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Reconciling the Age Discrimination in Employment Act and Federalism-Constitutional Balancing or Judicial Sleight of Hand: EEOC v. Wyoming

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Reconciling the Age Discrimination in Employment Act and Federalism—Constitutional Balancing or Judicial Sleight of Hand: *EEOC v. Wyoming**

The Age Discrimination in Employment Act of 1967 (ADEA)[1] prohibits an employer from discriminating on the basis of age against any employee between the ages of forty and seventy in connection with hiring, job retention, compensation, or other terms or conditions of employment,[2] except "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business."[3] ADEA originally applied only to private employers with twenty-five or more employees.[4] However, the Fair Labor Standards Amendments of 1974 (FLSA)[5] extended the coverage of ADEA to include employees of states and employees of state political subdivisions, agencies, and instrumentalities.[6]

The constitutionality of ADEA, as applied to the states, was cast in serious doubt by *National League of Cities v. Usery*,[7] a 1976 decision by the Supreme Court. In *National League of Cities* the Court held that FLSA violated the tenth amendment's

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* Editor's comment: This note was in final proof stage when the United States Supreme Court decided on Garcia v. San Antonio Metropolitan Transit Authority, 53 U.S.L.W. 4135 (U.S. Feb. 19, 1985), which expressly overruled National League of Cities v. Usery, 426 U.S. 833 (1976). We feel the issues discussed in *San Antonio* and *National League of Cities* are far from settled; consequently, we consider this note to have potential value as the controversy continues.

1. 29 U.S.C. §§ 621-634 (1982).

2. 29 U.S.C. §§ 623(a)(1), (f)(2), 631(a) (1982); *see also infra* note 16.

3. 29 U.S.C. § 623(f)(1) (1982).

4. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, § 11(b), 81 Stat. 602, 605.

5. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55 (codified as amended and appearing in scattered sections of 29 U.S.C. (1982)).

6. The definition of "employer" under § 11(b) of the original ADEA was extended to include "a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency." 29 U.S.C. § 630(b)(2) (1982). The definition of "employer" under the Fair Labor Standards Act of 1938 was also expanded to include states and state entities, thereby extending minimum wage and maximum hours protection to state employees. 29 U.S.C. § 203 (1982).

7. 426 U.S. 833 (1976).

immunity doctrine[8] by extending the minimum wage and maximum hours provisions of FLSA[9] to employees of states and state political subdivisions.[10] Nevertheless, in *EEOC v. Wyoming*,[11] the Supreme Court found that the extension of ADEA to state and local governments was a valid exercise of congressional power under the commerce clause. Although the Court reaffirmed the vitality of *National League of Cities* in reaching its conclusion in *EEOC v. Wyoming*, the two decisions are wholly inconsistent.

I. THE *EEOC v. Wyoming* CASE

The Wyoming State Highway Patrol and Game and Fish Warden Retirement Act[12] permits the involuntary retirement of Wyoming Game and Fish employees at age fifty-five and imposes mandatory retirement at age sixty-five.[13] As permitted by the Act, the Wyoming Game and Fish Department retired Bill Crump at age fifty-five from his position as game warden.[14]

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8. U.S. CONST. amend. X states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." In *National League of Cities* the Court determined that the tenth amendment was an affirmative limitation on Congress's commerce clause power. "The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." 426 U.S. at 843 (quoting Fry v. United States, 421 U.S. 542, 547 n.7 (1975)). The Court held that "insofar as the challenged [FLSA] amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art. I, § 8, cl. 3." 426 U.S. at 852.

9. 29 U.S.C. §§ 201-219 (1982).

10. 426 U.S. at 852. Although FLSA extended both the Fair Labor Standards Act of 1938 and ADEA to the states, the Court in *National League of Cities* examined only the expansion of the Fair Labor Standards Act.

11. 103 S. Ct. 1054, 1064 (1983).

12. WYO. STAT. §§ 31-3-101 to -121 (1977 & Supp. 1983).

13. WYO. STAT. § 31-3-107 (1977) provides in pertinent part:

> (c) An employee may continue in service on a year-to-year basis after . . . age fifty-five (55), with the approval of employer and under conditions as the employer may prescribe.
>
> (d) Any employee in service who has attained the age of sixty-five (65) years, shall be retired no later than the last day of the calendar month in which his 65th birthday occurs.

