasoning of *National League of Cities* only if each of the three requirements are met. *Id.* at 287. See *infra* notes 53-56 and accompanying text.

53. 452 U.S. at 287 (quoting 426 U.S. at 854). The Court in *Hodel* found this requirement lacking. 452 U.S. at 288. The Surface Mining Control and Reclamation Act of 1977, although establishing federal standards for surface mining, does not preclude states from having their own regulations or require the state to enforce federal regulations. *Id.* at 270-71.

Professor Michelman explains the "States as States" language to mean the "state" in the historically contingent sense of state-in-the-federal-system; not State as a philosophical absolute like Family, Corporation, or Individual." Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in National League of Cities v. Usery*, 86 YALE L.J. 1165, 1167 (1977). He further characterizes the distinction between states and individuals as a "common-sense" approach. *Id.*

54. 452 U.S. at 287-88 (quoting 426 U.S. at 845).

One undoubted attribute of state sovereignty is the States' power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions, what hours those persons will work, and what compensation will be provided where these employees may be called upon to work overtime.

426 U.S. at 845. Justice Brennan, in *Equal Employment Opportunity Comm'n*, refused to include every employment decision into the category of attributes of state sovereignty. 103 S. Ct. at 1061 n.11. *National League of Cities* also refers to other attributes of state sovereignty such as location of a capitol and appropriation of funds for a capitol building. 426 U.S. at 845. See *supra* note 47. Justice O'Connor, in her dissent in *Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 779 (1982), characterizes the power to make policy decisions and authority to enact laws as attributes of state sovereignty.

55. 452 U.S. at 288 (quoting 426 U.S. at 852).

met, the Court has left a loophole to uphold the federal law if the federal interest is great.⁵⁶ Justice Blackmun's concurring opinion in *National League of Cities* interprets the opinion as a balancing approach between state and federal interests.⁵⁷ Balancing may be the Court's future method of solving intragovernmental conflicts.⁵⁸

III. THE PLURALITY OPINION

Justice Brennan, author of the vigorous dissent in *National League of Cities*,⁵⁹ wrote the Court's opinion in *Equal Employment Opportunity Commission v. Wyoming*.⁶⁰ The use of the wolf to guard the sheep is evidence of the demise of *National League of Cities*. Writing for a four member plurality, Justice Brennan focused congressional intent to eradicate age discrimination.⁶¹

56. "Demonstrating that these three requirements are met does not, however, guarantee that a Tenth Amendment challenge to congressional commerce power action will succeed. There are situations in which the nature of the federal interest advanced may be such that it justifies state submission." *Id.* at 288 n.29.

57. 426 U.S. at 856 (Blackmun, J., concurring). Justice Blackmun says the Court's opinion "adopts a balancing approach, and does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential." *Id.* The Court's opinion in *National League of Cities* is unclear concerning balancing state and federal interests. *Id.* at 852-53. However, the Court in *Hodel* clearly articulated Blackmun's balancing approach. 452 U.S. at 288 n.29.

58. See *Johnson Controls, Inc. v. City of Cedar Rapids*, 713 F.2d 370 (8th Cir. 1983). After the *Equal Employment Opportunity Comm'n* decision was handed down, this Court warned that "the majority opinion in *National League of Cities* may have been overruled in toto by the Court's subsequent Tenth Amendment cases, in favor of the balancing test articulated by Justice Blackmun in his pivotal concurring opinion in *National League of Cities*." *Id.* at 378. Those subsequent cases cited by the court are *Equal Employment Opportunity Comm'n*, 103 S. Ct. at 1062-64, *Federal Energy Regulatory Comm'n*, 456 U.S. at 742, *United Transportation Union v. Long Island R.R. Co.*, 455 U.S. 678 (1982), and *Hodel*, 452 U.S. at 264.

59. 426 U.S. at 856 (Brennan, J., dissenting). Justice Brennan attacked the states' rights protection of the Court as "an abstraction without substance, founded neither on the words of the Constitution nor on precedent." *Id.* at 860. He cites early twentieth century commerce power cases to support the supremacy of the commerce power. *Id.* at 859-60. Justice Brennan claims the issue "is not a controversy between equals" when the Federal Government "is asserting its sovereign power to regulate commerce. . . . [T]he interests of the nation are more important than of any state." *Id.* at 859 (quoting *Sanitary Dist. v. United States*, 266 U.S. 405, 425-26 (1925)). Furthermore, Justice Brennan interpreted *National League of Cities* as an "abandonment of the heretofore unchallenged principle that Congress 'can, if it chooses, entirely displace the States to the full extent of the far-reaching Commerce Clause.'" 426 U.S. at 875 (quoting *Bethlehem Steel Co. v. New York State Bd.*, 330 U.S. 767, 780 (1947) (opinion of Frankfurter, J.)).

60. 103 S. Ct. at 1054. The short life of the state sovereignty based limit on the commerce power is suggested by the Court's choice to have Justice Brennan write this decision.

61. *Id.* at 1057-59. The ADEA, 29 U.S.C. § 621(b) (1976) declares: "It is therefore the purpose of this [Act] to promote employment of older persons based on

Representative Carl Perkins, Chairman of the House Committee on Education and Labor, stated that the ADEA was more than an attempt to bar age discrimination. "It is a [law] to promote employment of middle aged persons based on their ability."⁶² Critics have complained that since the ADEA only protected people between ages 40 to 65 (now 70), the ADEA only promotes ability rather than age distinctions for an unnecessarily limited number of people.⁶³

Nevertheless, Justice Brennan argued that the prevalence of age discrimination has two harmful effects: First, a significant amount of productive labor is lost which results in substantially increased costs in unemployment insurance and Social Security benefits. Second, workers are inflicted with the economic and psychological injury of not having the opportunity to work.⁶⁴ However, the ADEA allows an employer to have a mandatory retirement scheme based on age if the employer can show that age is a *bona fide occupational qualification* (BFOQ).⁶⁵ The BFOQ was designed to allow mandatory retirement in occupations such as jet pilots.⁶⁶ Justice Brennan listed several lower court decisions which have upheld the ADEA as a valid exercise of the commerce power or of the fourteenth amendment.⁶⁷ On the other hand, the

their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment."

