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I. Introduction

Defining the limits of congressional power to regulate the states has long proved to be constitutionally troublesome. On March 2, 1983, the United States Supreme Court in *Equal Employment Opportunity Commission (EEOC) v. Wyoming*[1] revisited this question and significantly strengthened congressional power in areas that arguably interfere with traditional state sovereignty. This development is particularly important when viewed in the context of recent Supreme Court decisions in this area, most notably *National League of Cities v. Usery*.[2] In *National League of Cities* the Court held that the 1974 amendments to the Fair Labor Standards Act,[3] which amendments extended the statute's coverage to state and local employees,[4] impermissibly would "alter or displace the state's ability to structure employer-employee relationships"[5] and thus "impermissibly [would] interfere with the integral governmental functions of these bodies"[6] in contravention of the tenth amendment.[7]

The primary issue presented in *EEOC v. Wyoming* was whether the tenth amendment analysis employed in *National League of Cities* extends to the Age Discrimination in Employment Act (ADEA)[8]

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1. 103 S. Ct. 1054 (1983), *rev'g* 514 F. Supp. 595 (D. Wyo. 1981).
2. 426 U.S. 833 (1976).
3. Pub. L. No. 93-259, 88 Stat. 55 (1974).
4. 29 U.S.C. §§ 203(d)-(s),-(x) (1976 & Supp. V 1981).
5. National League of Cities v. Usery, 426 U.S. 833, 851 (1976).
6. *Id.*
7. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U. S. CONST. amend. X.
8. 29 U.S.C. §§ 621-634 (1976). In 1974, the ADEA was amended to include states and subdivisions of states as employers. *Id.* § 630(b). In 1978, Congress amended the ADEA to prevent mandatory retirement at any age between 40 and 70 years unless (1) mandatory retirement is required by a reasonable factor other than age, or (2) age is a bona fide occupational qualification. 29 U.S.C. §§ 623(f)(1)(2), 631(a)(Supp. V 1981).

when that act is applied to a Wyoming statute requiring game wardens to retire at age fifty-five.[9] At issue was congressional power, presumably under the commerce clause,[10] to prohibit a state from discriminating against older workers by providing mandatory retirement. The State argued that the ADEA impermissibly restricts a state's prerogative as employer to structure a retirement system for law enforcement officers and thus violates the tenth amendment.[11] A second issue presented in *EEOC v. Wyoming* arose from the EEOC's claim that the ADEA was enacted not only pursuant to the commerce clause, but also as an exercise of congressional power under the enforcement clause of the fourteenth amendment.[12]

This article first examines the issue of state sovereignty and the history of the constitutional theory that the tenth amendment creates an affirmative limitation upon congressional power to regulate under the commerce clause.[13] Then explored is the alternative of congressional regulation under section 5 of the fourteenth amendment, legislative authority that is not limited by the tenth amendment.[14] Finally, this article describes and analyzes the significance of the Supreme Court's most recent pronouncement addressing state sovereignty's conflict with the exercise of congressional power.[15]

II. The Tenth Amendment as a Limitation on the Commerce Clause

Chief Justice Marshall, in *Gibbons v. Ogden*,[16] defined the power granted Congress in the commerce clause as "the power to regulate; that is to prescribe the rule by which commerce is to be governed."[17] Chief Justice Marshall further stated that congressional power under the commerce clause was "plenary"[18] in scope and "acknowledges no limitations, other than are prescribed in the Constitution."[19]

For a time, the Court intermittently invalidated federal statutes

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9. The Wyoming State Highway Patrol and Game and Fish Warden Retirement Act, WYO. STAT. §§ 31-3-101 to 31-3-121 (1977). The Act mandates the involuntary retirement at age 55 of game wardens who serve as full time law enforcement officers. *Id.* § 31-3-107(c).

10. U.S. CONST. art. I, § 8, cl. 3.

11. Brief for Appellee at 3, EEOC v. Wyoming, 514 F. Supp. 595 (D. Wyo. 1981).

12. "The Congress shall have the power to enforce by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, §5. The tenth amendment does not bar "appropriate" federal legislation passed pursuant to section 5. *See infra* note 44 and accompanying text.

13. *See infra* notes 16-42 and accompanying text.

14. *See infra* notes 43-55 and accompanying text.

15. *See infra* notes 56-99 and accompanying text.

16. 22 U.S. (9 Wheat.) 1 (1824).

17. *Id.* at 196.

18. *Id.* at 197 (dictum).

