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Repudiation of National League of Cities: The Supreme Court Abandons the State Sovereignty Doctrine

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NOTES

THE REPUDIATION OF *NATIONAL LEAGUE OF CITIES*: THE SUPREME COURT ABANDONS THE STATE SOVEREIGNTY DOCTRINE

In *National League of Cities v. Usery,*[1] the Supreme Court asserted that the constitutional policy of federalism, as embodied in the tenth amendment,[2] created an affirmative limitation of Congress's power under the commerce clause.[3] That limitation precluded the application of the Fair Labor Standards Act[4] to state and local governments, because such an application violated that constitutional policy.[5] The *National League* Court thus departed from a long line of commerce clause precedent and suggested the existence of a broad, although ill-defined "state sovereignty" restriction on Congress's commerce clause power.[6]

The Supreme Court's subsequent attempts to translate the broad policy concerns of *National League* into a workable doctrine, however, suggest a lack of commitment to those policies. In *Hodel v. Virginia Surface Mining & Reclamation Association,*[7] and *United Transportation Union v. Long Island Railroad,*[8] the Court sharply curtailed the apparent breadth of its asserted state sovereignty doctrine by defining specific threshold requirements to judicial consideration of the policy concerns raised in *National League.*[9]

In *EEOC v. Wyoming,*[10] its most recent treatment of the principles of *National League,* the Court further demonstrated its lack of commitment to the state sovereignty doctrine. The Court substantially undermined the constitutional policy concerns it had identified in *National League,*[11] virtually precluding any future application of the state sovereignty

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1 426 U.S. 833 (1976); *see infra* notes 28-46 and accompanying text.

2 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 . . . ." U.S. CONST. amend. X.

3 The commerce clause reads: "The Congress shall have Power . . . To regulate Commerce . . . among the several States . . . ." U.S. CONST. art. I, § 8, cl. 3.

4 29 U.S.C. §§ 201-219 (1982).

5 *See National League,* 426 U.S. at 851-52.

6 *See id.* at 844-45.

7 452 U.S. 264 (1981); *see infra* notes 47-59 and accompanying text .

8 455 U.S. 678 (1982); *see infra* notes 60-76 and accompanying text.

9 *See infra* notes 129-55 and accompanying text.

10 103 S. Ct. 1054 (1983). In *EEOC v. Wyoming,* the Court upheld the application of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1982), to the states. *See infra* notes 77-109 and accompanying text.

11 *See infra* notes 160-80 and accompanying text.

doctrine.[12]

This Note traces the abandonment of the *National League* doctrine and argues that the trilogy of cases comprised of *Hodel, Long Island Railroad,* and *EEOC v. Wyoming* represents the Supreme Court's repudiation of that doctrine. The Note ultimately concludes that the state sovereignty doctrine has no further vitality and thus *National League* represents nothing more than an anomaly in commerce clause litigation.

I
BACKGROUND

Although the tenth amendment had played an important role in earlier commerce clause litigation,[13] not until the Supreme Court's 1968

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12 *See infra* notes 181-84 and accompanying text.

13 The tenth amendment previously had served as a restriction on Congress's power under the commerce clause to regulate purely local, although private, activity. *See, e.g.,* Carter v. Carter Coal Co., 298 U.S. 238 (1936); Hammer v. Dagenhart, 247 U.S. 251 (1918). The tenth amendment and a narrow definition of the commerce clause's scope were the two components of the dual federalism doctrine that the Court applied numerous times to invalidate congressional legislation. *See, e.g.,* United States v. E.C. Knight Co., 156 U.S. 1 (1895). *See generally* Corwin, *The Passing of Dual Federalism,* 36 VA. L. REV. 1 (1950). In the 1930s, a number of New Deal statutes were struck down pursuant to the dual federalism doctrine. *See, e.g.,* United States v. Butler, 297 U.S. 1 (1936) (invalidating Agricultural Adjustment Act of 1933); Carter v. Carter Coal Co., 298 U.S. 238 (1936) (invalidating Bituminous Coal Conservation Act of 1935): A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (striking down National Industrial Recovery Act of 1933).

The Supreme Court repudiated the dual federalism doctrine in NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1936). After *Jones & Laughlin,* the Court no longer used the tenth amendment to insulate private, local activity from congressional regulation. In United States v. Darby, 312 U.S. 100 (1941), the Court stated:

> [T]he [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 suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution . . . or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers.

Id. at 124. In addition, the Court began to construe the commerce clause much more expansively. *See* Wickard v. Filburn, 317 U.S. 111 (1942) (permitting Congress to regulate crops grown by farmer for his personal consumption).

Even before abandoning dual federalism, the Court had approved federal regulation of a state-owned railroad in United States v. California, 297 U.S. 175 (1936). That decision upheld the application of the Federal Safety Appliance Act, 45 U.S.C. §§ 1-16 (1976 & Supp. V 1981), to California's state-owned railroad. Although the Court found that California had the power as a state to operate a railroad, it concluded that the state's power was subject to Congress's authority to regulate interstate commerce. The Court rejected California's argument that a state has the same immunity from the commerce clause as it does from the federal taxing power:

> [W]e 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.

United States v. California, 297 U.S. at 185. *National League* characterized this language as

decision in *Maryland v. Wirtz*[14] was it suggested that the tenth amendment might serve as an affirmative limitation on congressional power under the commerce clause. In *Wirtz,* the Court considered the constitutionality of amendments to the Fair Labor Standards Act,[15] which applied the Act's minimum wage and maximum hour provisions to state and local hospitals, institutions, and schools.[16] Although the *Wirtz* majority upheld the amendments,[17] Justice Douglas concluded in his dissent that the statute as amended was "not consistent with our constitutional federalism"[18] because it was "a serious invasion of state sovereignty protected by the Tenth Amendment."[19] He found that the Act disrupted the fiscal policies of the states and threatened their autonomy to regulate health and education.[20] Justice Douglas argued that the Court failed to consider the fact that these federal regulations were to be enforced against sovereign states and that it had incorrectly limited its inquiry to " 'whether there [was] a rational basis for regarding them as regulations of commerce among the States.' "[21]

Justice Rehnquist's subsequent dissent in *Fry v. United States*[22] elaborated on the tenth amendment argument presented by Douglas in *Wirtz.* In *Fry* the Court found that Congress had not exceeded its commerce clause powers in applying a federally mandated wage freeze to state and local employees pursuant to the Economic Stabilization Act of

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dicta that was "simply wrong," 426 U.S. at 854-55, although never explaining why it was dicta nor why it was wrong. By labeling this language dicta, the Court avoided overruling *United States v. California,* distinguishing that earlier decision on the ground that the operation of a railroad is not an activity "that the States have regarded as integral parts of their governmental activities." *National League,* 426 U.S. at 854 n.18.

For more detailed discussions of the history of commerce clause and tenth amendment litigation, see Stern, *The Commerce Clause and the National Economy, 1933-1946* (pts. 1-2), 59 HARV. L. REV. 645, 883 (1946); Comment, *The Supreme Court Rejects Constitutional Challenges to the Surface Mining Control and Reclamation Act of 1977,* 48 BROOKLYN L. REV. 137, 151-54 (1981) [hereinafter cited as Comment, *Constitutional Challenges*]; Comment, *Redefining the* National League of Cities *State Sovereignty Doctrine,* 129 U. PA. L. REV. 1460, 1462-67 (1981) [hereinafter cited as Comment, *Sovereignty Doctrine*].

14 392 U.S. 183 (1968), *overruled by* National League of Cities v. Usery, 426 U.S. 833, 855 (1976); *see infra* text accompanying note 38.

15 Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 102(b), 80 Stat. 830, 831 (1966) (amending 29 U.S.C. § 203(d) (1982)). The entire Act is codified at 29 U.S.C. §§ 201-219 (1982).

16 The original Fair Labor Standards Act, which applied only to employees working in the private sector, was upheld in United States v. Darby, 312 U.S. 100 (1941).

17 "[I]t is clear that the Federal Government, when acting within a delegated power, may override countervailing state interests . . . ." *Wirtz,* 392 U.S. at 195.

18 *Id.* at 201 (Douglas, J., dissenting).

19 *Id.*

20 *Id.* at 203.

21 *Id.* The Court noted that regulations promulgated pursuant to Congress's commerce clause authority are valid if the regulated aetivity affeets commerce and Congress had a "rational basis" for choosing the particular means to accomplish the goals of the regulation. *Wirtz,* 397 U.S. at 190 (quoting Katzenbach v. McClung, 379 U.S. 294, 303-04 (1964)).

22 421 U.S. 542 (1975).

1970.[23] Rehnquist argued, however, that when a federal statute regulates a state, the Court's review must go beyond merely examining whether Congress has acted within its commerce clause powers; the Court also must examine whether the statute impermissibly regulates a state in light of the state's "affirmative constitutional right . . . to be free from . . . congressionally asserted authority."[24]

The *Fry* majority implicitly acknowledged Rehnquist's contention but reached a different conclusion. In a footnote, the Court noted that the tenth amendment "is not without significance"[25] and acknowledged that "[t]he 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."[26] After examining the challenged regulations, however, the majority found no "drastic invasion of state sovereignty."[27] Nonetheless, for the first time in nearly forty years, the Court raised the possibility that Congress could unconstitutionally impinge on state sovereignty even though acting within the scope of its delegated authority.

A. *National League of Cities v. Usery*

In *National League of Cities v. Usery,*[28] the Court adopted Justice Rehnquist's view that the Constitution establishes an affirmative state sovereignty limitation on the congressional commerce power. In *National League,* the petitioners challenged the 1974 amendments to the Fair Labor Standards Act[29] that extended the minimum wage, maximum hour, and overtime provisions of that act to virtually all state and local public employees. Although the amendments clearly were within Congress's power under the commerce clause,[30] the Court invalidated them on the grounds that they unconstitutionally intruded into the "States' freedom to structure integral operations in areas of traditional governmental functions."[31]

Writing for the Court, Justice Rehnquist did not base his opinion on the tenth amendment.[32] Instead, he grounded the opinion on the

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23 *Id.* at 547-48; *see* Pub. L. No. 91-379, 84 Stat. 796, 799 (1970) (expired Apr. 30, 1974).

24 *Id.* at 553 (Rehnquist, J., dissenting).

25 *Id.* at 547 n.7.

26 *Id.*

27 *Id.* at 547-48 n.7.

28 426 U.S. 833 (1976).

29 Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 6(a)(2), 88 Stat. 55, 59 (1974) (amending 29 U.S.C. § 203(d) (1982)).

30 *See* 426 U.S. at 841.

31 *Id.* at 852.