14. Pursuant to the authority granted by the Wyoming State Highway Petrol and Game and Fish Warden Retirement Act, the Wyoming Game and Fish Commission adopted a mandatory retirement plan on Nov. 3, 1977, for all employees not serving in administrative positions. The district court in *EEOC v. Wyoming* found that game wardens were nonadministrative employees. EEOC v. Wyoming, 514 F. Supp. 595, 597 (D. Wyo. 1981).

Crump lodged a complaint with the Equal Employment Opportunity Commission (EEOC),[15] alleging that the Game and Fish Department's mandatory retirement policy constituted an unfair labor practice in violation of ADEA.[16] After conciliation efforts between the EEOC and the Game and Fish Department failed, the EEOC filed suit in the United States District Court for the District of Wyoming against the state and nine of its officials seeking declaratory and injunctive relief, back wages, liquidated damages, and reinstatement for Mr. Crump and others similarly situated.[17] The defendants moved to dismiss the complaint for failure to state a claim upon which relief could be granted, asserting that the state's tenth amendment immunity and the Court's holding in *National League of Cities*[18] prevented ADEA from applying to a state's retirement policy for law enforcement employees.[19] They contended that the criteria for selection and retention of such employees was a sovereign state function that could not be impaired by federal policy.

The district court dismissed the action, holding that Congress's exercise of commerce clause authority was unconstitutional under the tenth amendment. In reaching its decision, the court relied on the test articulated in *National League of Cit-*

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15. The EEOC was established under the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended at 42 U.S.C. § 2000e-4(a) (1982). In 1978 Congress empowered the EEOC to enforce ADEA. Reorg. Plan No. 1 of 1978, 3 C.F.R. 321 (1978), *reprinted in* 5 U.S.C.A. app. at 111 (West Supp. 1984), *and in* 92 Stat. 3781 (1978). The EEOC was also given authority to bring civil suits on behalf of victims of unfair labor practices. Exec. Order No. 12,144, 44 Fed. Reg. 37,193 (1979).

16. 103 S. Ct. at 1059. 29 U.S.C. § 623(a)(1) (1982) states that "[i]t shall be unlawful for an employer . . . to fail to refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." Subsection (f)(2) further provides that "no . . . seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual." 29 U.S.C. § 623(f)(2) (1982).

17. 103 S. Ct. at 1059-60. The individual defendants included the governor, members of the Wyoming Game and Fish Commission, and the director of the Wyoming Game and Fish Department. These nine officers were named as defendants in both their individual and representative capacities. The lower court dismissed the complaint against them in their individual capacities, finding that they were "entitled to a qualified privilege or immunity." 514 F. Supp. at 596.

18. *See supra* note 8.

19. Under the Wyoming Code, game wardens are included with police officers, highway patrolmen, and other law enforcement personnel in the definition of "peace officer." WYO. STAT. § 7-2-101 (Supp. 1983) (Criminal Procedure Act) and WYO. STAT. § 9-3-1901(vii) (1977) (Peace Officers Training Act). In addition, game wardens are given authority to arrest persons violating the Game and Fish Act. WYO. STAT. § 23-6-101 (1977).

ies[20] and concluded: (1) ADEA regulates the states as states, (2) the management of state parks is a traditional state function and an attribute of state sovereignty, and (3) the federal interests and policies promoted by applying ADEA to the states do not sufficiently outweigh the states' interests in maintaining the integrity of employer-employee relationships in enforcing their laws and managing their wildlife.[21] The court also determined that application of ADEA to the states could not be justified as an exercise of congressional power under section five of the fourteenth amendment[22] because Congress had not explicitly invoked that power in passing FLSA, as required by *Pennhurst State School v. Halderman*.[23]

On direct appeal, the Supreme Court reversed the district court's dismissal by a five to four vote and held that extension of ADEA to state and local governments was a valid exercise of Congress's authority under the commerce clause.[24] Justice Brennan, writing for the majority,[25] applied the test used by the district court, but reached a different result. Justice Brennan focused on the test's third requirement and disagreed with the lower court's finding that ADEA "directly impair[ed] the state's ability to structure integral operations" in areas of traditional government functions.[26] He reasoned that states would remain

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20. *See infra* text accompanying notes 43-46.