62. See SENATE SPECIAL COMMITTEE ON AGING, 93RD CONG., 1ST SESS., IMPROVING THE AGE DISCRIMINATION LAW, 37 (Comm. Print 1973) [hereinafter cited as SPECIAL COMMITTEE].

63. See Note, *Age Discrimination in Employment: Correcting a Constitutionally Infirm Legislative Judgment*, 47 S. CAL. L. REV. 1311, 1328 (1974). The limitation of the ADEA to people ages 40-65 is a "contradiction to its express purpose": prohibiting arbitrary age distinctions. *Id.*

64. 103 S. Ct. at 1058. See 29 U.S.C. 631 § 12(a) and the Age Discrimination in Employment Act Amendments of 1978, 92 Stat. 189 § 3 (raised the applicability of the ADEA from persons aged 65 to 70).

65. 29 U.S.C. § 623(f)(1) provides: "It shall not be unlawful for an employer . . . to take any action otherwise prohibited . . . where age is a bona fide occupational qualification of the business . . ." *Id.* However, Chief Justice Burger argued in his dissent that a bona fide occupational qualification [hereinafter referred to as BFOQ] is almost impossible to prove. 103 S. Ct. at 1071-72. See *infra* notes 100-01 and accompanying text.

66. See SPECIAL COMMITTEE, *supra* note 62, at 12. The occupation of jet pilot was singled out as an area where quick reflexes are required, which may diminish with age. *Id.*

67. 103 S. Ct. at 1059. He cites the following cases supporting the ADEA: *Equal Employment Opportunity Comm'n v. County of Calumet*, 686 F.2d 1249, 1251-53 (7th Cir. 1982) (deputy county clerk retired at 65; ADEA valid under four-

state of Wyoming argued that the ADEA as applied to the states violates the tenth amendment as construed by *National League of Cities*.⁶⁸

To resolve the commerce power and tenth amendment conflict, Justice Brennan limited the *National League of Cities* principle of immunity to its purpose: assurance that the “unique benefits of a federal system in which the states enjoy a ‘separate and independent existence’ be not lost through undue federal interference in certain core state functions.”⁶⁹ He then applied the three-pronged test from *National League of Cities* and *Hodel*.⁷⁰ The first requirement that the federal regulation regulate “States as

teenth amendment); Equal Employment Opportunity Comm’n v. Elrod, 674 F.2d 601, 603-12 (7th Cir. 1982) (county department of corrections employee retired at 63; ADEA valid under fourteenth amendment); Arritt v. Grisell, 567 F.2d 1267, 1269-70 (4th Cir. 1977) (police officer retired at 40; ADEA valid under fourteenth amendment); McCroan v. Bailey, 543 F. Supp. 1201, 1205-07 (S.D. Ga. 1982) (college bookstore cashier retired at 68; ADEA valid under the commerce clause); Kenny v. Valley County School Dist., 543 F. Supp. 1194, 1196-99 (D. Mont. 1982) (teacher retired at 65; ADEA valid under either fourteenth amendment or commerce clause); Equal Employment Opportunity Comm’n v. Minneapolis, 537 F. Supp. 750, 756 (D. Minn. 1982) (police captain retired at 65; ADEA valid under either fourteenth amendment or commerce clause); Bleakley v. Jekyll Island State Park Auth., 536 F. Supp. 236, 240 (S.D. Ga. 1982) (state employee retired at 65; ADEA valid but undecided as to source of power); Equal Employment Opportunity Comm’n v. County of Los Angeles, 531 F. Supp. 122, 124 (C.D. Cal. 1982) (requirement that applicants for helicopter pilot job be age 35 violates the ADEA); Equal Employment Opportunity Comm’n v. County of Los Angeles, 526 F. Supp. 1135, 1137-38 (C.D. Cal. 1981) (helicopter pilot applicants must be 35; ADEA is valid under the fourteenth amendment); Adams v. James, 526 F. Supp. 80, 84 (M.D. Ala. 1981) (state trooper captain retired at 60; ADEA valid under fourteenth amendment); Johnson v. Mayor of Baltimore, 515 F. Supp. 1287, 1291-92 (D. Md. 1981) (fire department employees retired at 55 and 60; ADEA is valid under the fourteenth amendment); Carpenter v. Pennsylvania Liquor Control Bd., 508 F. Supp. 148 (E.D. Pa. 1981) (Liquor Control Board officer mandatorily retired; ADEA valid under fourteenth amendment); Equal Employment Opportunity Comm’n v. Pennsylvania Liquor Control Bd., 503 F. Supp. 1051, 1052-53 (M.D. Pa. 1980) (ADEA valid under fourteenth amendment); Marshall v. Delaware River & Bay Auth., 471 F. Supp. 886, 891-92 (D. Del. 1979) (retirement scheme of interstate agency invalid; ADEA valid under fourteenth amendment); Remmick v. Barnes County, 435 F. Supp. 914 (D. N.D. 1977) (ADEA valid under fourteenth amendment); Aaron v. Davis, 424 F. Supp. 1238, 1239-41 (E.D. Ark. 1976) (fire chiefs retired at 62; ADEA valid under commerce clause); Usery v. Board of Educ., 421 F. Supp. 718 (D. Utah 1976) (school officials not promoted because of age; ADEA valid under fourteenth amendment and commerce clause).

68. 103 S. Ct. at 1060. The state of Wyoming did not claim that Congress exceeded the scope of the commerce clause, but rather the application of the ADEA to the states is precluded by “virtue of external constraints imposed on Congress’ commerce power by the Tenth Amendment.” *Id.*

69. *Id.* (quoting *Lane County v. Oregon*, 74 U.S. (7 Wall.) 71, 76 (1869) (citations omitted)). Justice Brennan distinguished this purpose from that of creating a “sacred province of state autonomy.” 103 S. Ct. at 1060.

70. 103 S. Ct. at 1061. See also *supra* notes 52-55 and accompanying text.