32 Rehnquist mentioned the tenth amendment only once in the opinion, *see id.* at 842-43, and the Court probably would have reached the same conclusion even if the amendment did not exist. *See* Note, *The Reaffirmation of State Sovereignty as a Fundamental Tenet of Constitutional Federalism*—National League of Cities v. Usery, 18 B.C. INDUS. & COM. L. REV. 736,

federal-state relationship embodied in the Constitution as a whole. Rehnquist recognized the existence of "attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner."[33]

The *National League* Court called the power to determine the wages, hours, and overtime of state employees an "undoubted attribute of state sovereignty."[34] After analyzing the economic consequences to the states of congressional intrusion into these matters, the Court found that the amendments "interfere[d] with traditional aspects of state sovereignty."[35] The majority also concluded that the amendments "significantly alter[ed] or displace[d] the States' abilities to structure employer-employee relationships in such areas as fire prevention, police protection, sanitation, public health, and parks and recreation."[36] Preempting the authority of the states to make such fundamental employment decisions would destroy their " 'separate and independent existence.' "[37]

Having found the amendments in question to be unconstitutional, the *National League* Court proceeded to overrule *Wirtz*[38] and distinguish *Fry*.[39] The Court distinguished *Fry* by identifying an overriding national interest in *Fry* that justified the temporary regulation of state and local employees' wages. The Court stated that "[t]he limits imposed upon the commerce power when Congress seeks to apply it to the States are not so inflexible as to preclude temporary enactments tailored to combat a national emergency."[40] Justice Blackmun, concurring, understood the majority's treatment of *Fry* to mean that the *National League*

741-42 n.44 (1977) [hereinafter cited as Note, *Fundamental Tenet*]; *see also* Note, *Federalism and Federal Regulation of Public Employers: The Implications of* National League of Cities v. Usery, 26 CLEV. ST. L. REV. 259, 273-74 (1977) (source of state sovereignty rights is in fabric of Constitution and system it created) [hereinafter cited as Note, *Federalism*].

Rehnquist also made no mention of the abandoned concept of dual federalism. *See National League,* 426 U.S. at 845; *see also supra* note 13 (discussing dual federalism doctrine and its demise); Note, *Federalism, supra* at 275-76.

33 426 U.S. at 845.

34 *Id.*

35 *Id.* at 845-49.

36 *Id.* at 851.

37 *Id.* (quoting United States v. Coyle, 221 U.S. 559, 580 (1910)).

38 *National League,* 426 U.S. at 853-55.

39 *Id.* at 852-53. The Court also distinguished United States v. Calfornia, 297 U.S. 175 (1936), on the ground that the activity regnlated in that case—state operation of a railroad—"was not in an area that the States have regarded as integral parts of their governmental activities." *National League,* 426 U.S. at 854 n.18; *see supra* note 13. The *National League* Court criticized that earlier decision extensively. Justice Brennan, in his dissenting opinion, criticized the Court's treatment of *Fry* and *United States v. California,* arguing that those cases were irreconcilable with *National League. See National League,* 426 U.S. at 871-72 (Brennan, J., dissenting).

40 *National League,* 426 U.S. at 853.

doctrine required a balancing of state and federal interests by courts confronting a tenth amendment challenge to a congressional statute.[41]

Justice Brennan, dissenting, broadly condemned the majority's decision. He contended that the Court had rejected well-established constitutional principles in reaching its decision and warned that the majority's approach signaled a return to the type of reasoning that precipitated the constitutional crisis in the 1930s.[42] Arguing that the national political system contained sufficient safeguards to protect state interests, Brennan concluded that the decision reflected "nothing but displeasure with a congressional judgment."[43]

National League prompted a great deal of commentary and uncertainty regarding the decision's ramifications on other congressional legislation and on federal-state relations.[44] This uncertainty was principally a result of the *National League* Court's failure to define explicitly a judicial test for determining whether a specific federal statute unconstitu-

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41 *Id.* at 856 (Blackmun, J., concurring). Many courts and commentators agree with Justice Blackmun that Justice Rehnquist's treatment requires courts to balance state and federal interests in determining whether a federal statute unconstitutionally intrudes into state sovereignty. *See, e.g.,* Woods v. Home & Structures, Inc., 489 F. Supp. 1270, 1296-97 (D. Kan. 1980); Usery v. Edward J. Meyer Memorial Hosp., 428 F. Supp. 1368, 1369-70 (W.D.N.Y. 1977); Note, *Fundamental Tenet, supra* note 39, at 750 & n.106; Comment, *Constitutional Challenges, supra* note 13, at 155-56 & n.103 (and cases cited); *cf.* Note, *The Constitutional Limitations Upon Federal Regulation of Municipal Issuers,* 51 ST. JOHN'S L. REV. 565, 583 (1977) (arguing that although it is difficult to interpret *National League* majority opinion as enunciating balancing approach, such approach will be used for foreseeable future). *But see* Comment, *Sovereignty Doctrine, supra* note 13, at 1470 ("[T]he Court's opinion [in *National League*] implicitly rejected a balancing approach"). Blackmun's balancing approach was rearticulated as a component of the *National League* doctrine in Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 n.29 (1981).

42 *National League,* 426 U.S. at 867-88 (Brennan, J., dissenting).

43 *Id.* at 872. Brennan argued that the Court adopted an "essential function" test, although he admitted to having difficulty in comprehending what the Court meant. *Id.* at 875. For discussions of the "essential function" test, see Note, *State Governmental Immunity From Federal Regulation Based on the Commerce Clause*—National League of Cities v. Usery, 26 DE PAUL L. REV. 100, 116-17; Note, *Minimum Wage Requirement Held Inapplicable to State Employees,* 60 MARQ. L. REV. 185, 187 (1976).

44 *See, e.g.,* Note, *Toward New Safeguards on Conditional Spending: Implications of* National Leagne of Cities v. Usery, 26 AM. U.L. REV. 726 (1977) [hereinafter cited as Note, *Safeguards*]; Note, *Fundamental Tenet, supra* note 32, at 778 (*National League* defines correct approach to constitutional federalism); Comment, *At Federalism's Crossroads:* National League of Cities v. Usery, 57 B.U.L. REV. 178, 180 (*National League* is consistent with constitutional theory requiring judicial protection of states from overly intrusive federal regulation). *But see* O'Fallon, *The Commerce Clause: A Theoretical Comment,* 61 OR. L. REV. 395, 400-04 (1982) (arguing that *National League* is inconsistent with theory of representation).

A number of commentators have examined specific federal statutes and congressional policies in light of *National League. See, e.g.,* Gold, *Clean Water, Federalism and the Res Judicata Impact of State Judgments in Federal Environmental Litigation,* 16 U.C.D. L. REV. 1 (1982); Note, *Safeguards, supra;* Note, *State Sovereiguty Challenges to Conditional Grants After* Virginia Surface Mining: *Is Section 103 of the Distressed Area Readjustment Act of 1983 Constitutional?,* 17 COLUM. J.L. & SOC. PROBS. 497 (1983); Note, *Federal Securities Fraud Liability and Municipal Issuers: Implications of* National League of Cities v. Usery, 77 COLUM. L. REV. 1064 (1977).

tionally intruded into the realm of state sovereignty.[45] Courts were thus left to struggle with the broad but vague language of Justice Rehnquist's opinion.[46]

B. *National League* Applied: *Hodel* and *Long Island Railroad*

The Supreme Court returned to the state sovereignty issue in 1981 in *Hodel v. Virginia Surface Mining & Reclamation Association.*[47] *Hodel* involved the constitutionality of the Surface Mining Control and Reclamation Act of 1978,[48] which was designed to protect the environment from the adverse effects of surface coal mining operations.[49]

The district court in *Hodel* held that the Act violated the tenth amendment limitation on Congress's commerce clause power.[50] The

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45 *See, e.g.,* Note, *The Constitutionality of the ADEA After Usery,* 30 ARK. L. REV. 363, 366 (1976) (*National League* "does not provide a clear test for determining if other federal statutes regulating state activities through the Commerce Clause are unconstitutional"); Note, *Federalism, supra* note 32, at 282 (*National League* "provides no clear test for determining when state sovereignty prevails over the national interest"); *see also* Amersbach v. City of Cleveland, 598 F.2d 1033, 1037 (6th Cir. 1979) (concluding that *National League* does not outline dimensions of state sovereignty limitation or articulate a test for determining if function is within protected state sovereignty).

46 *See, e.g.,* Amersbach v. City of Cleveland, 598 F.2d 1033, 1037 (6th Cir. 1979). Many courts have balanced federal and state interests in applying the principles of *National League. See, e.g.,* Usery v. Edward J. Meyer Memorial Hosp., 428 F. Supp. 1368 (W.D.N.Y. 1977); Remmick v. Barnes County, 435 F. Supp. 914 (D.N.D. 1977). Other courts consider the federal interests only after determining that the activity in question qualifies as an integral governmental function. *See, e.g.,* United Transp. Union v. Long Island R.R., 634 F.2d 19, 24 (2d Cir. 1980), *rev'd,* 455 U.S. 678 (1982); Peel v. Florida Dep't of Transp., 600 F.2d 1070, 1083 (5th Cir. 1979); Friends of the Earth v. Carey, 552 F.2d 25, 37-38 (2d Cir. 1977).

47 452 U.S. 264 (1981).

48 30 U.S.C. §§ 1201-1328 (1982). The Court also faced the constitutionality of this Act in a companion case, Hodel v. Indiana, 452 U.S. 314 (1981), decided on the same day. *See infra* note 55.

49 The Surface Mining Control and Reelamation Act established a two-stage program to regulate surface mining: the first, interim phase requires immediate enforcement of some of the Aet's environmental protection standards, *see* 30 U.S.C. § 1252 (1982), and the second, permanent phase mandates full compliance with the performance standards. *See* 30 U.S.C. §§ 1253-1254 (1982). The Secretary of the Interior oversees the interim phase, under whieh an enforcement program is established for each state. Under the permanent phase, either the state or federal government assumes enforcement responsibility. To assume regulatory responsibility over surface coal mining operations within its borders, a state must develop a regulatory program and secure the Secretary of the Interior's approval of that program. *See* 30 U.S.C. § 1253(a) (1982). If the Secretary disapproves the state's regulatory program or the state does not wish to assume enforcement responsibility, the Secretary must develop and implement a permanent federal program for that state. *See* 30 U.S.C. § 1254(a) (1982).