19. *Id.* at 196. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 5-1 to 5-8 (1978).

that interfered with a state's reserved powers to regulate its internal affairs. Thus, when Congress regulated private economic matters, the Court interpreted the commerce clause narrowly.[20] When, however, the federal statute was designed to safeguard the public health, safety or morality from dangerous products or services, the Court sustained the federal action on the theory that federal police powers outweigh state sovereignty objections.[21]

In 1941, the Court unanimously refused to view the tenth amendment as an express limitation upon federal power in *United States v. Darby*.[22] By upholding the constitutionality of federal wage and hour controls[23] as applied to purely intrastate transactions, the Court radically reinterpreted the tenth amendment by proclaiming as follows:

> The 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 before the amendment 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.[24]

It appeared that *Darby* finally and permanently removed any questions regarding the extent of the tenth amendment limitation of Congressional power under the commerce clause.[25]

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20. *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238 (1936) (commerce clause held insufficient to allow regulation of employment terms in intrastate coal production); Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935) (federal economic regulation of intrastate poultry industry held unconstitutional); Hammer v. Dagenhart, 247 U.S. 251 (1918) (federal child labor law that regulated articles in interstate commerce produced at factories in violation of statute held unconstitutional),*overruled*, United States v. Darby, 312 U.S. 100 (1941). The Court in *Dagenhart* expanded the tenth amendment analysis to limit the commerce clause unless an *express* delegation of federal power is found to exist. *Id.* at 275.

21. *See, e.g.*, Brooks v. United States, 267 U.S. 432 (1925) (regulation of automobiles upheld); Caminetti v. United States, 242 U.S. 470 (1917) (Mann Act upheld, precluding interstate movement of women for illegal purposes); Hipolite Egg Co. v. United States, 220 U.S. 45 (1911) (Pure Food and Drug Act upheld); Champion v. Ames (the Lottery Case), 188 U.S. 321 (1903) (federal prohibition of interstate sale of lottery tickets upheld).

22. 312 U.S. 100 (1941). The rejection of this view was indicated in NLRB v. Jones and Laughlin Steel Corp., 301 U.S. 1 (1937) (National Labor Relations Act of 1935 upheld against tenth amendment challenge). *See generally* Stern, *The Commerce Clause and the National Economy, 1933-46*, 59 HARV. L. REV. 645 (1946). It has been suggested that the decisions in *Darby* and *Jones & Laughlin* avoided a constitutional crisis, "spelled defeat for the Court-packing plan, and preserved the integrity of this institution." National League of Cities v. Usery, 426 U.S. 833, 867-68 (1976) (Brennan, J., dissenting).

23. Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. §§ 201-219 (1976 & Supp. V 1981).

24. United States v. Darby, 212 U.S. 100, 124 (1941). *See* STORY, COMMENTARIES ON THE CONSTITUTION 1907-08 (2d ed. 1951).

25. For post-*Darby* cases sustaining federal legislation over challenges predicated upon state sovereignty, see Fry v. United States, 421 U.S. 542 (1975) (upholding national wage

In 1976, however, a bitterly divided Supreme Court announced its plurality decision in *National League of Cities v. Usery*.[26] The Court held that congressional imposition of wage and hour restrictions on state employment directly displaced the states' "freedom to structure integral operations in areas of traditional governmental functions."[27] Not since 1936 had the Court struck down federal legislation promulgated pursuant to the commerce clause.[28] By resurrecting the tenth amendment as an affirmative limitation on the commerce clause, the Court recognized a "constitutional barrier"[29] to certain federal regulations "directed not to private citizens, but to the *States as States*."[30] The plurality opinion immunized the states from congressional regulation and declared that "neither government may destroy the other nor curtail in any substantial manner the exercise of its powers."[31]

Justice Brennan characterized this "startling restructuring of our federal system" as a "catastrophic judicial body blow" to congressional power under the commerce clause.[32] He further described the plurality opinion as a "mischievous decision,"[33] "so ominous for our constitutional jurisprudence as to leave one incredulous."[34] Perhaps the decision is somewhat less ominous than Justice Brennan suggests because a majority could only be sustained with the vote of Justice Blackmun, who interpreted the plurality decision as adopting a "balancing approach."[35] Although the plurality recognized that emergency situations could present circumstances necessitating federal regulation despite interference with state sovereignty,[36] Justice Blackmun insisted that federal regulation may be upheld even in nonemergency situations if the federal interest is "demonstrably

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freeze to state and local employees); Maryland v. Wirtz, 392 U.S. 183 (1968) (upholding amendments to the Fair Labor Standards Act extending coverage to employees of state schools and hospitals), *overruled*, National League of Cities v. Usery, 426 U.S. 833 (1976).