States" was clearly met.⁷¹ The Court refused to decide whether the second prong, "that the regulation address attributes of state sovereignty," was met.⁷² The tenth amendment challenge failed because the last requirement, that the ADEA directly impair Wyoming's "ability to structure integral operations in areas of traditional governmental functions," was lacking.⁷³

Justice Brennan's explanation for the failure of the third prong was that the federal intrusion in the present case was "less serious" than that in *National League of Cities*.⁷⁴ He agreed that the maintenance of state parks is a state function.⁷⁵ However, he did not discuss whether retirement policies were the result of structuring integral operations. Instead, Justice Brennan focused on the impairment portion of the test, making *National League of Cities* the extreme; any federal law less intrusive would be upheld. The application of the FLSA to the states was more serious because a requirement that the states pay minimum wages would financially cripple some states, depleting funds for other state services.⁷⁶ Also, the state would be precluded from social objectives which favor the employment of people with subminimum job qualifications.⁷⁷ Since the ADEA does not affect the states ec-

71. 103 S. Ct. at 1061. Justice Brennan quoted the following from *Hodel* to show the importance of the first prong:

A wealth of precedent attests to congressional authority to displace or pre-empt state laws regulating *private* activity affecting interstate commerce when these laws conflict with federal law. . . . Although such congressional enactments obviously curtail or prohibit the States' prerogatives to make legislative choices respecting subjects the States may consider important, the Supremacy Clause permits no other result.

Id. at n.10 (quoting 452 U.S. at 290 (emphasis added by Justice Brennan)).

72. 103 S. Ct. at 1061 (quoting 426 U.S. at 845). *See also supra* note 54 and accompanying text. A circuit court responding to this decision noted that in applying the three-pronged test, "the Supreme Court has avoided the first two parts of the *National League of Cities* test and has proceeded directly to the third or 'key prong' of that test." *Johnson Controls, Inc. v. City of Cedar Rapids*, 713 F.2d 370, 377 (8th Cir. 1983).

73. 103 S. Ct. at 1062. *See also supra* note 55 and accompanying text.

74. 103 S. Ct. at 1062. The comparison of intrusiveness indicates that the Court may be using the balancing approach suggested by Justice Blackmun in *National League of Cities*. *See* 426 U.S. at 856; *supra* notes 57, 58 and accompanying text.

75. *Id.* at 1062 (citing *National League of Cities*, 426 U.S. at 851). *See also infra* note 91.

76. 103 S. Ct. at 1062-63. Justice Rehnquist in *National League of Cities* was concerned with states' choices to hire teenagers at less than minimum wages and to employ workers without stringent overtime pay restrictions. 426 U.S. at 848-49. The FLSA "penalizes the States for choosing to hire governmental employees on terms different from those which Congress has sought to impose." *Id.* at 849.

77. 103 S. Ct. at 1063-64. Justice Brennan claims that Wyoming has "claimed

onomically to the degree the FLSA would, the third prong of the test fails.⁷⁸

The Court did not need to discuss the balancing approach because of the failure of the three-pronged test.⁷⁹ However, the Court said that even if the third and second prong requirements were met, the ADEA would still be valid because of the overwhelming federal interest in the ending of age discrimination.⁸⁰ The apparent inconsistency of the federal government in applying the ADEA to the states, but not to itself, did not destroy the weight of the federal interest.⁸¹ Justice Brennan did not decide whether the ADEA could be upheld as an exercise of the fourteenth amendment powers, but reaffirmed that the tenth amendment places no limitations on congressional use of power under the fourteenth amendment.⁸² The Court concluded that the ADEA, as an exercise of the commerce clause power, is not in violation of any tenth amendment principle.⁸³

IV. BURGER'S DISSENT

Chief Justice Burger, along with Justices Powell, Rehnquist, and O'Connor, dissented from the Court's conclusions.⁸⁴ The Chief Justice applied the same *National League of Cities* three-pronged test, but ended with a different result.⁸⁵ In order for the ADEA to violate the tenth amendment, the ADEA must regulate

no such [social] purpose" for this retirement law. *Id.* at 1064. However, he recognized the state claimed a social policy of assuring "the physical preparedness of Wyoming game wardens to perform their duties." *Id.* at 1062 (quoting Brief for Appellees at 18, 103 S. Ct. 1054).

78. *Id.* at 1062.

79. *See supra* note 52.

80. 103 S. Ct. at 1064 n.17.

81. *Id.* Acknowledging this inconsistency, Justice Brennan wrote:

We note, incidentally, that the strength of the federal interest underlying the Act is not negated by the fact that the federal government happens to impose mandatory retirement on a small class of its own workers. . . . Once Congress has asserted a federal interest, and once it has asserted the strength of that interest, we have no warrant for reading into the ebbs and flows of political decision making a conclusion that Congress was insincere in that declaration. . . .

Id.

82. *Id.* at 1064. Justice Brennan refused to acknowledge whether the ADEA could be upheld under the fourteenth amendment. However, he reaffirmed his position that the tenth amendment places no limitations on an exercise of the power under the fourteenth amendment. *Id.* at n.18.

83. *Id.* at 1064.

84. *Id.* at 1068 (Burger, C.J., dissenting). With the exception of Justice O'Connor, who was not a member of the Court in 1976, the dissenters comprised the plurality in *National League of Cities*. 426 U.S. at 833.

85. 103 S. Ct. at 1069. For an explanation of the three-pronged test, see *supra* notes 52-55 and accompanying text.

the "States as States."⁸⁶ There is no disagreement that it does.⁸⁷

The Chief Justice examined the second prong of the test: whether the ADEA addresses matters that are "attributes of state sovereignty."⁸⁸ Chief Justice Burger argued that the decision of Wyoming to retire its game wardens at age 55 is an attribute of state sovereignty for four reasons.⁸⁹ First, the Court in *National League of Cities* expressly referred to the maintenance of parks and recreation as a traditional state function.⁹⁰ Such language is analogous if not synonymous to game wardens' functions. Second, "it is the essence of state power to choose—subject only to constitutional limits—who is to be part of the state government."⁹¹ Third, the state of Wyoming, rather than the United States, is directly accountable to the people of Wyoming for the preservation of fish and game.⁹² Finally, he offered persuasive ev-

86. *Id.* (quoting *Hodel*, 452 U.S. at 287-88, and *National League of Cities*, 426 U.S. at 854).