50 The district court held that the Act "operates to 'displace the States' freedom to structure integral operations in areas of traditional governmental functions,' . . . and, therefore, is in contravention of the Tenth Amendment." Virginia Surface Mining & Reclamation Ass'n v. Andrus, 483 F. Supp. 425, 435 (W.D. Va. 1980) (quoting National League of Cities v. Usery, 426 U.S. 833, 852 (1976)), *rev'd sub nom.* Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981). The district court found that although the Act ultimately affects coal mine operators, it impermissibly restricted Virginia's ability to make essential decisions "through forced relinquishment of state control of land usc planning; through loss of

Supreme Court reversed and upheld the statute.[51] The *Hodel* Court interpreted *National League* as setting out a three-part test for determining the success or failure of constitutional challenge to a federal statute enacted pursuant to the commerce clause. For such a challenge to succeed all three of the following requirements must be satisfied:

> First, there must be a showing that the challenged statute regulates the "States as States." . . . Second, the federal regulation must address matters that are indisputably "attribute[s] of state sovereignty." . . . And third, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional government functions."[52]

The Court asserted, however, that even if all three requirements are satisfied, a tenth amendment challenge to a commerce clause enactment could fail if "the nature of the federal interest advanced . . . justifies state submission."[53] This test thus incorporated the balancing approach advocated by Justice Blackmun in his *National League* concurrence.[54]

The *Hodel* Court applied the test to the statute at issue, concluded the law did not regulate "states as states," and thus disposed of the plaintiff's tenth amendment challenge.[55] The Court rejected arguments that the Act compels the states to establish a regulatory program, noting that the statute merely establishes a program of "cooperative federalism"[56] permitting the states to enact and administer their own regulatory programs.[57] Furthermore, the Court stated that the tenth amendment does not prohibit or displace federal policy over laws regulating private activity,[58] thus implicitly categorizing the Surface Mining and Reclamation Act as such a statute.[59]

The Court applied the *Hodel* test in *United Transportation Union v.*

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state control of its economy; and through economic harm, from the expenditure of state funds to implement the act and from destruction of the taxing power of certain counties, cities, and towns." *Virginia Surface Mining v. Andrus,* 483 F. Supp. at 435.

51 *Hodel,* 452 U.S. at 264.

52 *Hodel,* 452 U.S. at 287-88 (citations omitted) (quoting *National League,* 426 U.S. at 854, 845, 852).

53 *Id.* at 288 n.29.

54 *See supra* note 41 and accompanying text.

55 *Hodel,* 452 U.S. at 288. Because the Court disposed of the case under the first part of the test, it made no effort to define the test's other components. As a result, *Hodel* failed to resolve many of the uncertainties of *National League.*

The Court disposed of the tenth amendment challenge in the companion case, Hodel v. Indiana, 452 U.S. 314 (1981), on the same ground. *Id.* at 330.

56 *Hodel,* 452 U.S. at 289.

57 *Id.*

58 *Id.* at 288. Justice Rehnquist, who authored *National League,* concurred in the judgment. In his concurrence Rehnquist discussed only the scope of congressional power under the commerce clause and did not mention the tenth amendment or the Court's reformulation of its *National League* decision. *See id.* at 307-11 (Rehnquist, J., concurring).

59 *Id.* at 288.

Long Island Railroad.[60] In *Long Island Railroad,* the railroad employees' union and the railroad, which had been state-owned since 1966,[61] were unable to agree to the terms of a new collective bargaining agreement.[62] As a result of their failure to reach agreement, the union brought suit in federal district court, seeking a declaratory judgment that the dispute was covered by the federal Railway Labor Act[63] and not by New York state's Taylor Act.[64] The union sought to bring the dispute within the scope of the federal statute because that Act permitted strikes under certain circumstances;[65] the state statute prohibited all strikes by public employees.[66] After suit was filed, New York sought to preclude the applicability of the Railway Labor Act to the dispute by converting the railroad from a private stock corporation to a public benefit corporation, which would make all railroad employees public employees.[67] Despite the state's maneurving, the federal district court, in an unpublished opinon, held that the federal statute applied in this context.[68] The United States Court of Appeals for the Second Circuit reversed. The court applied the balancing test suggested by Justice Blackmun in *National League* and held that Congress could not regulate the state-owned railroad.[69]

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60 455 U.S. 678 (1982).

61 The railroad was acquired by New York State's Metropolitan Transportation Authority. *See* United Transp. Union v. Long Island R.R., 634 F.2d 19, 20 (2d Cir. 1980), *rev'd,* 455 U.S. 678 (1982). Although the railroad operated under the auspices of the state, it remained organized as a private stock corporation, *see* Brief for amicus curiae United States at 4, United Transp. Union v. Long Island R.R., 455 U.S. 678 (1982), and its employees were not considered public employees. *See* N.Y. PUB. AUTH. LAW § 1265(9)(1) (McKinney 1982).

62 United Transp. Union v. Long Island R.R., 634 F.2d 19, 21 (2d Cir. 1980), *rev'd,* 455 U.S. 678 (1982).

63 45 U.S.C. §§ 151-161, 159a (1976 & Supp. V 1981).

64 N.Y. CIV. SERV. LAW § 210 (McKinney 1983).

65 *See* 45 U.S.C. § 151-161 (1976 & Supp. V 1981). Although the Railway Labor Act does not specifically authorize strikes, such self-help measures are available once the Act's dispute resolution procedures have been exhausted. *See* United Transp. Union v. Long Island R.R., 634 F.2d 19, 20 & n.2 (2d Cir. 1982), *rev'd,* 455 U.S. 678 (1982).

66 N.Y. CIV. SERV. LAW § 210(1) (McKinney 1983) ("No public employee . . . shall engage in a strike.").

67 *See* N.Y. CIV. SERV. LAW §§ 101(6)(a), 210(1) (McKinney 1983); N.Y. PUB. AUTH. LAW § 1265(9)(1) (McKinney 1982).

68 *See* United Transp. Union v. Long Island R.R., 634 F.2d 19, 21 (2d Cir. 1980), *rev'd,* 455 U.S. 678 (1982).

69 The Second Circuit first determined that the federal regulation "directly displaces [the] State's ability to structure its employee-employer relationships and to make essential governmental decisions." United Transp. Union v. Long Island R.R., 634 F.2d 19, 25 (2d Cir. 1980), *rev'd,* 455 U.S. 678 (1982). Next, the court found that the state's operation of a passenger rail service was an "integral government function." *Id.* at 27. Since the court found that the statute displaced New York's ability to make essential decisions with respect to such functions, it balanced the state and federal interests and concluded that the federal interests did not justify federal regulatory intrusion. *See* United Transp. Union v. Long Island R.R., 634 F.2d at 29-30.

In the course of reaching its decision, the Second Circuit distinguished United States v. California, 297 U.S. 175 (1936), which upheld Congress's right to regulate a state-owned

The Supreme Court reversed the court of appeals. Writing for the Court, Chief Justice Burger found that the railroad's challenge failed the third part of the *Hodel* test.[70] That component of the test restricts application of the *National League* doctrine to statutes that "directly impair [a state's] ability 'to structure integral operations in areas of traditional governmental functions.' "[71] The Court asserted that it was well-established that the operation of a railroad by a state is not a traditional state activity,[72] and held that "a railroad engaged in interstate commerce is not an integral part of traditional state activities generally immune from federal regulation under [*National League*]."[73] Burger maintained that *National League* did not "impose a static historical view of state functions generally immune from federal regulation."[74] Instead, he interpreted that earlier decision as requiring "an inquiry into whether the federal regulation affects basic state prerogatives in such a way as would be likely to hamper the state government's ability to fulfill its role in the Union and endanger its 'separate and independent existence.' "[75] Applying this analysis to the Railway Labor Act's impact on

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railroad, on the ground that *United States v. California* involved only a freight system while the railway at issue in *Long Island Railroad* was both a freight and commuter system. United Transp. Union v. Long Island R.R., 634 F.2d at 26-27. The Second Circuit's decision has been criticized by commentators. *See* Comment, *Railroad Regulation After* National League of Cities: United Transportation Union v. Long Island Railroad, 56 N.Y.U. L. REV. 809 (1981); Comment, UTU v. LIRR: National League of Cities *Derailed*?, 34 RUTGERS L. REV. 189 (1981).

70 United Transp. Union v. Long Island R.R., 455 U.S. at 684.

71 *Hodel,* 452 U.S. at 288 (quoting National League of Cities v. Usery, 426 U.S. 833, 853 (1976)).

72 The court cited United States v. California, 297 U.S. 175 (1936), to support this proposition. United Transp. Union v. Long Island R.R., 455 U.S. at 685. For a brief discussion of that case see *supra* note 13. *See also supra* note 69 (noting that Second Circuit distinguished *United States v. California* in *United Transp. Union v. Long Island R.R.).*

73 United Transp. Union v. Long Island R.R., 455 U.S. at 685. The Court held that commuter and freight railroads should be treated similarly under the *National League* doctrine. *Id.* In doing so, the Court rejected the Second Circuit's distinction between these two types of railroads. *See supra* note 68. That distinction had enabled the Second Circuit to distinguish United States v. Calfornia, 297 U.S. 175 (1936), *see supra* note 13, from *United Transp. Union v. Long Island R.R. See supra* note 69.

The Second Circuit did not construe traditional state activities in a strictly historical sense and concluded that *National League's* state sovereignty limitations on congressional action applied to all "essential state-provided services." United Transp. Union v. Long Island R.R., 634 F.2d 19, 26 (2d Cir. 1980), *rev'd,* 455 U.S. 678 (1982). Thus, in determining whether a particular state activity was beyond federal regulatory authority under the *National League* doctrine, the Second Circuit examined the importance of the activity rather than whether the state traditionally engaged in it. *Id. See* Amersbach v. City of Cleveland, 598 F.2d 1033, 1037 (6th Cir. 1979) ("Although [*National League*] does not contain a specific outline of the dimensions of the state sovereiguty limitation, the definition suggests that the terms 'traditional' or 'integral' are to be given a meaning permitting expansion to meeting changing times").

74 United Transp. Union v. Long Island R.R., 455 U.S. at 686. Burger referred to *National League's* list of traditional activities as dicta. *Id.*

75 *Id.* at 686-87.

regulation of the Long Island Railroad, the Court concluded that because Congress has historically regulated railroads and because New York had acquiesced in the thirteen years of federal regulatory authority over the Long Island Railroad, the state could not now argue that its "separate and independent existence" was suddenly threatened by federal regulation.[76] Thus, the Court found that the state interest did not outweigh the federal one.

C. The *EEOC v. Wyoming* Decision

In *EEOC v. Wyoming,*[77] the Court again addressed a challenge to a federal statute regulating state and local employees. In 1974, Congress amended the Age Discrimination in Employment Act of 1974 (the Age Act) to extend the Act's coverage to state and local governments.[78] The Act prohibits various forms of age discrimination against employees

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76 *Id.* at 686-90. In a subsequent decision, Federal Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742 (1982), the Court faced another tenth amendment challenge to a federal statute. That case involved the constitutionality of certain provisions of the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. §§ 2601-2645 (1982), enacted in response to the energy crisis of the late 1970s.