Of course congressional power pursuant to the commerce clause is not without limit. *See, e.g.*, Leary v. United States, 395 U.S. 6 (1969) (due process clause of the fifth amendment limitation); United States v. Jackson, 390 U.S. 570 (1968) (sixth amendment limitation).

26. 426 U.S. 833 (1976). *See supra* notes 5-9 and accompanying text.

27. 426 U.S. at 852.

28. Carter v. Carter Coal Co., 298 U.S. 238 (1936). *See supra* note 20 and accompanying text.

29. National League of Cities v. Usery, 426 U.S. 833, 841 (1976).

30. *Id.* at 845 (emphasis added).

31. *Id.* at 844 (citing Metcalf & Eddy v. Mitchell, 269 U.S. 514, 523 (1926)).

32. *Id.* at 880 (Brennan, J., dissenting). Justice Brennan's dissent was joined by Justices White and Marshall. Justice Stevens authored a separate dissenting opinion.

33. *Id.*

34. *Id.* at 875.

35. *Id.* at 856 (Blackmun, J., concurring). This approach is vigorously criticized by Justice Brennan as "a thinly veiled rationalization for judicial supervision of a policy judgment that our system of government reserves to Congress." *Id.* at 876 (Brennan, J., dissenting).

36. *See Id.* at 853, distinguishing Fry v. United States, 421 U.S. 542 (1975), which upheld the Economic Stabilization Act of 1960 as applied to temporary wage freeze of state and local government employees.

greater" than the state's interest and state compliance is "essential."[37]

In the recent case of *Hodel v. Virginia Surface Mining & Reclamation Association*,[38] the Court clarified the test for determining whether congressional action is limited by the tenth amendment and enunciated the following three tests: 1) Does the statute regulate the "States as States";[39] 2) does the statute regulate matters that are "attributes of state sovereignty";[40] and 3) does the state's compliance directly impair its ability "to structure integral operations in areas of traditional functions."[41] The *Hodel* Court noted, however, that these tests together are only a preface to the balancing of the federal interest against the state interest.[42]

III. Section Five of the Fourteenth Amendment: An Alternative Analysis

In *National League of Cities*, the Court noted that its tenth amendment analysis applies only to congressional exercise of authority granted in the commerce clause and not to legislation enacted pursuant to section 5 of the fourteenth amendment.[43] Section 5 empowers Congress to enforce by "appropriate legislation" the substantive provisions of section 1 of the fourteenth amendment.[44] Clearly,

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37. *Id.* at 856 (Blackmun, J., concurring).

38. 452 U.S. 264 (1981). For discussions of the difficulties in applying the *National League of Cities* standard, see Matsumato, *National League of Cities - From Footnote to Holding - State Immunity from Commerce Clause Regulation*, 1977 ARIZ. ST. L.J. 35; Beard & Ellington, *A Commerce Power Seesaw: Balancing National League of Cities*, 11 GA. L. REV. 35 (1976); Tribe, *Unraveling National League of Cities v. Usery: The New Federalism and Affirmative Rights to Essential Governmental Services*, 90 HARV. L. REV. 1065 (1977); Note, *National League of Cities v. Usery: A New Approach to State Sovereignty?*, 48 U. COLO. L. REV. 467 (1977); Note, *At Federalism's Crossroads: National League of Cities v. Usery*, 57 B.U.L. REV. 178 (1977).

39. National League of Cities v. Usery, 426 U.S. 833, 854 (1976).

40. *Id.* at 845.

41. *Id.* at 852.

42. Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 n. 29 (1981). The Court stated as follows: "Demonstrating that these three requirements are met does not, however, guarantee that a Tenth Amendment challenge to congressional commerce power action will succeed. There are situations in which the nature of the federal interest advanced may be such that it justifies State submission." The Court has noted the "balancing test" in other recent cases also. *See, e.g.*, United Transp. Union v. Long Island R.R., 455 U.S. 678, 684 n. 9 (1982); FERC v. Mississippi, 456 U.S. 742, 763 n.28 (1982). Other courts have also adopted the balancing approach. *See, e.g.*, Remmick v. Barnes County, 435 F. Supp. 914, 915 (D.N.D. 1977); Colorado v. Veterans Admin., 430 F. Supp. 551, 559 (D. Colo. 1977), *aff'd on other grounds*, 602 F.2d 926 (10th Cir. 1979), *cert. denied*, 444 U.S. 1014 (1980); Usery v. Edward J. Meyer Memorial Hosp., 428 F. Supp. 1368, 1370 (N.D.N.Y. 1977).