87. 103 S. Ct. at 1069. See *supra* note 68 and accompanying text.

88. *Id.* at 1069. See *supra* note 69.

89. *Id.* at 1069 (quoting *National League of Cities*, 426 U.S. at 854). Chief Justice Burger contends that "Wyoming sought to assure the physical preparedness of its game wardens and others who enforce its laws. . . . This goal is surely an attribute of sovereignty. . . ." *Id.*

90. 103 S. Ct. at 1069. The Chief Justice relies on this language in *National League of Cities* which says the FLSA would:

significantly alter or displace the States' abilities to structure employer-employee relationships in such areas as fire prevention, police protection, sanitation, public health, and *parks and recreation*. These activities are typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services. Indeed, it is functions such as these which governments are created to provide, services such as these which the States have traditionally afforded their citizens. If Congress may withdraw from the States the authority to make those *fundamental employment decisions* upon which their systems for performance of these functions must rest, we think there would be little left of the States' "separate and independent existence."

Id. 426 U.S. at 851 (quoting *Coyle v. Oklahoma*, 221 U.S. 559, 580 (1911)) (emphasis added). At the end of the Court's opinion in *National League of Cities*, Justice Rehnquist again states that the "fire and police departments . . . [provide] an integral portion of those governmental services which the States and their political subdivisions have traditionally afforded their citizens." *Id.* at 855.

91. 103 S. Ct. at 1069 (emphasis in the original). Chief Justice Burger cites, for comparison, *Oregon v. Mitchell*, 400 U.S. 112, 123 (1970). There the Court held that the states could regulate national elections unless Congress interfered. *Id.* at 125. However, the states have "the power to control state and local elections which the Constitution originally reserved to them. . . ." *Id.* at 134-35.

92. 103 S. Ct. at 1069. The Chief Justice warns "[i]f poachers destroy the fish and game reserves of Wyoming, it is not to the Congress that people are going to complain, but to state and local authorities who will have to justify their actions in selecting wardens. Since it is the state that bears the responsibility for delivering

idence that other states have similar retirement statutes.⁹³ Furthermore, Congress has considered mandatory retirement an exercise of its sovereignty by refusing to apply the ADEA to certain categories of federal employees.⁹⁴

Chief Justice Burger argued that the third prong—that the ADEA must “impair the ability of the state to structure integral operations” in areas of traditional functions—was met for several reasons.⁹⁵ Like the FLSA, the ADEA puts an undue financial bur-

the services, it is clearly an attribute of state sovereignty to choose who will perform these duties.” *Id.*

Professor Michelman also suggests that an explanation of *National League of Cities* is a “functional approach” of accountability. Michelman, *supra* note 53, at 1173. He suggests:

Congress and the federal executive do not normally think themselves primarily or ultimately responsible for ensuring of [police and fire protection, public health and sanitation, parks and recreation, and education] services; and that the electorate does not normally hold them accountable for failures to provide the services at acceptable levels of quality and cost [T]he political blame would [therefore] fall not on Congress but on innocent and helpless state and local governments.

Id. at 1173-74.

93. 103 S. Ct. at 1069 & n.2. *See, e.g.*, ALA. CODE § 36-27-16(a)(1)(e) (Supp. 1983) (police, age 60); ARK. STAT. ANN. § 42-455(c) (1977) (police, 65); CAL. GOV'T CODE ANN. § 20980 (West 1980) (highway patrol, 60); DEL. CODE ANN. tit. 11, § 8323 (1979) (police, 55); IDAHO CODE § 50-1514(a) (Supp. 1983) (police, 65); ILL. REV. STAT. ch. 24, 10-2.1-17 (Supp. 1983-84) (police and firemen, 65); IND. CODE § 36-8-3.5-20 (1981) (police and firemen, 65); IOWA CODE § 97B.46(3) (Supp. 1983-84) (peace officers and firefighters, 65); KAN. STAT. ANN. § 74-4975(b) (1980) (patrolmen, 60); LA. REV. STAT. ANN. § 42:691 (West Supp. 1984) (law enforcement personnel and firefighters, 65); MASS. GEN. LAWS ANN. ch. 32, § 69(d) (West 1966) (police, 65); MICH. COMP. LAWS § 5.3375(b) (1982) (police and firemen, 65); MINN. STAT. ANN. § 423.075(1) (West Supp. 1984) (police and firemen, 65); MISS. CODE ANN. § 25-13-11 (Supp. 1983) (highway patrol, 55), 21-29-245 (Supp. 1983) (police and firemen, 60); MO. REV. STAT. § 104.010 & § 104.080 (West Supp. 1984) (highway patrol, 60); MONT. CODE ANN. § 19-6-504 (1983) (highway patrol, 60), 19-9-801(3) (1983) (police, 65); NEB. REV. STAT. § 81-2025(2) (1981) (patrolmen, 60); N.Y. RETIRE. & SOC. SEC. LAW § 381-b(e) (McKinney Supp. 1983-84) (police and firemen, 55); N.D. CENT. CODE § 39-03.1-18 (1980) (highway patrol, 60); OHIO REV. CODE ANN. § 5505.16 (Page Supp. 1981) (highway patrol, 55); OKLA. STAT. tit. 47, § 2-305A (Supp. 1983-84) (police, 60); ORE. REV. STAT. § 237.129(1) (1983) (school personnel, 70); PA. STAT. ANN. tit. 71, § 65(d) (Purdon Supp. 1983-84) (police, 60); R.I. GEN. LAWS § 45-21.2-5 (Supp. 1980) (police and firemen, 65); S.C. CODE ANN. § 9-1-1535 (Law Co-op Supp. 1982) (conservation officers, 65); TENN. CODE ANN. § 8-36-205(1) (1980) (police, 60); VT. STAT. ANN. tit. 3, § 459(a)(2) (Supp. 1983) (police, 55); WASH. REV. CODE § 43.43.250(1) (1983) (state patrol, 60); W. VA. CODE § 8-22-25(d) (Supp. 1983) (policemen and firemen, 65); WYO. STAT. § 15-5-307(a) (Supp. 1982) (police, 60). In addition, there are also 160 municipalities that have similar laws. 103 S. Ct. at 1070 n.2.