The Court was most troubled by two particular provisions of the Act. One provision required state utility commissions to consider adoption and implementation of specific regulatory standards based on factors listed in the Act, *see* Federal Energy Regulatory Comm'n v. Mississippi, 456 U.S. at 761. A second provision prescribed procedures that state commissions must follow during their consideration of these standards. Justice Blackmun, writing for the Court, upheld the federal regulatory scheme. He did not, however, apply the *Hodel* test; instead he examined only the effect of the federal scheme on the states, and concluded that the adverse consequences of this federal regulation of a state administrative apparatus were insufficient to threaten the state's sovereignty. *See id.* at 760-61, 769-71.

Justice O'Connor, dissenting, applied the *Hodel* test and concluded that the Act was unconstitutional. O'Connor believed that the Act regulated states as states because Congress required state regulatory agencies to appraise the appropriateness of various utility rates. *Id.* at 778-79 (O'Connor, J., dissenting). She also believed that the Act impinged on attributes of state sovereignty because it deprived the states of "the power to decide which proposals are most worthy of consideration, the order in which they should be taken up, and the precise form in which they should be debated." *Id.* at 779. Furthermore, O'Connor noted that regulating utilities is a traditional state governmental function and that the work of a state regulatory commission is the most integral part of that function. O'Connor contended that the Act taxed the limited resources of these commissions and decreased their ability to address local regulatory problems, thus "directly impair[ing] their power . . . to discharge their traditional functions efficiently and effectively." *Id.* at 781. Finally, she concluded that the federal interests did not outweigh state interests, especially in light of the fact that Congress could have chosen a less intrusive means to accomplish its goals. *Id.* at 781 n.8.

Justice Powell objected only to the procedural provision. *Id.* at 771-75 (Powell, J., concurring in part and dissenting in part). One commentator has termed the procedural provision of the Act its "most constitutionally suspect feature." *The Supreme Court, 1981 Term,* 96 HARV. L. REV. 4, 189 (1982).

77 103 S. Ct. 1054 (1983).

78 Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 28(a)(2), 88 Stat. 55, 74 (1974) (amending 29 U.S.C. § 630(b) (1982)). The amendment at issue in *EEOC v. Wyoming* was passed at the same time as the Fair Labor Standards Act amendments that were invalidated in *National League. See supra* note 29 and accompanying text.

aged forty to sixty-five,[79] including the discharge of such workers on the basis of age.[80] Congress recognized, however, that in certain situations age is a relevant employment consideration and thus provided that otherwise prohibited practices are not unlawful "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."[81]

Prior to the Supreme Court's decision in *EEOC v. Wyoming,* every lower court that had considered the constitutionality of the 1975 amendments to the Age Act extending the statute's coverage to state and local workers had upheld them.[82] The specific issue in *EEOC v. Wyoming* was whether the Age Act preempted a Wyoming statute[83] conditioning continued employment for game and fish wardens who had reached the age of fifty-five on the approval of their employers. After concluding that Congress had passed the Act pursuant to the commerce clause,[84] the

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79 In 1978, Congress further amended the Age Act to cover persons up to the age of 70. *See* Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 6(a)(1), 92 Stat. 189, 192 (amending 29 U.S.C. § 624 (1982)).

80 29 U.S.C. § 623(a) (1982).

81 29 U.S.C. § 623(f)(1) (1982).

82 103 S. Ct. at 1059. Most courts treated the Age Act and its 1974 amendments as having been enacted pursuant to Congress's powers under § 5 of the fourteenth amendment. U.S. CONST. amend. XIV, § 5. *See, e.g.,* Arritt v. Grissell, 567 F.2d 1267, 1272 (4th Cir. 1977); Johnson v. Mayor of Baltimore, 515 F. Supp. 1287, 1302 (D. Md. 1981), *cert. denied,* 455 U.S. 944 (1982); Remmiek v. Barnes County, 435 F. Supp. 914, 916 (D.N.D. 1977); Usery v. Board of Educ., 421 F. Supp. 718, 721 (D. Utah 1976).

The Supreme Court's opinion in Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), strongly suggests that the fourteenth amendment, unlike the commerce clause, is not subject to a tenth amendment limitation. Although *Fitzpatrick* was an eleventh amendment case, it stands for the general proposition "that the Constitution granted Congress more authority to regulate state activities when acting pursuant to the fourteenth amendment than when acting pursuant to the commerce power." Note, *Tenth Amendment Protects State Mandatory Retirement Policy Against Federal Age Discrimination in Employment Act,* 60 WASH. U.L.Q. 687, 699 n.80 (1982) [hereinafter cited as Note, *Retirement Policy*]. Many courts thus upheld the Age Act as a proper exereise of Congress's power under the fourteenth amendmcnt.

Other courts took the position that Congress had passed the Age Act pursuant to the commerce clause and upheld the amendments as a legitimate exereise of the power granted by that clause. *See, e.g.,* Aaron v. Davis, 424 F. Supp. 1238 (E.D. Ark. 1976).

Following the Supreme Court's decision in Pennhurst State School v. Halderman, 451 U.S. 1 (1981), many courts and commentators concluded that the Court was requiring a clear showing of congressional intent to act pursuant to the fourteenth amendment for a federal statute to be considered as having been enacted pursuant to that constitutional provision. *See, e.g.,* EEOC v. Wyoming, 514 F. Supp. 595, 600 (D. Wyo. 1981), *rev'd,* 103 S. Ct. 1054 (1983); Note, *Retirement Policy, supra* at 699. This reading of *Pennhurst* foreclosed courts from concluding that the Age Act had been passed pursuant to the fourteenth amendment because the Act failed to contain such a clear statement of intent. Courts thus would be forced to infer that the Act had been passed pursuant to the commerce clause. In *EEOC v. Wyoming,* however, the Supreme Court suggested that *Pennhurst* did not mandate such a clear statement of intent. *See infra* note 87.

83 WYO. STAT. § 31-3-107(c) (1977), *amended by* 1983 Wyo. Sess. Laws § 1, ch. 154.

84 EEOC v. Wyoming, 514 F. Supp. 595, 600 (D. Wyo. 1981), *rev'd,* 103 S. Ct. 1054 (1983); *see supra* note 82.

district court held that extending the statute to Wyoming's game and fish wardens violated the tenth amendment.[85]

The Supreme Court reversed in a five-to-four decision.[86] Writing for the Court, Justice Brennan first noted that Congress had acted within the scope of its commerce clause authority in passing the Age Act.[87] Brennan then addressed Wyoming's contention that the tenth amendment precluded the application of the Age Act to its game wardens.[88]

In determining whether the Age Act amendments violated the tenth amendment, Brennan first analyzed the policies and purposes of *National League.* The Court in *National League,* according to Brennan, drew from the tenth amendment an affirmative limitation on congressional power under the commerce clause because of its concern that imposing certain federal regulations on state governments might severely

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85 EEOC v. Wyoming, 514 F. Supp. 595, 600 (D. Wyo. 1981), *rev'd,* 103 S. Ct. 1054 (1983). The district court did not explicitly apply the *Hodel* test. Instead, the court found that "an integral portion of government services which the States and their political subdivisions have traditionally afforded their citizens would be affected" if the Age Act were applied in this instance. *Id.* Noting that the management of wildlife resources by game wardens is a traditional service of state government as identified by the Supreme Court in National League of Cities v. Usery, 426 U.S. 833, 851 (1976), the court concluded that the Act would interfere with the legitimate state policy of ensuring physically capable game wardens. Furthermore, the district court felt that the Act would saddle the state with the responsibility of "keeping its law enforcement personnel on its payrolls an additional 10 years." EEOC v. Wyoming, 514 F. Supp. at 600. The court then balanced this important state interest against the federal interest at stake and found that the state interest outweighed the federal interest. This conclusion was based in part on the fact that the federal government had a mandatory retirement age of 55 for some of its law enforcement personnel, which suggested an important governmental interest in ensuring physically capable law enforcement personnel. *Id.* The decision was appealed directly to the Supreme Court pursuant to 28 U.S.C. § 1252 (1976), which provides for direct appeal to the Supreme Court of any judgment invalidating a congressional act. At least one commentator has criticized the district court opinion. *See* Note, *Retirement Policy, supra* note 82.

86 EEOC v. Wyoming, 103 S. Ct. at 1054. The majority included Justices Brennan, Marshall, Stevens, and White, all of whom dissented in *National League,* as well as Justice Blackmun, who concurred in *National League.*

87 EEOC v. Wyoming, 103 S. Ct. at 1061-62. The Court declined to decide whether the statute was also a legitimate exercise of congressional power under the fourteenth amendment. *Id.* at 1064. This issue nevertheless was the subject of considerable disagreement between Brennan and Chief Justice Burger, who wrote the principal dissent. Brennan contended that the district court misread Pennhurst State School v. Halderman, 451 U.S. 1 (1981), *see supra* note 82, as holding that congressional action could not be upheld under § 5 of the fourteenth amendment unless Congress expressed a clear intent to act pursuant to that section. EEOC v. Wyoming, 103 S. Ct. at 1064 n.18. Thus, Brennan argued that *Pennhurst* had no relevance to *EEOC.* According to Brennan, the *Pennhurst* Court was construing a statute, not passing on its constitutional validity. *Id.* at 1064 n.18. Burger responded that the fourteenth amendment does not give Congress "a 'blank check' to intrude into details of states' governments at will," *id.* at 1072 (Burger, C.J., dissenting), and concluded that Congress could not apply the Age Act to the states pursuant to the fourteenth amendment. *Id.* at 1074.

88 EEOC v. Wyoming, 103 S. Ct. at 1060.

impinge on state sovereignty.[89] In the view of the majority in *EEOC v. Wyoming,*

> [t]he principle of immunity articulated in [*National League*] is a functional doctrine . . . whose ultimate purpose is not to create a sacred province of state autonomy, but to ensure that the unique 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.[90]

The majority next asserted that the *Hodel* test is the proper standard for assessing tenth amendment challenges to federal legislation. Applying that test, Brennan noted that the Age Act clearly satisfied the first part because it regulated the state as a state.[91] He then acknowledged that the Act posed problems with respect to the second part of the test, the attribute of state sovereignty requirement. He did not resolve this issue because he disposed of the challenge by applying the third part of the test.[92]

The Court found that applying the Age Act to Wyoming's game and fish wardens did not satisfy the third requirement of the *Hodel* test because extending the Act's coverage to these employees "[did] not 'directly impair' [Wyoming's] ability to 'structure integral operations.' "[93] Having found no direct impairment in this regard, the majority upheld the extension of the Age Act to the states, both as applied in this case and on its face.[94] Brennan concluded "that the degree of federal intrusion in this case is sufficiently less serious than it was in [*National League*] so as to make it unnecessary . . . to override Congress's express choice to extend its regulatory authority to the States."[95]

The Court's conclusion that there was no direct impairment of Wy-

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89 *Id.*

90 *Id.* (citations omitted).