43. 426 U.S. 833, 852 n. 17 (1976). The Court also expressly refused to discuss legislation enacted pursuant to the spending power. *See* U.S. CONST. art. I, § 8, cl. 1.

44. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV. *See supra* note 12 and accompanying text.

the tenth amendment does not limit congressional exercise of power under section 5 of the fourteenth amendment. In the same week as its decision in *National League of Cities*, the Court decided a civil rights issue in *Fitzpatrick v. Bitzer*.[45] Therein the Court declared that congressional power under section 5 was constitutionally intended as a limitation upon state authority.[46] As far back as 1880, the Supreme Court recognized that both the thirteenth and fourteenth amendments "were intended to be . . . limitations of the power of the States and enlargements of the power of Congress."[47] After *National League of Cities*, litigants, like the EEOC, who have confronted tenth amendment objections to federal legislation have sought a judicial determination that the relevant statute constitutes a proper exercise of power pursuant to section 5.[48] The difficulty with this approach for the ADEA is that the 1974 amendments to the ADEA[49] extending coverage to state employees did not expressly rely upon section 5 of the fourteenth amendment. The statute construed in *Fitzpatrick v. Bitzer* clearly relied on an express statement of section 5 intent.[50] Thus, further judicial deliberation was necessary to establish a test for determining the applicability of that intent.

In *Pennhurst State School v. Halderman*,[51] Justice Rehnquist, who also authored the plurality opinion in *National League of Cities* and the opinion in *Fitzpatrick*, had an opportunity to discuss this issue. Writing for the majority in *Pennhurst*, Justice Rehnquist declined to "attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment."[52] In *Pennhurst*, the Court construed a federal statute[53] to determine if that statute was adopted pursuant to section 5 rather than the spending power

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45. 427 U.S. 445 (1976).

46. *Id.* at 456.

47. *Ex parte* Virginia, 100 U.S. 339, 345 (1880). *See also* Mitchum v. Foster, 407 U.S. 225, 238-39 (1972); Katzenbach v. Morgan, 384 U.S. 641, 648 (1966).

48. *See, e.g.*, Arnett v. Grissell, 567 F.2d 1267 (4th Cir. 1977); Usery v. Board of Educ. of Salt Lake City, 421 F. Supp. 718 (D. Utah 1976); Aaron v. Davis, 424 F. Supp. 1238 (E.D. Ark. 1976); Remmick v. Barnes County, 435 F. Supp. 914 (D.N.D. 1976). *Contra* Morgan v. Dep't. of Offender Rehab., No. C81-2118A (N.D. Ga. March 31, 1982); Taylor v. Dep't. of Fish & Game, 523 F. Supp. 514 (D. Mont. 1981); Usery v. Manchester E. Catholic Regional School Bd., 430 F. Supp. 188 (D.N.H. 1977).

49. *See supra* note 2. For an argument that the legislative history of the 1974 amendments implies section 5 reliance, see Brief for Appellant at 23-27, 514 F. Supp. 595.

50. At issue in *Fitzpatrick* were the 1972 Amendments to the Civil Rights Act of 1964, 42 U.S.C. §§ 2000-2000h-6 (1970 and Supp. IV), which had a legislative history expressly basing authority on section 5 of the fourteenth amendment. *See, e.g.*, H.R. REP. NO. 92-238, 92d Cong., 1st Sess. 19 (1971); S. REP. No. 92-415, 92d Cong., 1st Sess. 10-11 (1971).

51. 451 U.S. 1 (1981).

52. *Id.* at 16.