21. 514 F. Supp. at 599-600.

22. U.S. CONST. amend. XIV, §§ 1 and 5 read:

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

23. 451 U.S. 1 (1981). The district court interpreted *Pennhurst* as requiring an explicit statement of congressional intent to invoke the fourteenth amendment enforcement power as a prerequisite to upholding congressional action based upon it. 514 F. Supp. at 600. On appeal, the Supreme Court criticized the district court's interpretation of *Pennhurst* and stated that the constitutionality of congressional action does not depend on formal recitals of the power it undertakes to exercise. 103 S. Ct. at 1064 n.18.

24. 103 S. Ct. at 1064. The jurisdiction of the Supreme Court was invoked under 28 U.S.C. § 1252 (1982). The statute provides for direct appeal of district court decisions holding an act of Congress unconstitutional in a civil action to which the United States or any of its agencies is a party.

25. Justice Brennan was joined in his opinion by Justices White, Marshall, Blackmun, and Stevens. Justice Stevens also filed a separate concurrence. Chief Justice Burger filed a dissenting opinion, in which Justices Powell, Rehnquist, and O'Connor joined. Justice Powell also filed a separate dissent, in which Justice O'Connor joined.

26. 103 S. Ct. at 1062. The Court determined that the primary purpose of tenth

free under ADEA to set age limits so long as they were bona fide occupational qualifications for law enforcement officials. Since ADEA had no substantial or unintended consequential effects on state decisionmaking in other areas, the degree of federal intrusion on the states' ability to structure integral operations was insignificant. Consequently, Justice Brennan refused to override Congress's choice to extend its regulatory authority to state and local governments.[27] As an alternate basis for the majority decision, Justice Brennan found that even if the third prong of the test had been satisfied, the federal interest in preventing age discrimination in employment was so substantial that it would have justified state submission to ADEA in any event.[28] Justice Brennan did not address the issue whether ADEA was justified under section five of the fourteenth amendment, having decided that the extension was valid under the commerce clause.[29]

Justice Stevens, in a concurring opinion, examined the scope of power granted to Congress by the commerce clause. He started with the premise that the commerce clause was the framers' response to the central problem that gave rise to the Constitution.[30] Justice Stevens traced the evolution of commerce clause construction in Supreme Court decisions and concluded that congressional power to regulate commerce was restricted only by specific limitations found in the Constitution itself. Justice Stevens noted that the tenth amendment itself did not specifically limit Congress's commerce power. Consequently, he asserted that *National League of Cities* had been incorrectly decided, and called for its "prompt rejection."[31]

In his dissent, Chief Justice Burger concluded that Congress had exceeded its authority under both the commerce clause and

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amendment immunity was to protect states from federal intrusions that might threaten their " 'separate and independent existence' " rather than create a "sacred province of state autonomy." *Id.* at 1060 (quoting Lane County v. Oregon, 74 U.S. (7 Wall.) 71, 76 (1869)).

27. 103 S. Ct. at 1062.

28. *Id.* at 1064 n.17.

29. *Id.* at 1064.

30. *Id.* at 1065 (Stevens, J., concurring). Justice Stevens opined that the regulation of commerce was the central purpose behind the drafting of the Constitution, and that the commerce clause should therefore be broadly construed. This view stems from comments by Justice Rutledge that the Articles of Confederation failed because the federal government lacked the power to regulate commerce between the states and that the Constitutional Convention had been convened to remedy that specific problem. W. RUTLEDGE, A DECLARATION OF LEGAL FAITH 25-26 (1947).

31. 103 S. Ct. at 1067 (Stevens, J., concurring).

section five of the fourteenth amendment when it extended ADEA to the states. He rejected the majority's finding that ADEA could be constitutionally applied to the states under the *National League of Cities* analysis. He argued that the third prong of the test, which required a federal intrusion that impaired the states' ability to structure integral operations, had been satisfied.[32] ADEA allowed Congress to usurp a fundamental state function by prescribing detailed standards for the selection and retention of state employees.[33] He emphasized that ADEA would increase employment costs and impede promotional opportunities by forcing retention of older employees. Further, ADEA would endanger public safety and welfare by preventing employment of those best able to perform the job.