91 *Id.* at 1061. Brennan emphasized that this aspect of the test "marks it as a specialized immunity doctrine rather than a broad limitation on federal authority." *Id.* at 1061 n.10. He distinguished the direct regulation of states from the regulation of private activity, which, in his view, is clearly constitutional under the supremacy clause. *Id.*

92 *Id.* at 1061. Brennan attempted to resolve the uncertainty created by *National League's* failure to adequately define "attributes of state sovereignty." He claimed that some state employment decisions are immune from federal regulation. Such decisions include those "so clearly connected to the execution of underlying sovereign choices . . . *'upon which* [the] *systems* [of the states'] *performance of* [their dual functions of administering the public law and furnishing pubic services] *must rest.'* " *Id.* n.11 (emphasis in original).

93 *Id.* at 1060-62.

94 *Id.* at 1064. The Court did not balance the state and federal interests at stake because it disposed of the challenge to the Age Act on the third part of the *Hodel* test. Brennan nevertheless observed that if it had been necessary to balance these interests, the federal interests might outweigh the state interests. *Id.* at 1064 n.17. Furthermore, the Court thought it unimportant that Congress had not applied the Age Act to federal employees. *Id.* That fact had been an important consideration in the district court's decision. *See* EEOC v. Wyoming, 514 F. Supp. 595, 600 (D. Wyo. 1981), *rev'd,* 103 S. Ct. 1054 (1983).

95 EEOC v. Wyoming, 103 S. Ct. at 1062.

oming's ability to structure integral operations was based primarily on two considerations. First, the Age Act still allows Wyoming to dismiss those wardens unfit for duty.[96] Second, Wyoming may continue to set a mandatory retirement age of fifty-five by demonstrating that age is a bona fide occupational qualification.[97] Thus, the majority argued that the Act does not prevent the state from exercising its discretion in employment decisions but merely tests the exercise of that discretion against a reasonable federal standard.[98]

Finally, the Court addressed the potential impact of the federal regulation on the state's ability to structure its own operations and priorities. Brennan noted that the Court in *National League* had been concerned that the application of the Fair Labor Standards Act[99] to the states might "threaten . . . a virtual chain reaction of substantial and almost certainly unintended consequential effects on state decisionmaking."[100] In *EEOC v. Wyoming* the Court found that there were no such substantial consequences in applying the Age Act to the states. In reaching this conclusion, the majority examined two potentially serious consequences of federal regulation identified in *National League*—the federal statute's effect on state finances,[101] and its effect on the state's ability to use state employment as a policy tool[102]—and found that these effects were insignificant. Therefore, the Court concluded that applying the federal minimum retirement age of seventy to Wyoming's game and fish wardens did not pose "anything like the same wide-ranging and profound threat to the structure of State governance" that the Court had faced in *National League.* [103]

Chief Justice Burger, in dissent, also applied the *Hodel* test to the statute in question but he reached a result contrary to that of the majority. Burger had no difficulty in concluding that the Age Act satisfied the first two requirements of the *Hodel* test. The act satisfied the first requirement because it regulated states as states,[104] and the second requirement because "defining the qualifications of employees is an essential of sovereignty."[105]

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96 *Id.*

97 *Id.; see supra* note 81 and accompanying text.

98 *Id.*

99 29 U.S.C. §§ 201-219 (1982).

100 EEOC v. Wyoming, 103 S. Ct. at 1062.

101 The Court acknowledged that state payrolls might increase if the Age Act retirement age of 70 were enforced against the states because older workers tend to get paid more than younger ones by virtue of seniority. The majority, however, contended this increase would be offset by a decrease in pension costs resulting from the fact that fewer people would be receiving pensions. *See id.* at 1062-63.

102 The Court could not imagine any public policies that would be frustrated by the Age Act. *Id.* at 1063-64.

103 *Id.* at 1062.

104 *Id.* at 1069 (Burger, C.J., dissenting).

105 *Id.* at 1069-70. Burger concluded that the prerogative to set mandatory retirement

With respect to the third requirement of the *Hodel* test—that the statute impair traditional governmental functions—the Chief Justice found the Age Act objectionable on several grounds. First, the Act could increase certain state employment expenses such as insurance, salary, pension, and disability costs.[106] Second, the Act would preclude states from employing those best able physically to perform the job.[107] Furthermore, Burger rejected the majority's suggestion that the bona fide occupational qualification provision of the Act provided states with adequate discretion in making age-related employment decisions; Burger argued that "[g]iven the state of modern medicine, it is virtually impossible to prove that *all* persons within a class are unable to perform a particular job or that it is impossible to test employees on an individual basis."[108] Having determined that all three parts of the test were satisfied, Burger balanced the interests at stake and found the federal interest inadequate.[109]

II
ANALYSIS

In *National League of Cities v. Usery,*[110] the Supreme Court established a flexible, policy-based constitutional doctrine that restrained the federal government from interfering with the sovereign functioning of the states. In *Hodel v. Virginia Surface Mining & Reclamation Association,*[111] the Court developed a three-part test for determining when federal legislation unconstitutionally impinges on state sovereignty.[112] Although the *Hodel* Court claimed that the test was consistent with the decision in *National League,* it severely limited *National League* by replacing that earlier decision's flexible restraints on federal action with a narrow, rigid

standards is an attribute of sovereignty because over one-half of the states and Congress have enacted mandatory retirement age laws for their own employees, indicating that "such laws are traditional methods for insuring an efficient workforce for certain governmental functions." *Id.* at 1069.

106 *Id.* at 1070.

107 *Id.* at 1071.

108 *Id.* at 1072 (emphasis in original).

109 *Id. EEOC v. Wyoming* also featured an interesting historical debate between Justice Stevens, who joined the majority, and Justice Powell, who dissented. Stevens argued that the commerce clause "was the Framers' response to the central problem that gave rise to the Constitution itself." *Id.* at 1065 (Stevens, J., concurring). He contended that although the clause has been construed strictly at various times in the past, the "Court has [recently] construed the Commerce Clause to reflect the intent of the Framers of the Constitution—to confer a power on the national government adequate to discharge its central mission." *Id.* at 1066. Justice Powell called this a "novel view of our Nation's history." *Id.* at 1075 (Powell, J., dissenting). He argued that commerce was not the major concern of the Framers and that "[c]reating a national government within a federal system was far more central than any 18th century concern for interstate commerce." *Id.* at 1076.

110 426 U.S. 833 (1976); *see supra* notes 28-46 and accompanying text.

111 452 U.S. 264 (1981); *see supra* notes 47-59 and accompanying text.

112 *Hodel,* 452 U.S. at 287-88.

test that disregarded underlying policy concerns. The Court further undermined its *National League* doctrine in *EEOC v. Wyoming.*[113] In that decision, the Court considered a statute that conceivably satisfied the first two threshold requirements of the *Hodel* test. Thus, for the first time, the Court was forced to reach the merits of a tenth amendment challenge to a federal statute and to determine whether that statute unconstitutionally impaired a state's ability to structure integral activities. In resolving this question, the Court substantially undermined the *National League* doctrine and demonstrated that *National League's* underlying concerns are no longer important considerations. The *Hodel* test and the *EEOC v. Wyoming* decision represent an abandonment of the *National League* doctrine.

A. The Policies Underlying *National League*

In *National League,* the Supreme Court perceived a congressional threat to the ability of the states to fulfill their constitutionally mandated role in the federal system. To counteract this threat, the Court articulated an affirmative constitutional limitation on Congress's power to regulate the states.

The *National League* Court contended that this restraint on Congress's authority was similar to other affirmative constitutional limitations on congressional power.[114] This restriction, however, never before articulated by the Court,[115] differed from previously accepted limitations because it is not expressly stated in the Constitution.

The *National League* Court derived the limitation on congressional power from the federal-state relationship embodied in the Constitution as a whole.[116] In that relationship, states were considered independent, autonomous units, secure from federal encroachment;[117] they were deemed to play an "essential role . . . in our federal system of government."[118] To preserve state sovereignty and thus the federal system, the Court construed the Constitution to prohibit Congress from exercising " 'power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system.' "[119]

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113 103 S. Ct. 1054 (1983); *see supra* notes 77-109 and accompanying text.

114 Other affirmative constitutional limitations mentioned by the Court include the right to a jury trial and the due process requirement. *National League,* 426 U.S. at 841.

115 Prior to *National League,* the Court had used the tenth amendment in commerce clause litigation to restrict Congress's ability to regulate purely local matters. This was the doctrine of dual federalism. *See supra* note 13.

116 *National League,* 426 U.S. at 852; *see* Note, *Federalism, supra* note 32, at 274 (suggesting that outcome of *National League* would have been same even if Constitution did not contain the tenth amendment).

117 *See generally* THE POLITICS OF AMERICAN FEDERALISM (D. Elazar ed. 1969).

118 *National League,* 426 U.S. at 844.

119 *Id.* at 843 (quoting Fry v. United States, 421 U.S. 542, 547 n.7 (1975)); *see* United Transp. Union v. Long Island R.R., 455 U.S. 678, 687 (1982) (stating that *National League*

The Court in *National League* struck down the 1974 Fair Labor Standards Act amendments[120] because it concluded that they threatened the states' ability to fulfill their essential role in the federal system. In reaching this conclusion, the Court examined the effect of the amendments on the states.[121] Although the Court conjectured that the amendments might have serious financial and policymaking consequences for the states, concern over these consequences was not the primary reason for barring the application of the provisions to state and local governments. Instead, the Court stated that "the dispositive factor is that Congress has attempted to exercise its Commerce Clause authority to prescribe minimum wages and maximum hours to be paid by the States in their capacities as sovereign governments."[122] This reasoning suggests that the Court would have reached the same result regardless of the amendments' actual impact upon the states.[123] Thus, the Court indicated that a mere attempt by Congress to regulate minimum wages and maximum hours of state employees constituted a threat to the states' ability to fulfill their constitutional role in the federal system.

In *National League,* the Court considered a federal statute that clearly attempted to regulate fundamental employment decisions made by states while engaged in "traditional state activities"[124] or "traditional governmental functions."[125] The Court prohibited Congress from interfering with a state's ability to make such decisions.[126] Furthermore, the Court noted that the *effects* of federal regulation may "impermissibly interfere with [a state's] integral governmental functions."[127]

National League thus suggests that certain types of state activities are absolutely protected from federal regulation without regard to the consequences of such regulation. In addition, *National League* suggests that other types of state activities are insulated from congressional regulation if the effects of such regulation impinge on the state in such a way as to threaten its separate and independent existence. Unfortunately, the *National League* Court failed to indicate what state activities were absolutely protected from federal regulation.[128] The Court also neglected to

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requires an inquiry into whether basic state prerogatives would be affected "in such a way as would be likely to hamper the state government's ability to fulfill its role in the Union").