94. 103 S. Ct. at 1070. *See, e.g.*, S. REP. NO. 948, 93d Cong., 2d Sess. 2, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 3698. “This bill requires mandatory retirement of otherwise eligible law-enforcement officers and firefighters at age 55. . . . This intent [to retire employees early] has been based on the nature of the work involved and the determination that these occupations should be composed . . . of young men and women. . . . They are the occupations calling for the strength and stamina of the young rather than the middle aged.” *Id.* at 3699.

95. 103 S. Ct. at 1071. *See* 10 U.S.C. § 1251 (1982) (mandatory retirement in the

den on the states.⁹⁶ A ban on early retirement schemes also "impedes promotion opportunities" and "affirmative action objectives."⁹⁷ These noneconomic goals are surely valid because the federal government uses them to justify its early retirement laws.⁹⁸ Finally, the ability of Wyoming to keep its mandatory retirement system upon proving a BFOQ is no help at all.⁹⁹ A common approach to proving a BFOQ requires proof that: (1) the age qualification is reasonably necessary to the business; and (2) the employer has reason to believe all or substantially all persons above the age limit are unfit for the job.¹⁰⁰ The Chief Justice claims the second part of the test is impossible to prove.¹⁰¹

After showing that the requirements of the three-pronged test were met, Chief Justice Burger balanced the state and federal interests to see if the ADEA is unconstitutional.¹⁰² The balancing requirement was extrapolated by the court in *Hodel*.¹⁰³ Chief Justice Burger characterized the federal interest as "largely theoreti-

Armed Services); 22 U.S.C. § 4052 (1982) (mandatory retirement for Foreign Service personnel).

96. 103 S. Ct. at 1070. See *supra* note 55 and accompanying text.

97. *Id.* at 1071.

98. *Id.* He contends that the "[l]ack of such opportunities tends to undermine younger employees' incentive to strive for excellence" *Id.*

99. *Id.* See *infra* notes 100-01 and accompanying text.

100. *Id.* at 1071-72. Chief Justice Burger gets this test from *Arritt v. Grisell*, 567 F.2d 1267 (4th Cir. 1977) (Virginia law precluding 40 year old police officer from applying for civil service job violated the ADEA). The court in *Arritt* derived this strict standard for proving a BFOQ from *Usery v. Tamiami Trail Tours*, 531 F.2d 224 (5th Cir. 1976) (bus company's refusal to accept applications from individuals between ages 40 and 65 held valid). 567 F.2d at 1271.

101. 103 S. Ct. at 1072. Chief Justice Burger cites *Johnson v. Mayor of Baltimore*, 515 F. Supp. 1287 (D. Md. 1981), *cert. denied*, 455 U.S. 944 (1982). Baltimore was unable to show that age 55 was a BFOQ for firefighters. *Id.* at 1294.

Notice the instability of decisions in this area: *Keating v. Federal Aviation Admin.*, 610 F.2d 611 (9th Cir. 1980) (BFOQ proven for pilots, age 60). *Cf.* *Equal Employment Opportunity Comm'n v. County of Los Angeles*, 706 F.2d 1039 (9th Cir. 1983) (no BFOQ for helicopter pilots); *cf.* *Orzel v. City of Wauwatosa Fire Dept.*, 697 F.2d 743 (7th Cir. 1983) (no BFOQ for firefighters, age 55); *Tuohy v. Ford Motor Co.*, 675 F.2d 842 (6th Cir. 1982) (no BFOQ for pilots, age 60, as a matter of law); (See *supra* note 66 and accompanying text); *Equal Employment Opportunity Comm'n v. Janesville*, 630 F.2d 1254 (7th Cir. 1980) (BFOQ for police chief found).

The Court in *Orzel* said the BFOQ exception is to be interpreted narrowly. 697 F.2d at 748. See also *Stillman & Jepson, Compliance with the Age Discrimination in Employment Act: Special Problems*, 64 CHI. B. REC. 284, 288 (1983).

102. 103 S. Ct. at 1072.

103. 452 U.S. at 288 n.29. In *National League of Cities*, the Court justified the application of the federal wage controls to state employees in *Fry* because the federal interest was to "counter severe inflation that threatened the national economy." 426 U.S. at 853 (quoting 421 U.S. at 548).

cal.”¹⁰⁴ On the other side of the scale, the state has a great interest in assuring the physical preparedness of firefighters and law enforcement personnel.¹⁰⁵ He rejected the charge that Wyoming’s interest is merely a “bald assertion of a prerogative to be arbitrary.”¹⁰⁶

Chief Justice Burger further addressed the issue as to whether the ADEA is valid as an exercise of the fourteenth amendment.¹⁰⁷ He contended that although congressional power under the fourteenth amendment is unclear, one principle is certain: “Congress may act only where a violation lurks.”¹⁰⁸ Neither the Court nor Congress has found employment discrimination based on age to be a violation of fourteenth amendment rights.¹⁰⁹ The Court in *City of Rome v. United States*¹¹⁰ recognized congressional power to prohibit activity not in itself unconstitutional, but which, when prohibited, prevents the encroachment of guaranteed rights.¹¹¹ However, Chief Justice Burger argued that the right to work regardless of age has not been identified by the Court as a fourteenth amendment right.¹¹² Therefore, the ADEA is not a valid exercise of congressional power under the fourteenth

104. 103 S. Ct. at 1072. Chief Justice Burger rejected the weight of the Commission’s claim that the ADEA “prevent[s] unnecessary demands on the social security system and other maintenance programs, . . . [protects] employees from arbitrary discrimination, and [eliminates] unnecessary burdens of the free flow of commerce. . . .” *Id.* Not only may the benefits be theoretical, it is hard to ignore the federal inconsistency in having its own mandatory retirement schemes. *See supra* notes 94-95 and accompanying text.