Although Justice Brennan's majority opinion did not address the issue, Chief Justice Burger also sharply criticized the theory that ADEA, as applied to the states, could be justified under section five of the fourteenth amendment. He noted that Congress's "appropriate legislation" power, though not constrained by the tenth amendment,[34] could nevertheless be exercised "only where a violation lurk[ed]."[35] He reasoned that Congress was precluded from invoking this remedial power in behalf of ADEA because "no one—not the Court, not the Congress—has determined that mandatory retirement plans violate any rights protected by these amendments."[36] Chief Justice Burger further noted that since age is not a suspect classification, and government employment is not a fundamental right, Wyoming's statute need only satisfy a rational basis equal protection standard to be constitutionally valid.[37] He concluded that Wyoming's statute could hardly be considered irrational in light of similar state and federal schemes that had been upheld in *Mas-*

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32. *Id.* at 1070 (Burger, C.J., dissenting).

33. *Id.* at 1068.

34. *See, e.g., Ex parte* Virginia, 100 U.S. 339, 346 (1880):

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

35. 103 S. Ct. at 1072-73 (Burger, C.J., dissenting).

36. *Id.* at 1073.

37. *Id.*; *see also infra* notes 83-90 and accompanying text.

sachusetts Board of Retirement v. Murgia[38] and *Vance v. Bradley*.[39]

Justice Powell filed a separate dissent in which he rebutted Justice Stevens's thesis that the commerce clause had been the central force behind the adoption of the Constitution. Rather, he argued that the primary purpose of the Constitution was to establish a federal system of government.[40] He noted that state sovereignty was a fundamental component of that system, and that the framers had intended "the States' reserved powers to be a limitation on Congress's powers—including its power under the Commerce Clause."[41]

II. ANALYSIS

In *EEOC v. Wyoming* the Supreme Court failed to give proper weight to state sovereignty protections afforded by the tenth amendment because of its preoccupation with government policy against age discrimination in employment. A proper constitutional inquiry would have revealed that the states are immune not only from application of ADEA under the commerce clause, but also from its imposition pursuant to section five of the fourteenth amendment. Instead, the Court sidestepped the requirements of *National League of Cities* by erroneously applying its test for determining how much the commerce clause allows Congress to interfere in the states' affairs without contravening the tenth amendment. Additionally, ADEA's application to the states cannot be justified as appropriate legislation under section five of the fourteenth amendment.

A. Tenth Amendment Analysis

Elimination of unreasonable discrimination from all sectors of life is a laudable goal. If eradication of age discrimination in

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38. 427 U.S. 307 (1976); *see infra* text accompanying note 83.

39. 440 U.S. 93 (1979); *see infra* text accompanying note 87.

40. 103 S. Ct. at 1076-77 (Powell, J., dissenting). Justice Powell supported his premise by noting that, regardless of the impetus behind it, the focus of attention at the Constitutional Convention in Philadelphia was the formation of a new government. He pointed out that the preamble states the purpose of the Constitution to be the formation of "a more perfect Union," and does not mention the regulation of commerce. This is further evidenced by the fact that the first three articles of the Constitution relate to the establishment of that government, whereas the commerce clause is but one of many delegated powers appearing in a less conspicuous place.

41. 103 S. Ct. at 1080-81 (Powell, J., dissenting).

employment had been the issue in *EEOC v. Wyoming*, the Court's conclusion may have been warranted. However, as Justice Stevens emphasized in his concurring opinion, "[t]he question in this case is purely one of constitutional power."[42] Thus, personal or popular views on age discrimination are irrelevant to whether Congress may, under the commerce clause, constitutionally impose upon the states detailed employment standards for the selection and retention of state law enforcement employees.

1. The National League of Cities *test*

In *National League of Cities* the Supreme Court formulated a general test for determining whether a particular federal commerce regulation improperly intruded upon state sovereignty. The specific elements of this test were later summarized and clarified in *Hodel v. Virginia Surface Mining & Reclamation Association*.[43] The three-pronged test requires that the challenged statute: (1) regulate the "States as States," (2) address matters that are indisputably "attribute[s] of state sovereignty," and (3) directly impair the states' ability to "structure integral operations in areas of traditional governmental functions."[44] In addition, the Court has recognized a fourth prong, advocated by Justice Blackmun, that balances the competing federal and state interests.[45] Under this fourth prong "balancing approach," Congress may legitimately impose its will upon the states when asserting a paramount federal interest, even though the legislation would otherwise be forbidden under the traditional *National League of Cities* rationale.[46] The majority in *EEOC v. Wyoming*

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42. 103 S. Ct. at 1068 (Stevens, J., concurring).