120 Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 6(a)(2), 88 Stat. 55, 59 (1974) (amending 29 U.S.C. § 203(d) (1982)).

121 *National League,* 426 U.S. at 846-51.

122 *Id.* at 852.

123 *See id.* at 851-52.

124 *Id.* at 849-51.

125 *Id.* at 852.

126 *Id.* at 851-52. The fact that the Court approved Fry v. United States, 421 U.S. 542 (1975), however, suggests the existence of a "national emergency" exception under which Congress may regulate fundamental employment decisions.

127 *National League,* 426 U.S. at 851.

128 Based on the facts of *National League,* the power to make wage and hour employment decisions is accorded absolute protection. The Court also explicitly mentioned some exam-

indicate what types of consequential effects it considered relevant in determining whether a state's sovereignty was threatened, and how serious those consequences must be to invalidate a federal statute.

B. The *Hodel* Test

The Court in *Hodel* attempted to explain the *National League* decision by defining standards for its application.[129] The Court did not simply reformulate *National League's* policy and rationale into a workable standard, however; instead, it severely restricted the scope of the *National League* doctrine and limited its applicability. In *Hodel,* the Court created a three-part test to guide courts in deciding tenth amendment challenges to congressional statutes. Although the Court stated the test in three parts, it actually embodies four requirements. To violate the tenth amendment, a federal statute must: first, regulate " 'States as States' ";[130] second, address matters that are " 'attribute[s] of state sovereignty' ";[131] third, regulate areas of traditional state functions; and fourth, impair a state's ability to structure integral activities.[132]

Prior to its decision in *EEOC v. Wyoming,* the Court had applied only two of these requirements. In *Hodel,* the Court considered the states as states requirement and, in *United Transportation Union v. Long Island Railroad,*[133] it considered the traditional state activities requirement. In these two decisions, the Court indicated that both these requirements must be satisfied before a court can make a policy-based inquiry into whether the federal statute in question directly impairs a state's ability to structure integral operations. Thus, the Court effectively established thresholds that must be crossed before the concerns that troubled the Court in *National League* can be considered.

The extent to which these threshold requirements will affect the *National League* holding depends on the manner in which they are applied. In *Hodel,* the Court indicated that the states as states requirement will be applied rigidly;[134] the *Long Island Railroad* Court gave conflicting indications as to how the traditional state activity requirement will be applied.[135] Rigid application of these two requirements effectively ignores *National League's* broad, policy-based rationale.

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ples of traditional state activities: fire prevention, police protection, sanitation, public health, and parks and recreation. *Id.* at 851.

129 *See Hodel,* 452 U.S. at 264.

130 *Id.* at 287 (quoting *National League,* 426 U.S. at 854).

131 *Id.* at 288 (quoting *National League,* 426 U.S. at 845).

132 *Id.*

133 455 U.S. 678 (1982); *see supra* notes 60-74 and accompanying text.

134 *See Hodel,* 452 U.S. at 287-93.

135 *See* United Transp. Union v. Long Island R.R., 455 U.S. at 684-86.

1. *The States as States Requirement*

In *National League,* the Court distinguished between "laws regulating individual businesses necessarily subject to the dual sovereignty of [federal and state] government"[136] and laws directed to the "States as States."[137] The *Hodel* Court adopted this distinction from the earlier opinion and turned it into a rigid rule, thus drawing an arbitrary line that undermined the flexibility of *National League.* In *National League,* the Court was concerned with congressional statutes that threatened the states' ability to fulfill their constitutional role,[138] and not with the particular manner in which federal law threatened the states. The broad policy concerns articulated in *National League* suggest that the decision was intended to invalidate any federal statute that unconstitutionally infringed on state sovereignty, regardless of whether the statute was directed primarily at private business or at a governmental entity. By requiring that an invalid statute regulate "states as states," however, the *Hodel* Court rejected the possibility that federal legislation regulating only private business might exceed *National League's* tenth amendment limitation on congressional intrusion into state sovereignty. Thus, the *Hodel* Court implicitly held that a state's separate and independent existence can never be threatened when Congress does not directly regulate a state.

Unfortunately, the Court did not substantiate this conclusion. Instead, the *Hodel* majority relied on the supremacy clause[139] to assert that, because Congress could preempt state regulation of surface mining entirely, it could also choose to offer the states a role in the regulatory scheme.[140] Although this argument has an appealing simplicity, it ignores the fact that many of the concerns that troubled the Court in *National League* are also present when Congress indirectly imposes burdens on the states by regulating private business. As some commentators have noted, congressional regulation of surface mining may impose substantial costs and have other detrimental effects on state activities such as land-use planning.[141] Therefore, whether such a regulation affects a

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136 *National League,* 426 U.S. at 845.

137 *Id.* This distinction may simply indicate that *National League* was not intended to signal a return to the abandoned concept of dual federalism. *See* Note, *Federalism, supra* note 32, at 276.

138 *See supra* notes 110-23 and accompanying text.

139 The supremacy clause provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . ." U.S. CONST. art. VI, cl. 2.

140 *See Hodel,* 452 U.S. at 290.

141 *See, e.g.,* Note, *Tenth Amendment Challenges to the Surface Mining Control and Reclamation Act of 1977: The Implications of* National League of Cities *on Indirect Regulation of the States,* 49 FORDHAM L. REV. 589, 601-08 (1981); Note, *A Critique of* Hodel v. Virginia Surface Mining and Reclamation Association, 16 U. RICH. L. REV. 179, 197 (1981) [hereinafter cited as Note, *Critique of* Hodel].

state in a manner that threatens its separate and independent existence is a question that demands close scrutiny; yet under the *Hodel* test, that question will never be asked.[142]

2. *The Traditional Governmental Functions Requirement*

The *Hodel* Court erected a second threshold requirement that had to be satisfied before *National League's* limitations on congressional intrusion into state sovereignty became applicable. To satisfy this requirement, a party challenging a federal statute had to demonstrate that the "States' compliance with the federal law would directly impair their ability 'to structure integral operations in areas of *traditional governmental functions.*' "[143] The *Hodel* Court once again lifted a phrase from the *National League* opinion and turned it into a rule. Unfortunately, it failed to define traditional state activities in more detail than the *National League* Court had. Instead the *Hodel* Court incorporated the phrase in an ill-defined, potentially rigid test. *Hodel* thus did little to remedy the uncertainty of *National League.*[144]

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142 One commentator has suggested that *Hodel's* states as states requirement "severely limits the rhetoric of *National League of Cities.*" Note, *Constitutional Challenges to the Surface Mining Control and Reclamation Act,* 43 MONT. L. REV. 235, 242 (1982) [hereinafter cited as Note, *Challenges*]. Another commentator has indicated that

> [i]n interpreting the test of *National League of Cities* to be applicable only to the regulation of the "States as States," the [Hodel] Court has achieved the diffcult [sic] task of clarifying that decision in a remarkably simple fashion. Effectively, the Court has foreclosed the majority of tenth amendment challenges that might have been brought following *National League of Cities* by simply demanding that there must be shown a direct assertion of authority over a state.

Comment, *Constitutional Challenges, supra* note 13, at 159 (footnote omitted); *see* Note, *Challenges, supra,* at 242 ("[T]his distinction appears to leave no middle ground for considering the primary effects of regulation on states when the states are not the principal object of regulation."); Note, *Critique of* Hodel, *supra* note 141, at 197 ("[T]he level of interference and the degree to which the state's ability to structure integral operations is impaired are factors that are totally irrelevant unless the federal law *directly* regulates the states.") (emphasis in original).

Even if the *Hodel* Court had found that the statute before it regulated Virginia as a state, the Court might have permitted such regulation. In Federal Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742 (1982), the Court upheld a federal statute directing state regulatory authorities to participate in a federal energy regulatory scheme. The Court reasoned that because Congress constitutionally could preempt state regulation entirely, Congress could also grant the states a role in the regulatory scheme. *Id.* at 765. The Court's premisc, however, that allowing the states a regulatory role is less drastic than preempting their regulatory activities completely, is not necessarily correct. *See id.* at 786-87 (O'Connor, J., dissenting). Furthermore, Congress did not merely grant the states a regulatory role, it ordered them to take specific action. *See supra* note 76.

143 *Hodel,* 452 U.S. at 288 (quoting *National League,* 426 U.S. at 852) (emphasis added) (footnote omitted).

144 *See supra* notes 45-46. Although the *National League* Court's discussion of traditional state activities allowed it to distinguish United States v. California, 297 U.S. 175 (1936), *see supra* note 13, it seemed to serve no other purpose. *See National League,* 426 U.S. at 854 n.18.

The Court in *National League* gave specific examples of traditional state activities: fire

From a strictly historical perspective, a requirement that a federal statute regulate a traditional state activity before it can exceed tenth amendment limitations on congressional intrusion into state sovereignty sharply curtails the *National League* doctrine. Under such an approach, a state activity would be immune from federal regulation only if the state had engaged in the activity for such an extended period of time that a court would consider it part of the state's traditional functions. In light of this threshold requirement, the importance of the activity in providing services to state citizens, the effect of federal regulation on the state's ability to conduct such services, and the technological developments creating new state activities become irrelevant concerns. Yet the first two of these concerns were important considerations in the Court's *National League* decision.[145] Thus, a strict historical construction of traditional state activities sharply diminishes the scope of *National League.*

In *United Transportation Union v. Long Island Railroad,*[146] the Court sent conflicting signals as to its approach to the issue of what activities satisfy *Hodel's* traditional state activities requirement. Chief Justice Burger, writing for a unanimous Court, disposed of the case in a manner suggesting a strictly historical approach to traditional state activities. He rejected the state's contention that its commuter railroad system[147] should be exempt from federal regulation and upheld the application of the federal Railway Labor Act to that system, reasoning that the operation of passenger railroads "has traditionally been a function of private industry, not state or local governments."[148] Burger noted that although some passenger railroads recently have come under state control, this fact "does not alter the historical reality that the operation of railroads is not among the functions *traditionally* performed by state and local governments."[149]

Despite this seemingly rigid historical approach, the Chief Justice claimed he was not "looking only to the past to determine what is 'traditional.' "[150] He contended that *National League's* "emphasis on tradi-

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prevention, sanitation, public health, and parks and recreation. *National League,* 426 U.S. at 851. The Court explicitly stated that its list of traditional state activities was "not an exhaustive catalogue of the numerous line and support aetivities which are well within the area of traditional operations of state and local governments." *Id.* at 851 n.16. Although this suggests that there may be other activities within the scope of *National League,* the decision did not indicate how to identify them. *Hodel* did little to remedy this uncertainty.