53. The Developmentally Disabled Assistance and Bill of Rights Act of 1975, 42 U.S.C. § 6010 (1976 & Supp. III).

clause;[54] if the statute was adopted pursuant to section 5, it applied to all states, even those that did not accept federal funds. It is unclear whether the Court would apply *Pennhurst* to a case involving the constitutional underpinnings of congressional action rather than a practical rule of statutory construction.[55]

IV. The District Court Decision in *EEOC v. Wyoming*

The principal dispute in *EEOC v. Wyoming*[56] was a challenge to the constitutionality of the ADEA as it applies to state employees and conflicts with a Wyoming statute[57] requiring involuntary retirement of game wardens at age fifty-five. Bill Crump, a game warden, was involuntarily retired at age fifty-five and filed a charge of unlawful age discrimination with the EEOC. The Commission filed suit in federal district court and sought a declaratory judgment that Wyoming was engaged in unlawful employment practices in violation of the ADEA. The Commission also sought injunctive relief, back wages and damages.[58]

District Judge Brimmer dismissed the complaint and ruled that the extension of the ADEA to the states was based solely upon the commerce clause and that its application to state law enforcement officers was banned by the tenth amendment principles discussed in *National League of Cities*. Noticeably absent from the court's opinion is the three-pronged *Hodel* analysis, which was discussed in *United Transportation Union v. Long Island Railroad Co.*[59] The trial court never explained precisely how the prohibition against age discrimination interfered with "attributes of state sovereignty"[60] or how conformity with ADEA would impair directly the state's ability "to structure integral operations in areas of traditional functions."[61]

Rather, the court focused exclusively on the nature of law en-

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54. *See* U.S. CONST. art. I, § 8, cl. 1.

55. In *Pennhurst*, the Court engaged in statutory construction to determine if the act created substantive rights, which were enforceable by the mentally retarded and which required, by implication, the expenditure of substantial state revenue. 451 U.S. 1, 18-19 (1981).

56. 514 F. Supp. 595 (D. Wyo. 1981), *rev'd*, 103 S. Ct. 1054 (1983).

57. Wyoming State Highway Patrol and Game and Fish Warden Retirement Act, WYO. STAT. §§ 31-3-101 to 31-3-121 (1977). Full time law enforcement officers are retired involuntarily at age 55, but they may continue in service on a year-to-year basis until age 65 "with the approval of the employer and under conditions as the employer may prescribe." *Id.* § 31-3-107(c) (1977).

58. The district court dismissed the personal action against the Governor of Wyoming, the Game and Fish Commission members and directors and the Director of the Game and Fish Department. The court commented that the federal agency's is quest for personal judgments against voluntary Commission members offended the court's sense of fair play. Moreover, personal liability was precluded by a qualified privilege or immunity. EEOC v. Wyoming, 514 F. Supp. 595, 596 (1981).

59. 455 U.S. 678 (1982). For a discussion of the three-pronged *Hodel* test, see *supra* notes 38-41 and accompanying text.

60. National League of Cities v. Usery, 426 U.S. 833, 845 (1976).

61. *Id.* at 852.

forcement and wildlife management as traditional state activities and did not discuss the manner in which enforcement of the ADEA would impair such activities.[62] Furthermore, the district court opinion did not explain why the ADEA provision permitting mandatory retirement upon a showing that age is a "bona fide occupational qualification" (BFOQ) failed to protect the state from the onus of forced retention of less than qualified older employees.[63] Thus, the court did not support its statement that the state would be "saddled" with additional costs by keeping workers on for ten additional years.[64]

Judge Brimmer did discuss the "balancing approach" set forth in Justice Blackmun's concurring opinion in *National League of Cities*.[65] He refused to rely, however, on the EEOC's assertion that the national interest outweighed the intrusion upon state sovereignty. The district court strongly emphasized that the federal government requires certain law enforcement employees to retire at age fifty-five[66] and that Wyoming game wardens engage in law enforcement. Thus, according to Judge Brimmer, the federal government requires the states to "do as the United States says, but not as it does."[67]

The district court flatly rejected the assertion that the ADEA was passed pursuant to section 5 of the fourteenth amendment.[68] After reviewing the legislative history of the ADEA, the court found adequate expression of commerce clause intention and no evidence that Congress acted pursuant to section 5.[69] The court relied on *Pen-*

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62. EEOC v. Wyoming, 514 F. Supp. 595, 600 (D. Wyo. 1981).

63. *See* 29 U.S.C. 623(f)(1), (3) (1976 & Supp. III). On appeal Wyoming argued that the BFOQ was no protection for the state, which must confront difficult evidentiary issues requiring a "battle of experts" with inconsistent results. Brief for Appellee at 15-16, 514 F. Supp. 595. *See* EEOC v. City of St. Paul, 671 F.2d 1162 (11th Cir. 1982) (age BFOQ for firefighters but not for district fire chiefs); Adams v. James, 526 F. Supp. 80 (M.D. Ala. 1981) (age not BFOQ for highway patrol); Johnson v. Mayor of Baltimore, 515 F. Supp. 1287 (D. Md. 1981), *cert. denied*, 455 U.S. 944 (1982) (age not BFOQ for firefighters); Beck v. Manheim, 505 F. Supp. 923 (E. D. Pa. 1981) (age BFOQ for city police).