105. *Id.* at 1072. Chief Justice Burger compared the “theoretical benefits” with the “very real danger” of a fire out of control or a criminal escaping and injuring an officer. *Id.*

106. 103 S. Ct. at 1072 (quoting Brief for Appellant at 19). Furthermore, the Chief Justice argued that “Wyoming is [not] resting its challenge to the [ADEA] on a ‘sovereign’ right to discriminate” but rather “asserting a right to set standards to meet local needs.” *Id.*

107. 103 S. Ct. at 1072-74.

108. *Id.* at 1072-73. Chief Justice Burger cited no case law to indicate his certainty.

109. *Id.* at 1073. Twice the Court has upheld mandatory retirement schemes against equal protection challenges. *See Vance v. Bradley*, 440 U.S. 93 (1979) (mandatory retirement for Foreign Service officers valid); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976) (mandatory retirement of state police valid). As far as Congress is concerned, Chief Justice Burger contended 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 is assumed that Congress has this power.” 103 S. Ct. at 1073 n.6. He contended that the “[ADEA] can be sustained only if we assume first, that Congress can define rights wholly independent of our case law, and second, that Congress has done so here. I agree with neither proposition.” *Id.* at 1074.

110. 446 U.S. 156 (1980).

111. *Id.* at 176-77. Changes in a city’s electoral system may endanger the rights of black voters. *Id.*

112. 103 S. Ct. at 1073 n.7. Chief Justice Burger declared “that since this Court has not decided the question, the Government cannot support this enactment on

amendment.¹¹³

V. CONCURRENCE AND DISSENT

The instability of the adherence or rejection of principles of federalism is evident from the lack of agreement among the Court members. In addition to the Court's opinion and Chief Justice Burger's dissent, Justice Stevens wrote a separate concurring opinion¹¹⁴ and Justice Powell, a separate dissent.¹¹⁵ Justice Stevens gave broad power to Congress under the commerce clause.¹¹⁶ Justice Powell, although having joined Chief Justice Burger's dissent, wrote specifically to counter Justice Stevens' claims.¹¹⁷

Justice Stevens in his concurring opinion defended national supremacy with words of historical rhetoric.¹¹⁸ He maintained that the need for regulation of commerce was the "central problem that gave rise to the Constitution itself."¹¹⁹ Furthermore, the Court has historically expanded the commerce power to "reflect the intent of the Framers of the Constitution [and] to confer a power on the national government adequate to discharge its cen-

the ground that Congress was attempting to establish further safeguards for a class we have found to be constitutionally protected." *Id.*

113. *Id.* at 1073.

114. *Id.* at 1064 (Stevens, J., concurring).

115. 103 S. Ct. at 1075 (Powell, J., dissenting).

116. *Id.* at 1068. Justice Stevens declared that "[i]f the power is to be adequate to enable the national government to perform its central mission [to regulate commerce]," Congress must be free to regulate states. *Id.*

117. *Id.* at 1075. Justice Powell did not use his dissent to attack the Court's opinion, but rather Justice Stevens' separate concurrence.

118. 103 S. Ct. at 1065. Justice Stevens' emphasis was on Congress' power to regulate commerce as the historical catalyst for establishing the Constitution and rejecting the Articles of Confederation. *Id.*

119. *Id.* In support of this proposition, Justice Stevens relied upon a 1946 lecture by Justice Rutledge. Justice Stevens quotes the following language from that lecture:

If any liberties may be held more basic than others, they are the great and indispensable democratic freedoms secured by the First Amendment. But it was not to assure them that the Constitution was framed and adopted. Only later were they added, by popular demand. It was rather to secure freedom of trade, to break down the barriers to its free flow, that the Annapolis Convention was called, only to adjourn with a view to Philadelphia. Thus the generating source of the Constitution lay in the rising volume of restraints upon commerce which the Confederation could not check. These were the proximate cause of our national existence down to today.

Id. (quoting W. RUTLEDGE, A DECLARATION OF LEGAL FAITH 25 (1947)).

tral mission.”¹²⁰ Only specific limitations in the Constitution limit that power.¹²¹ However, no limitations applied in this case.¹²²

Justice Stevens’ disagreement with the principles of federalism expressed in *National League of Cities* was apparent again.¹²³ He characterized the *National League of Cities* opinion as “pure judicial fiat” and unworthy of “the deference that the doctrine of *stare decisis* ordinarily commands for this Court’s precedents.”¹²⁴ He called for a “prompt rejection of *National League of Cities* modern embodiment of the spirit of the Articles of Confederation.”¹²⁵

Justice O’Connor joined Justice Powell’s rejection of Justice Stevens’ “novel view of our Nation’s history.”¹²⁶ The dissenters took a more moderate approach, claiming that the regulation of commerce is only one *raison d’etre* of the United States among many others.¹²⁷ Preservation of federalism was as important, if not more important, than the need for regulation of interstate commerce.¹²⁸ In support of states’ rights, Justice Powell used the initial ratification of the Constitution on a state-by-state basis.¹²⁹ Opponents of the Bill of Rights did not oppose limitations on the national government, but rather contended that such limitations

120. 103 S. Ct. at 1066. The expansion accompanied the change from a local to a regional to a national economy. *Id.*

121. *Id.* at 1067. Justice Stevens agreed that “Congress may not, of course, transcend specific limitations on its exercise of the commerce power that are imposed by other provisions of the Constitution.” *Id.* By requiring specific limitations, he rejected any implied or inherent federalism based protections of state sovereignty.

122. *Id.* He maintained, “no limitation in the text of the Constitution . . . is even arguably applicable to this case.” *Id.* Justice Stevens reiterated the position of the Court in *United States v. Darby*, 312 U.S. 100, 124 (1941), that the tenth “amendment states but a truism that all is retained which has not been surrendered. . . . From the beginning and for many years the amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a granted Power. . . .” *Id.*

123. 103 S. Ct. at 1067. See *National League of Cities*, 426 U.S. 833, 880 (1976) (Stevens, J., dissenting).

124. 103 S. Ct. at 1067.

125. *Id.* See *supra* note 119 and accompanying text.

126. *Id.* at 1075 (Powell, J., dissenting).