145 *See National League,* 426 U.S. at 851.

146 455 U.S. 678 (1982); *see supra* notes 60-74 and accompanying text.

147 Burger concluded that the case was governed by the Court's decision in United States v. California, 297 U.S. 175 (1936), *see supra* note 13, which upheld federal regulation of a state-operated freight railroad. The Court thus did not distinguish between commuter railroads and freight railroads in applying the traditional state requirement. United Transp. Union v. Long Island R.R., 455 U.S. at 684-86.

148 United Transp. Union v. Long Island R.R., 455 U.S. at 686 (footnote omitted).

149 *Id.* (emphasis in original).

150 *Id.*

tional governmental functions and traditional aspects of state sovereignty was not meant to impose a static historical view of state functions generally immune from federal regulation."[151] Instead, Burger claimed that *National League* required "an inquiry into whether the federal regulation affects basic state prerogatives in such a way as would be likely to hamper the state government's ability to fulfill its role in the Union and endanger its 'separate and independent existence.' "[152] Burger further added to the confusion by suggesting a historical standard that favored federal regulation and ignored state interests. He would not allow states "to erode federal authority in areas traditionally subject to federal statutory regulation"[153] by "acquiring functions previously performed by the private sector."[154]

Thus, *Long Island Railroad* further clouded the issue of what state activities are protected by *National League.*[155] The Court's reasoning and

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151 *Id.*

152 *Id.* at 686-87 (quoting *National League,* 426 U.S. at 851). Burger's inquiry suggests that he views *National League* as requiring a balancing of state and federal interests. Burger found a strong federal interest evidenced by comprehensive federal railroad regulation, United Transp. Union v. Long Island R.R., 455 U.S. at 687-89, and concluded that it outweighed the state's interest, especially in light of New York's acquiescence to 13 years of federal regulation. *Id.* at 689-90.

153 *Id.* at 687.

154 *Id.*

155 For example, lower federal courts have reached conflicting conclusions with respect to whether a municipal mass transit system constitutes a traditional governmental function for purposes of determining whether the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-219 (1982), can constitutionally be applied to these systems. *Compare* Alewine v. City Council, 699 F.2d 1060 (11th Cir. 1983) (upholding application of the FLSA) *and* Kramer v. New Castle Area Transit Auth., 677 F.2d 308 (3d Cir.) (same), *reh'g denied,* (1982) *with* Enrique Molina-Estrada v. Puerto Rico Highway Auth., 680 F.2d 841 (1st Cir. 1982) (prohibiting application of FLSA) *and* San Antonio Metropolitan Transit Auth. v. Donovan, 557 F. Supp. 445 (W.D. Tex.) (same), *probable jurisdiction noted,* 104 S.Ct. 64 (1983). Arguably intracity bus and rail service is the type of activity that should be protected under *National League.* An intracity mass transit system often is vital to the commercial success of a city. Many large cities such as Baltimore and Washington only recently have established large municipal rail systems. *See* TIME, Jan. 16, 1984, at 18. Many other cities have offered such services for a long time, either by operating bus and rail systems directly, or by contracting with private companies to provide such services. It is possible that such mass transit systems could fall within the protections of *National League.*

The *Donovan* decision has an interesting history. In *Donovan,* the district court originally sustained a tenth amendment challenge to the application of the FLSA to San Antonio's mass transit system. On direct appeal to the Supreme Court pursuant to 28 U.S.C. § 1252 (1982), the Court vacated the decision and remanded for reconsideration in light of its intervening decision in *United Transp. Union v. Long Island R.R. See* Donovan v. San Antonio Metropolitan Transit Auth., 457 U.S. 1102 (1982). On remand, the district court reached the same conclusion, holding that even though San Antonio did not own and operate the mass transit system until 1959, it had a long history of involvement in the system prior to that year and was thus engaged in a "traditional state activity." *Donovan,* 557 F. Supp. at 448. Therefore, although San Antonio did not assume direct control of its mass transit system until 1959, its involvement in the system had begun much earlier. The Supreme Court has noted probable jurisdiction to review that decision. 104 S.Ct. 64 (1983).

Donovan offers the Court another chance to elaborate on the meaning of traditional state

holding suggest a rigid historical approach but dicta in the opinion indicates otherwise.

C. *EEOC v. Wyoming:* The Abandonment of *National League*

Hodel and *Long Island Railroad* reflect the Court's conclusion that its *National League* decision unduly restricted Congress's power to regulate state activity. The Court in these later decisions apparently concluded that *National League's* language was so broad that it raised questions regarding the constitutionality of a range of commerce clause legislation affecting the states.[156] Therefore, *Hodel's* requirement that a congressional statute regulate states as states before it can be considered constitutionally suspect may have been an attempt to reconcile *National League's* broad language with the more limited intent of the *National League* Court.[157] The fact that Justice Rehnquist, who authored *National League,* did not object to the "states as states" requirement in either *Hodel* or *Long Island Railroad*[158] strongly suggests that this was the Court's goal. *Hodel* and *Long Island Railroad,* however, did not completely eliminate the *National League* state sovereignty doctrine: certain state activities[159] remained insulated from congressional regulation in some instances. In *EEOC v. Wyoming,* however, the Court took the final step and completely abandoned *National League's* state sovereignty doctrine.

In *EEOC v. Wyoming,* the Court acknowledged that the statute in question regulated states as states engaging in a traditional state activity.[160] Because the Age Act as applied to Wyoming's game and fish wardens satisfied these two threshold requirements of the *Hodel* test, the Court addressed a previously undefined component of the *Hodel* test:

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activities. The fact that the Supreme Court remanded *Donovan* to the district court for reconsideration in light of *United Transp. Union v. Long Island R.R.* suggests that it might consider United States v. California, 297 U.S. 175 (1936), *see supra* note 13, to be controlling. The two cases, however, are distinguishable because San Antonio has a bus as well as a rail system, whereas the holding and logic of *United States v. California* were based entirely on the fact that the public service in question was an interstate railroad carrier. Thus, *United States v. California* seems to be inapposite. The Court thus may be forced to determine whether an intracity mass transit system is an activity protected by *National League,* and in doing so it may further indicate what types of activities constitute traditional state activities.

156 *See supra* note 44.

157 The Court's opinion in *Hodel* indicates that a federal statute that regulates a state only indirectly is not constitutionally suspect under *National League,* regardless of how burdensome that regulation may be upon the state. *Cf.* EEOC v. Wyoming, 103 S. Ct. at 1062 n.14 ("We do not mean to suggest that . . . consequential effects could be enough, by themselves, to invalidate a federal statute.").

158 *See supra* note 58.

159 It is unclear, however, what activities are included within this category. The Court's opinion in United Transp. Union v. Long Island R.R., 455 U.S. 678 (1982), failed to identify the state activities falling within the scope of *National League. See supra* notes 146-55 and accompanying text.

160 The *National League* Court explicitly identified park management as a traditional state activity. *National League,* 426 U.S. at 851; *see also* EEOC v. Wyoming, 103 S. Ct. at 1062.

Whether the Age Act " 'directly impair[ed]' [Wyoming's] ability to 'structure integral operations.' "[161]

In applying this undefined component of the *Hodel* test, Justice Brennan, writing for a divided Court,[162] turned to the language and spirit of *National League* for guidance in formulating a standard.[163] He contended that *National League* did not "create a sacred province of state autonomy"[164] but instead enunciated a functional doctrine[165] "to ensure that the unique benefits of a federal system . . . not be lost through undue federal interference in certain core state functions."[166] Under Brennan's conception of *National League,* a court applying the third component of the *Hodel* test—the impairment of integral operations requirement—need only consider whether Congress has interfered with a state's performance of a core function[167] to such a degree[168] that the state's separate and independent existence is threatened.[169] Brennan's approach therefore required an examination of the direct and consequential effects of applying the Age Act to Wyoming's game and fish wardens.

By focusing solely upon the effects of a congressional enactment, Brennan's analysis rejected the possibility that a federal statute will be invalidated on the ground that it merely lessens or preempts a state's power to make decisions in a particular field. The statute will be upheld unless it unconstitutionally threatens that state's sovereignty. Thus, under Brennan's view, Congress can regulate any state activity as long as the extent of that regulation does not endanger the state's ability to function as an autonomous unit.

Brennan's approach ignores a predominant concern of the *National League* Court: that a state's power to make certain decisions is so intertwined with the state's ability to function as an autonomous unit that any federal infringement of that power, regardless of how minimal that

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161 EEOC v. Wyoming, 103 S. Ct. at 1061-62 (quoting *Hodel,* 452 U.S. at 288; *National League,* 426 U.S. at 852).

162 *See supra* note 86 and accompanying text.

163 EEOC V. Wyoming, 103 S. Ct. at 1060-61. It is significant that Justice Brennan wrote the majority opinion because he had denied the existence of the state sovereignty doctrine in his *National League* dissent. In his dissenting opinion, Brennan stated that "there is no restraint based on state sovereignty . . . expressed in the Constitution," *National League,* 426 U.S. at 858, and "nothing in the Tenth Amendment constitutes a limitation on congressional exercise of powers delegated by the Constitution to Congress." *Id.* at 862.

164 103 S. Ct. at 1060. *But see* Note, *Federalism, supra* note 32, at 282 ("[T]he Court's holding [in *National League*], read alone, implies that certain state and local functions may never be interfered with under the commerce power regardless of the national interest involved.") (footnote omitted).

165 103 S. Ct. at 1060.

166 *Id.*

167 *Id.*

168 *Id.* at 1062.