64. EEOC v. Wyoming, 514 F. Supp. 595, 600 (1981). It was argued that, since no worker is required to be retained who cannot perform his or her job, no increased employment costs would be incurred. *See* Brief for Appellant at 13 n.5.

65. *Id. See supra* note 37 and accompanying text.

66. *Id.* at 597. The U.S. Postal Service requires certain law enforcement officers to retire at age 55. 5 U.S.C. §8335(b) (1976 and Supp. V). *See* Thomas v. United States Postal Inspection Serv., 647 F.2d 1035 (10th Cir. 1981). In Vance v. Bradley, 440 U.S. 93 (1979), the Court upheld the mandatory retirement of foreign service employees at age 60.

67. *Id.*

68. For a discussion of section 5 of the fourteenth amendment and its significance see notes 43-55 and accompanying text.

69. The ADEA was passed pursuant to a legislative determination that arbitrary age discrimination burdens interstate commerce. 29 U.S.C. §621(a) (1976 and Supp. V). The remedies and enforcement procedures of the ADEA also are entwined with those of the Fair Labor Standards Act, 29 U.S.C. §201-19 (1976 & Supp. V) which was clearly passed pursuant to the commerce clause. *See* 29 U.S.C. § 216 (1976 & Supp. V). The EEOC argued that there is some legislative evidence that the ADEA was passed pursuant to section 5. *See* Brief for Appellant at 23-27, 514 F. Supp. 595.

nhurst for the proposition that a clear statement of legislative intent is necessary before legislation can be regarded as having been passed pursuant to section 5.[70]

This broad construction of *Pennhurst* was an important issue on appeal. The EEOC argued that *Pennhurst* should be read narrowly to apply only to the questions whether a federal statute creates certain substantive rights in citizens, and whether the statute applies to all states or only to those accepting federal funds.[71] The EEOC asserted that in cases like *Pennhurst*, to imply that Congress was acting pursuant to section 5 not only would explain the theoretical constitutional basis, but also would alter the practical effect of the statute. In *EEOC v. Wyoming*, the Court found a clear congressional intent supporting imposition of the ADEA upon the states. The only remaining issue was the constitutional basis for the congressional action. The EEOC argued that nothing in the Constitution "requires Congress to generate a legislative history" to identify the constitutional basis for its action[72] and that Congress should be presumed to have acted pursuant to whatever power it possessed. The EEOC thus argued that Congress acted pursuant to section 5 of the fourteenth amendment.[73]

On appeal, Wyoming argued that Congress does not have such power. Further, even if Congress had intended to use its section 5 power, the ADEA was not "appropriate legislation" under the equal protection clause of the fourteenth amendment.[74] Wyoming also argued that the ADEA diluted the guarantees of the equal protection clause by limiting the Act's coverage exclusively to individuals between the ages of forty and seventy years. Thus, the ADEA abrogated the protection of the equal protection clause for those individuals outside this "protected class."[75] Wyoming supported this argument by suggesting that the ADEA was analogous to hypothetical legislation prohibiting race discrimination, but only against Caucasians and American Indians.[76]

V. The Supreme Court Decision

On March 2, 1983, a deeply divided Supreme Court reversed the district court's decision and upheld application of the ADEA to

70. 514 F. Supp. at 599-600.
71. *See supra* notes 53-55 and accompanying text.
72. Brief for Appellant at 22, 514 F. Supp. 595.
73. *Id.* at 22 n.11. The EEOC argued that Congress intended to act pursuant to both the commerce clause and section 5 of the fourteenth amendment by identifying comparisons in the legislative histories of the ADEA and Title VII of the Civil Rights Act, 42 U.S.C. 2000e, which clearly is section 5 legislation. *Id.* at 23-27.
74. Brief for Appellee at 23-26, 514 F. Supp. 595.
75. *Id.* at 24.
76. *Id.* at 24 n.20.

state public sector employment.[77] In concluding that the tenth amendment did not preclude imposition of the ADEA upon the states by Congress through its commerce clause power, the Court continued both to refine its post-*National League of Cities* analysis and to limit the impact of that decision.[78]