127. 103 S. Ct. at 1076. Justice Powell agreed that “removing trade barriers between the States was *one* of the Constitution’s purposes.” *Id.* However, “creating a national government within a federal system was far more central than any 18th century concern for interstate commerce.” Justice Powell did not defend the significance of the Founders’ intent. However, since Justice Stevens relied on the Founders’ intent to exalt the commerce power, Justice Powell argued that their intent did not revolve around the need to regulate commerce. *Id.*

128. *Id.*

129. *Id.* at 1078. Further support lies in James Madison’s explanation that “[t]he State Governments may be regarded as constituent and essential parts of the federal Government; whilst the latter is nowise essential to the operation or organization of the former.” THE FEDERALIST NO. 45, at 311 (J. Madison) (J. Cooke ed. 1961).

as amendments were unnecessary.¹³⁰

Justice Powell further relied on early historical assertions of states' rights as evidence of an early assumption of state sovereignty based federalism.¹³¹ He maintained that the Framers' intent is of little significance today, thus rejecting Justice Stevens' reliance on the Framers' intent to exalt commerce above all other provisions. Justice Powell found his own historical rhetoric to counter Justice Stevens' assertions.¹³²

To dispel any notion that all respect for states' rights was abolished during the Civil War, Justice Powell mentioned several recent Supreme Court decisions which considered state sovereignty.¹³³ Justices Powell and O'Connor are concerned that Justice Stevens has emasculated state sovereignty¹³⁴ since decentralization of power is a safeguard which protects individual liberties.¹³⁵ The separation of power doctrine applies not only within

130. 103 S. Ct. at 1078. See THE FEDERALIST NO. 84, at 579 (A. Hamilton) (J. Cooke ed. 1961). Hamilton contends that "the constitution ought not to be charged with the absurdity of providing against the abuse of an authority which was not given. . . ." *Id.* His example was freedom of the press. Since Congress could not imaginably control or regulate the press under any granted power, why must there be an amendment to guarantee such a freedom? *Id.*

131. 103 S. Ct. at 1078-79. Justice Powell referred to Thomas Jefferson's Kentucky Resolutions which emphasized the reserved powers of the states. Kentucky Resolution of 1798, reprinted in 4 J. ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION 536-40 (2d ed. 1863). Justice Powell mentioned similar ideas found in the Virginia Resolutions and John C. Calhoun's nullification doctrine. *Id.* at 1078 n.8. Justice Powell asserted that the presence of these state sovereignty doctrines tends to deny that there was ever "any intention that the Commerce Clause would empower the Federal Government to intrude expansively upon the sovereign powers reserved to the States." *Id.*

132. See *supra* note 128 and accompanying text.

133. 103 S. Ct. at 1080 n.12. See Federal Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742 (1982) (state sovereignty was a consideration in determining if states must follow public utility regulations); United Trans. Union v. Long Island R.R. Co., 455 U.S. 678 (1982) (federal government may regulate state owned railroad only because operation of a railroad is not a sovereign function of the state); Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982) (State is exempt from antitrust laws).

134. 103 S. Ct. at 1081. Justice Powell warned that under Justice Stevens' view, "it is not easy to think of any state function—however sovereign—that could not be preempted." *Id.*

The reader should be aware that some commentators consider the conflict to be merely one of efficiency. States are sovereign only because, and to the degree that, they can serve the people more efficiently than the federal government. See Michelman, *States' Rights and States' Roles*, 86 YALE L.J. 1165, 1172-73 (1977).

135. See Nagel, *Federalism as a Fundamental Value: National League of Cities in Perspective*, 1981 SUP. CT. REV. 81 (1981). Nagel quotes THE FEDERALIST NO. 46, at 299 (J. Madison) (J. Cooke ed. 1961), which declares it is "the existence of

the branches of the federal government, but also between the federal and state governments.¹³⁶

VI. AFTERMATH

After the smoke has cleared, there is still little certainty as to the scope of Congress' power to regulate the states. The forces remain assembled. Justice Rehnquist stands firmly committed to the states' rights position.¹³⁷ With the exception of his position in *Fry*,¹³⁸ Chief Justice Burger has agreed with Justice Rehnquist's view of federalism.¹³⁹ Justice Powell also has followed the state sovereignty path.¹⁴⁰ Finally, Justice O'Connor, the newest member of the Court, may be one of the strongest supporters of states' rights.¹⁴¹

In the other camp, Justice Stevens has taken a strong national supremacy stand with little room to retreat.¹⁴² Although not as extreme as Justice Stevens, Justices Brennan, Marshall, and White have traditionally been allied together in support of na-

subordinate governments to which the people are attached [that] forms a barrier against the enterprises of ambition." *Id.* at 100.

136. *Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 790 (1981) (O'Connor, J., dissenting). She contends that the Founding Fathers, in order to avoid the evil of a powerful central government, "both allocated governmental power between state and national authorities, and divided the national power among three branches of government." *Id.* See also Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition of the National Government*, 54 COLUM. L. REV. 543, 543-44 (1954).

137. For a full treatment of Justice Rehnquist's position on federalism, see Powell, *The Compleat Jeffersonian: Justice Rehnquist and Federalism*, 91 YALE L.J. 1317 (1982). Justice Rehnquist has stood on the states' rights' side in *Equal Employment Opportunity Comm'n*, 103 S. Ct. at 1068 (joining Chief Justice Burger's dissent), *Federal Energy Regulatory Comm'n*, 456 U.S. at 775 (joining Justice O'Connor's partial concurrence and partial dissent), *Hodel*, 452 U.S. at 307 (concurring in judgment), *National League of Cities*, 426 U.S. at 835 (author of the Court's opinion), and *Fry*, 421 U.S. at 549 (dissenting).

138. 421 U.S. at 542. Chief Justice Burger joined the majority opinion.

139. See *Equal Employment Opportunity Comm'n*, 103 S. Ct. at 1068 (Burger, C.J., dissenting); *Federal Regulatory Comm'n*, 456 U.S. at 775 (joining Justice O'Connor's partial concurrence and partial dissent); *Hodel*, 452 U.S. at 305 (Burger, C.J., concurring); *National League of Cities*, 426 U.S. at 834.