169 *Id.* Brennan stated that the result in *National League* also depended on considerations of degree. *Id.*

infringement might be, constitutes a threat to the state's separate and independent existence.[170] The dispositive factor in *National League* was not the extent to which Congress attempted to regulate the states but rather the exercise of its commerce clause power to withdraw from the states the power to make fundamental employment decisions.[171] The result in *National League,* given the Court's reasoning, would have been the same even if the effects of federal regulation were not as serious as the petitioners had alleged.[172]

As Justice Brennan noted in his *National League* dissent, that decision "operate[d] as a[n] . . . absolute prohibition against congressional regulation [under the Commerce Clause] of the wages and hours of state employees"[173] engaging in traditional state activities.[174] The fact that Congress withdrew from the states the power to set minimum wages and maximum hours itself constituted a threat to the states' ability to fulfill their constitutional role. Brennan's interpretation of *National League* as it appeared in his dissenting opinion is thus inconsistent with his majority

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170 In *National League,* the Court called the states' power to set employees' wages an "undoubted attribute of state sovereignty," *National League,* 426 U.S. at 845, and held that Congress may not constitutionally infringe upon this power. The *Hodel* Court converted the phrase "attributes of sovereignty" into one component of a three-part test, *Hodel,* 452 U.S. at 287-88. Under *Hodel,* a federal statute was not unconstitutional merely because it regulated attributes of state sovereignty. The *Hodel* Court, however, did not define what it meant by "attributes of sovereignty." In *EEOC v. Wyoming,* Justice Brennan defined "attributes of sovereignty" to include the power to make employment decisions that "are so clearly connected to the execution of underlying sovereign choices that they must be assimilated into [those choices] for purposes of the Tenth Amendment." 103 S. Ct. at 1061 n.11. The Court's holding in *National League,* which denied Congress the power to set minimum wages and the power to set maximum hours for state employees, suggests such employment decisions come within Brennan's definition. *National League,* 426 U.S. at 850-51. Under the *Hodel* test, even if the power to set minimum wages and maximum hours is deemed an attribute of sovereignty as defined by Brennan in *EEOC v. Wyoming,* this finding, by itself, would not preclude congressional regulation. *Hodel,* 452 U.S. at 287-88. Such a finding, however, might prohibit federal regulation under *National League.*

In *EEOC v. Wyoming,* Brennan acknowledged that it is difficult to determine whether the power to set retirement ages for certain state employees is an attribute of sovereignty. EEOC v. Wyoming, 103 S. Ct. at 1061. This suggests that the power to decide retirement ages may be "clearly connected to the execution of underlying sovereign choices," *id.* at 1061 n.11, and thus possibly insulated from congressional regulation under *National League.* The *Hodel* test enabled Brennan to avoid this difficult issue in *EEOC v. Wyoming.*

171 *See National League,* 426 U.S. at 851.

172 *Id.* ("We do not believe particularized assessments of actual impact are crucial to resolution of the issue presented . . . .").

173 *National League,* 426 U.S. at 875 (Brennan, J., dissenting).

174 Where an activity is not traditionally under the purview of the state, the *National League* doctrine does not apply. Thus, in Alewine v. City Council, 699 F.2d 1060 (11th Cir. 1983) and Kramer v. New Castle Area Transit Auth., 677 F.2d 308 (3d Cir. 1982), *cert. denied,* 103 S. Ct. 786 (1983), *see supra* note 155 and accompanying text, the courts concluded that operating a mass transit system is not a traditional state activity and approved the application of the Fair Labor Standards Act to such systems. The First Circuit has reached the opposite conclusion. *See* Enrique Molina-Estrada v. Puerto Rico Highway Auth., 680 F.2d 841 (1st Cir. 1982). *See generally supra* note 155 (discussing mass transit within the context of *National League).*

opinion in *EEOC v. Wyoming:* in his *National League* dissent, he chastised the majority for absolutely prohibiting federal regulation in a particular field of state activity; yet in his majority opinion in *EEOC v. Wyoming,* he interpreted *National League* as permitting some degree of federal regulation in all state activities.

Having interpreted *National League* to permit congressional regulation of any state activity as long as that regulation does not threaten the state's sovereignty, Brennan then analyzed the effects of the Age Act on Wyoming. He compared the effects of the Act with the effects of the Fair Labor Standards Act at issue in *National League* and concluded that the degree of federal intrusion in *EEOC v. Wyoming* was "sufficiently less serious than . . . in *National League of Cities* so as to make it unnecessary for [the Court] to override Congress's express choice to extend its regulatory authority to the States."[175]

In comparing the effects on the states of the statutes under review in *National League* and *EEOC v. Wyoming,* Brennan limited his inquiry to concerns that had troubled the Court in *National League:* first, whether applying the Age Act to Wyoming's game and fish wardens directly infringed upon the state's ability to achieve the legitimate state policy underlying its retirement age; and second, whether two specific indirect consequences might result from such infringement—adverse financial consequences, and the inability to use employment as a public policy tool.[176] Brennan found that the federal intrusion in this case was minimal, an outcome that, given his general hostility to the *National League* doctrine,[177] was certain. But Brennan's arguments in support of his conclusion are unpersuasive, and thus he failed adequately to distinguish *National League.*[178]

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175 EEOC v. Wyoming, 103 S. Ct. at 1062.

176 *Id.* at 1062-64 (citing *National League,* 426 U.S. at 845-52). The Court characterized its inquiry with respect to the financial consequences as legal in nature. *See* EEOC v. Wyoming, 103 S. Ct. at 1063. Yet at one point the Court explicitly rejected a factual contention concerning certain financial consequences that Wyoming had raised. *Id.* at 1063 n.15.

177 *See supra* note 163.

178 Brennan's discussion of the Age Act's effect on Wyoming's ability to accomplish a legitimate goal, the physical preparedness of its game wardens, demonstrates the inadequacies of his arguments. Brennan contended that the Age Act has a minimal impact on Wyoming's ability to achieve this goal. He asserted that the state may assess the fitness of its game wardens on a case-by-case basis and "dismiss those wardens whom it reasonably finds to be unfit." 103 S. Ct. at 1062. Furthermore, Brennan noted that under the Age Act, Wyoming may continue to retire wardens at age 55 if it can demonstrate that age is a "bona fide occupational qualification." *See* 29 U.S.C. § 623(f)(1) (1982). He concluded that the Age Act's impact on Wyoming's ability to accomplish its legitimate policy is insignificant when compared with the effects of the statute considered in *National League.*

Brennan's reasoning is questionable, especially his suggestion that Wyoming might rely on the bona fide occupational qualification (BFOQ) defense as a justification for continuing to retire game and fish wardens at age 55. As Chief Justice Burger argued in his *EEOC v. Wyoming* dissent, the BFOQ defense may be an inadequate check on federal infringement of state autonomy because courts generally impose a "high standard of what constitutes a bona

Even if Brennan had conducted a broad, policy-based inquiry into the effects of applying the Age Act to Wyoming's game and fish wardens, the outcome might have been the same. Such an inquiry would have examined whether any interference with Wyoming's ability to set the retirement ages of its game wardens threatened its separate and independent existence. Thus, *EEOC v. Wyoming's* narrow holding that extending the Age Act to Wyoming's game and fish wardens is constitutional may be correct. Brennan, however, went further and converted *National League's* broad, policy-based inquiry into a limited analysis of the specific effects of a federal statute on a state.[179] Furthermore, Brennan restricted that inquiry by suggesting that a federal statute could be unconstitutional as applied to a traditional state activity only when the effects of that statute were as severe as the effects of the statute invalidated in *National League.*[180] *EEOC v. Wyoming's* narrow ruling upholding the statute as applied to Wyoming's game and fish wardens thus does not repudiate the *National League* doctrine entirely because the Court did not expressly overrule *National League.*

The broader holding of *EEOC v. Wyoming,* however, that the Age Act is constitutional on its face,[181] suggests an abandonment of the policy underlying *National League.* In *EEOC v. Wyoming,* Brennan limited the scope of his inquiry to the specific effects of the Age Act on Wyoming's game and fish wardens,[182] but he upheld all possible applications of the statute. Brennan's holding therefore, must rest on the unarticu-

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fide occupational qualification." 103 S. Ct. at 1071 (Burger, C.J., dissenting). For example, Burger noted that one circuit requires an employer to show " 'a factual basis for believing that all or substantially all persons within the class . . . would be unable to perform safely and efficiently the duties involved, or that it is impossible or impractical to deal wtih persons over the age limit on an individualized basis.' " *Id.* at 1072 (quoting Arritt v. Grisell, 567 F.2d 1267, 1271 (4th Cir. 1977)); *see* Usery v. Tamiami Trail Tours, Inc., 431 F.2d 224, 236 (5th Cir. 1976) (holding that employer was required to show factual basis for believing that all or substantially all of persons over 40 years of age are unable to drive buses safely); Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235 (5th Cir. 1969) (holding that in order to rely on BFOQ defense, employer must show factual basis for believing "all or substantially all [class members] would be unable to perform safely and efficiently the duties of the job involved"); Note, *The Age Discrimination in Employment Act of 1967,* 90 HARV. L. REV. 380, 407 (1976) (criticizing "all or substantially all" formulation). Commenting on this standard, Burger noted that "[g]iven the state of modern medicine, it is virtually impossible to prove that *all* persons within a class are unable to perform a particular job or that it is impossible to test employees on an individual basis." EEOC v. Wyoming, 103 S. Ct. at 1072 (Burger, C.J., dissenting) (emphasis in original).

179 *See supra* notes 170-78 and accompanying text.

180 In light of Brennan's hostility to *National League,* he probably would conclude that the Fair Labor Standards Act could constitutionally be applied to Wyoming's game and fish wardens. In *National League,* Brennan contended that the Fair Labor Standards Act should be upheld under all circumstances. *See National League,* 426 U.S. at 871 (Brennan, J., dissenting).

181 EEOC v. Wyoming, 103 S. Ct. at 1064.

182 Although Brennan conducted a broad inquiry into the financial impact of the Age Act, *id.* at 1062-63, the rest of his analysis was specifically directed to Wyoming's game and fish wardens. *Id.* at 1062-64.

lated, unproven, and unlikely premise that Wyoming's game and fish wardens represent the entire spectrum of state and local employees engaged in traditional state activities. Brennan thus foreclosed all future attacks upon the Age Act based on the statute's intrusion into state sovereignty. Even if a state could demonstrate that the burdens of the Age Act on a particular group of its public employees engaged in providing an integral state service were so onerous that the state was forced to curtail that service,[183] the state would still be remediless because of Brennan's conclusion that the effects of the Age Act on Wyoming's game and fish wardens are "minimal" in character.[184] By precluding the remedy that *National League* would have provided in such a case, the Court in *EEOC v. Wyoming* abandoned and repudiated *National League's* state sovereignty doctrine.

CONCLUSION

In *National League,* the Supreme Court held that the Constitution protects state sovereignty by affirmatively limiting congressional power to regulate the states under the commerce clause. In two subsequent decisions, *Hodel v. Virginia Surface Mining & Reclamation Association* and *United Transportation Union v. Long Island Railroad,* the Court indicated that the tenth amendment did not really limit congressional power to the extent that *National League* had suggested and that the state sovereignty doctrine was not as broad as *National League* had implied. Finally, in *EEOC v. Wyoming,* the Court completely undermined the state sovereignty doctrine articulated in *National League* by demonstrating that the tenth amendment actually does not limit Congress's power to regulate states under the commerce clause. Thus, in *EEOC v. Wyoming* the Court repudiated the doctrine that, in the words of Justice Stevens, had represented the "modern embodiment of the spirit of the Articles of Confederation."[185]

Lee E. Berner

183 *See National League,* 426 U.S. at 847-50.

184 EEOC v. Wyoming, 103 S. Ct. at 1064 n.17.

185 *Id.* at 1067 (Stevens, J., concurring).