Justice Brennan, writing for a five justice majority,[79] referred to the principle of immunity set forth in *National League of Cities* as "a functional doctrine . . . whose ultimate purpose is not to create a sacred province of state autonomy. . . ."[80] Justice Brennan then applied the three-pronged *Hodel* test[81] to determine whether a state or local government is immune from otherwise legitimate congressional commerce clause legislation and described this immunity as a "specialized immunity doctrine rather than a broad limitation on federal authority."[82] The majority concluded that the first prong of the immunity test — that the legislation must regulate the "States as States" — clearly was satisfied.[83]

The Court did not decide whether the ADEA regulated matters that were indisputably attributes of state sovereignty. Although a state's employment relationship with its employees may involve a "core sovereign function," the Court declared that not every employment decision made under the guise of efficient management would qualify as part of this sovereign function.[84] The Court avoided this issue by assuming that the second prong was satisfied and proceeded to the third prong analysis.

The Court applied this third prong analysis and determined that the ADEA would directly impair Wyoming's ability to "structure integral operations in areas of traditional governmental functions."[85] The majority opinion stated that this analysis involved "considerations of degree"[86] and that the degree of intrusion in *EEOC v. Wyoming* was considerably less serious than in *National League of Cities*. Here, Wyoming had means to achieve its goal of assuring the physical preparedness of game wardens,[87] notwithstanding the ADEA restrictions. Additionally, Wyoming was free "to continue to

77. EEOC v. Wyoming, 103 S. Ct. 1054 (1983). The Court reviewed the district court decision on a direct appeal taken pursuant to 28 U.S.C. § 1252 (1976).

78. *See also* FERC v. Mississippi, 456 U.S. 742 (1982); United Transp. Union v. Long Island R.R., 445 U.S. 678 (1982); Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981).

79. Justice Brennan was joined by Justices White, Marshall, Blackmun and Stevens.

80. 103 S. Ct. at 1060.

81. *See supra* notes 38-41 and accompanying text.

82. 103 S. Ct. at 1061 n.10..

83. *Id.* at 4222.

84. *Id.* at 4222 n.11.

85. *Id.* at 4222.

86. *Id.*

87. Brief for Appellee at 18, 514 F.Supp. 595.

do *precisely what [it is] doing now*, if [it] can demonstrate that age is a 'bona fide occupational qualification' for the job of game warden."[88] Wyoming's argument that the BFOQ exception was inadequate because of legal expense and delay caused by evidentiary difficulties and inconsistent judicial resolution apparently was rejected.[89] Distinguishing *EEOC v. Wyoming* from *National League of Cities*, the Court concluded that Wyoming's discretion over the manner of achieving its goals was not entirely usurped but merely was "tested against a reasonable federal standard."[90]

Further analyzing the degree of federal intrusion, the Court found little evidence that the ADEA impacts adversely upon state finances. Although the Court distinguished *National League of Cities* on this basis, the *EEOC v. Wyoming* opinion clearly states that mere economic impact upon state financial resources is not necessarily fatal to federal commerce clause regulation.[91] The test is "essentially legal rather than factual."[92] The Court further distinguished *National League of Cities* by emphasizing the restrictive impact of federal legislation in that case upon state choices affecting social and economic policies, rather than merely general managerial goals.[93] The Court found no similar intrusion on state social or economic policies choices in *EEOC v. Wyoming.*

Curiously, Chief Justice Burger, writing for the dissent in *EEOC v. Wyoming*, had no difficulty identifying negative impacts upon state policy choices, including the impediment of promotional opportunities for younger workers into supervisory positions and of fulfillment of affirmative action objectives.[94] If this line between interference with state social and economic policy choices and mere managerial efficiency is the key to *Hodel*'s third-prong analysis, future litigants and lower courts may have substantial difficulty discerning this distinction.

An additional question remains after *EEOC v. Wyoming.*

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88. 103 S. Ct. at 1062 (emphasis in original). *See supra* note 63 and accompanying text.

89. *See* Brief for Appellee at 16, 514 F. Supp. 595; *see also* 103 S. Ct. at 1070-1072 (Burger, C. J., dissenting).

90. 51 U.S.L.W. at 4223.

91. *Id. See also* FERC v. Mississippi, 456 U.S. 742, 770 n.33 (1982); Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 292 n.33 (1981); Oklahoma *ex rel.* Phillips v. Guy F. Atkinson Co., 313 U.S. 508, 534-35 (1941). The retention of older workers would not necessarily result in increased economic burdens for the state, since the ADEA permits the adjustment of pension, health insurance or retirement plans to avoid such burdens. 29 U.S.C. § 623(f)(2) (1976 & Supp. IV).