140. See *Equal Employment Opportunity Comm'n*, 103 S. Ct. at 1068, 1075 (joining Chief Justice Burger's dissent and writing his own separate dissent); *Federal Energy Regulatory Comm'n*, 456 U.S. at 771 (concurring and dissenting in part); *National League of Cities*, 426 U.S. at 834 (joining the Court's opinion).

141. See *Equal Employment Opportunity Comm'n*, 103 S. Ct. at 1068, 1075 (joining Chief Justice Burger's dissent and Justice Powell's dissent); *Federal Energy Regulatory Comm'n*, 456 U.S. at 775 (O'Connor, J., partially concurring and dissenting).

142. 103 S. Ct. at 1064 (Stevens, J., concurring). See *supra* notes 119-126 and accompanying text. See also *Federal Energy Regulatory Comm'n*, 456 U.S. at 745 (joining the Court's opinion); *Hodel*, 452 U.S. at 268 (joining the Court's opinion); *National League of Cities*, 426 U.S. at 880 (Stevens, J., dissenting).

tional power.¹⁴³ Justice Blackmun, however, has upheld federal power except in the most important case: *National League of Cities*.¹⁴⁴ Since he cast the swing vote in *National League of Cities*, Justice Blackmun may be the swing vote in the future. Since the federalism cases have been critically divided, a new member of the Court could either bring *National League of Cities* back to life or bury it altogether.¹⁴⁵

The impact of the *Equal Employment Opportunity Commission* decision reaches further than Wyoming's Game Wardens. Protective service personnel, such as police department and fire department employees, are also affected. Thirty-two states have similar retirement statutes for protective service personnel.¹⁴⁶ All of these statutes violate the ADEA unless the state can show that age is a BFOQ.¹⁴⁷ Furthermore, unless Congress or the courts lessen the burden of proving a BFOQ, it is unlikely that states will be able to meet the burden of proof.¹⁴⁸

This decision also lessens the importance of *National League of Cities*, almost limiting it to its facts.¹⁴⁹ The states' rights issue can and will arise in many other situations. One obvious area in which federal and state law may conflict is administrative law.¹⁵⁰

143. See *Equal Employment Opportunity Comm'n*, 103 S. Ct. at 1056 (Justices White and Marshall joined Justice Brennan's opinion); *Federal Energy Regulatory Comm'n*, 456 U.S. at 745 (Justices Brennan, White, and Marshall joined Justice Blackmun's opinion); *Hodel*, 452 U.S. at 268 (Justices Brennan and White joined Justice Marshall's opinion); *National League of Cities*, 426 U.S. at 856 (Justices White and Marshall joined Justice Brennan's dissent); *Fry*, 421 U.S. at 543 (Justices Brennan and White joined Justice Marshall's opinion).

144. 426 U.S. at 856 (Blackmun, J., concurring). Compare *Fry*, 421 U.S. at 543 (joined the Court's opinion), with *Equal Employment Opportunity Comm'n*, 103 S. Ct. at 1056 (joined the Court's opinion); *Federal Energy Regulatory Comm'n*, 456 U.S. at 745 (author of the Court's opinion); *Hodel*, 452 U.S. at 268 (joined the Court's opinion); *National League of Cities*, 426 U.S. at 856 (Blackmun, J., concurring).

145. See *Equal Employment Opportunity Comm'n*, 103 S. Ct. at 1054 (five to four decision; four separate opinions); *Federal Energy Regulatory Comm'n*, 456 U.S. 742 (five to four decision; three separate opinions); *National League of Cities*, 426 U.S. at 833 (five to four decision; four separate opinions); *Fry*, 421 U.S. at 543 (Justices Brennan and White joined Justice Marshall's opinion).

146. See *supra* note 93.

147. See *supra* note 65 and accompanying text.

148. See *supra* notes 100-01 and accompanying text.

149. See *Johnson Controls, Inc.*, 713 F.2d 340, 378 (8th Cir. 1983). If not overruled, "[a]t the very least the *National League of Cities* holding has been narrowly confined to its precise facts." *Id.*

150. See *Federal Energy Regulatory Comm'n*, 456 U.S. at 742 (federal public utility regulations must be considered by the states); *United States v. Ohio Dept. of Highway Safety*, 635 F.2d 1195 (6th Cir. 1980), *cert. denied*, 451 U.S. 949 (1981)

Another area is the power of the federal courts.¹⁵¹ Any exercise of federal power may impinge upon state functions and thereby raise the tenth amendment issue. The *National League of Cities* doctrine, however, has almost exclusively been limited to commerce power cases.¹⁵² The *Equal Employment Opportunity Commission* decision has left little of the states' rights protection of *National League of Cities*. In resolving future conflicts, courts will probably use Justice Blackmun's balancing test or overrule or ignore *National League of Cities* altogether.¹⁵³ However, the concern should remain that power be not overly centralized and the states be not mere federal provinces.

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(Environmental Protection Agency requirement that states withhold registrations for vehicles which did not pass inspections was valid).

151. See *United States v. District of Columbia*, 654 F.2d 802 (D.C. Cir. 1981), cert. denied, 454 U.S. 1082 (1981) (federal district court enjoined compliance with a state court order); *United States v. Best*, 573 F.2d 1095 (9th Cir. 1978) (motorist drove under the influence of alcohol on federal enclave; state driver's license could not be suspended by United States Magistrate).

152. See Phillips, *The Declining Fortunes of National League of Cities v. Usery*, 21 AM. BUS. L.J. 89 (1983). Phillips discusses the enforcement clauses of the thirteenth, fourteenth, and fifteenth amendments and the spending, war, and postal powers. *Id.* at 96-100. He concludes that the "*National League of Cities* doctrine has little, if any, application to exercise of congressional power justified by powers other than the commerce clause." *Id.* at 113.

153. See *Johnson Controls, Inc.*, 713 F.2d at 378. "Indeed, the majority opinion in *National League of Cities* may have been overruled in toto by the Court's subsequent tenth amendment cases, in favor of the balancing test articulated by Justice Blackmun in his pivotal concurring opinion in *National League of Cities*, . . ." *Id.*