92. 103 S. Ct. at 1063.

93. In National League of Cities v. Usery, the Court discussed the FLSA amendments, interference with state flexibility to offer jobs at less than minimum wage to persons with below minimum employment requirements. 426 U.S. 883, 848 (1976).

94. 103 S. Ct. at 1071 (Burger, C.J., dissenting). Interference with affirmative action objectives was one example of the social policy interference cited in National League of Cities. 426 U.S. at 847.

Would the federal interest promoted by the ADEA have been perceived to outweigh the intrusion upon state sovereignty if the statute had survived the *Hodel* test?[95] The impression left by the majority opinion is that the federal interest would have survived the "balancing approach"; in dictum the Court indicated that the federal interest is not diminished by the federal policy of imposing mandatory retirement on certain federal employees.[96]

Since the Court concluded that the ADEA was a valid exercise of congressional power pursuant to the commerce clause, it did not decide whether section 5 of the fourteenth amendment provides an alternative analysis for validation.[97] The opinion, however, did include dictum indicating that the district court's application of *Pennhurst* was clearly erroneous[98] and that valid legislation pursuant to section 5 did not require an express congressional recital of section 5 intent.[99]

VI. Conclusion

Although the *EEOC v. Wyoming* decision stopped short of overruling *National League of Cities*,[100] it clearly represents a serious setback for those who seek to expand the concept of a tenth amendment limitation on congressional power under the commerce clause. The decision reaffirmed the methodology of tenth amendment analysis, application of the three-pronged *Hodel* test, followed by a balancing of the federal interest against the degree of intrusion upon state sovereignty. In refining its approach to the third prong — impairing integral operations in areas of traditional functions — and narrowing its approach to the second prong by defining "undoubted attributes of state sovereignty,"[101] the Court has limited substantially the potency of *National League of Cities* for creating an omi-

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95. *See* 103 S. Ct. at 1064 n.17. *See also supra* notes 35-37 and accompanying text.

96. The court notes:

> Once Congress has asserted a federal interest, and once it has asserted the strength of that interest, we have no warrant for reading into the ebbs and flows of political decision making a conclusion that Congress was insincere in that declaration, and must from that point on evaluate the sufficiency of the federal interest *as a matter of law rather than psychological analysis.*

103 S. Ct. at 1064 n.17 (emphasis added).

97. *See supra* notes 43-55 and accompanying text.

98. 103 S. Ct. at 1064 n.18. *See supra* notes 51-55, 70 and accompanying text.

99. *See* Woods v. Miller, 333 U.S. 138, 144 (1948). The Court declared that *Pennhurst* is merely a statutory construction case and, therefore, was not applicable. *See supra* notes 71-72 and accompanying text.

100. Justice Stevens stated as follows: "I think it so plain that *National League of Cities* not only was incorrectly decided, but also is inconsistent with the central purpose of the Constitution itself, that it is not entitled to the deference that the doctrine of *stare decisis* ordinarily commands for this Court's precedents." 103 S. Ct. at 1067 (Stevens, J., concurring).

101. The Court suggested that not all employment policy decisions are within this definition. *See supra* note 84 and accompanying text.

nous disruption of the constitutional system.[102]

The future course of federal-state constitutional jurisprudence in this area, however, is far from certain. The refinements of the *Hodel* test set forth in *EEOC v. Wyoming* create some uncertainty. By characterizing the third prong requirement as a matter of degree and by distinguishing impairments of social and economic policies from general managerial goals,[103] the Court has created judicial standards that are far from unambiguous.

Additional uncertainty in this area results from this issue's divisive effect on the Justices of the Court. The five member majority in *EEOC v. Wyoming* consisted of the four *National League of Cities* dissenters plus Justice Blackmun, who authored the pivotal "balancing approach" concurrence in *National League of Cities*.[104] Thus, if any one Justice departs from the Court or changes his position on the proper applications of the *Hodel* analysis and the balancing approach, then the course of federal-state relations may be radically altered, and this delicate balance of interests again may be upset.

102. National League of Cities v. Usery, 426 U.S. 833, 880 (1976) (Brennan, J., dissenting).

103. *See supra* note 93 and accompanying text.

104. Justice Stewart, who joined the majority opinion in *National League of Cities*, has retired from the Court. Justice O'Connor joined the dissent in EEOC v. Wyoming and authored a vigorous defense of "state sovereignty" in her recent dissent in FERC v. Mississippi, 456 U.S. 742 (1982).