43. 452 U.S. 264 (1981). In *Hodel*, the Supreme Court reexamined the *National League of Cities* decision and concluded that proper application of the principle announced in that decision required the satisfaction of three separate criteria. Hence, while the test originated with *National League of Cities*, the *Hodel* decision first identified the specific test requirements.

44. 452 U.S. at 287-88.

45. *Id.* at 288 n.29 (citing National League of Cities v. Usery, 426 U.S. at 856 (Blackmun, J., concurring); Fry v. United States, 421 U.S. 542 (1975)).

46. 426 U.S. at 856 (Blackmun, J., concurring). Justice Blackmun expressly stated that he joined the majority only because he read its decision as allowing federal legislation responding to a strong national need as an exception to the general rule that prohibits federal commerce clause regulations from infringing on state sovereignty. His opinion represents the "lowest common denominator" in the Court's holding, since his vote was needed to comprise a majority.

purported to apply this fourth prong, but reached a result contrary to established precedent.

a. Hodel's *first and second requirements.* In *EEOC v. Wyoming*, the Court, applying the first prong of the *National League of Cities* test (as enunciated in *Hodel*), recognized that, by including the state within the definition of "employer," FLSA regulated state governments in their traditional capacities, or "States as States."[47] The majority declined to resolve the second prong because it found the third requirement unsatisfied. Nevertheless, the second requirement was also plainly met. ADEA regulates the employment of state workers, an area characterized as an indisputable attribute of state sovereignty in *National League of Cities.*

> One undoubted attribute of state sovereignty is the States' power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions, what hours those persons will work, and what compensation will be provided where these employees may be called upon to work overtime.[48]

Although *National League of Cities* involved wage and hour guidelines while *EEOC v. Wyoming* addressed retirement criteria, no significant distinction exists between the two aspects of employment that justifies categorizing wage and hour guidelines as "fundamental employment decision[s]" and "attribute[s] of state sovereignty," while excluding retirement criteria. Indeed, choosing who will work is the most fundamental of all employment decisions. Further, little would be left of state sovereignty if Congress, although prohibited from regulating wages and hours, were able to dictate who would occupy state government positions.

b. Hodel's *third requirement.* In considering the third prong of the test—impairment of the state's ability to structure traditional government functions—the Court attempted to distinguish the federal intrusion invalidated in *National League of Cities* from the imposition of ADEA in *EEOC v. Wyoming* on the basis of degree. The Court held that since the government intervention in *EEOC v. Wyoming* was "sufficiently less serious" than that in *National League of Cities*, this prong of the test remained unsatisfied and it was unnecessary to override Con-

47. EEOC v. Wyoming, 103 S. Ct. at 1061.
48. 426 U.S. at 845.

gress's express decision to extend its regulatory scheme to the states.[49] However, in deciding that the extension of ADEA outweighed Wyoming's interest in state-defined employment standards, the Court failed to examine the primary issue raised by the third prong—whether the intrusion directly impaired the state's employment decisions in the area of law enforcement and wildlife management. The Court's analysis bypassed the third requirement of the test and implemented Justice Blackmun's "balancing approach" in its place.

Contrary to the Court's suggestion, the third prong, as articulated in *Hodel*, neither addresses the degree of intrusion nor involves implicit "balancing." Rather, it is an objective test that measures only whether a regulation has impaired a state's ability to structure its traditional government functions. The analysis should center not on whether the regulation preempts all or most of the state's freedom to structure its integral operations, but on whether the state's freedom is impaired at all. The Court based its erroneous interpretation of this prong on the following language found in *National League of Cities*: "The question we must resolve here, then, is whether these determinations are 'functions essential to separate and independent existence . . . .' "[50] The Court extrapolated from this statement the conclusion that, under the third prong, there is no impairment unless the state's independent existence is threatened. Accepting the Court's definition of "directly impair," one is hard-pressed to imagine any congressional action, other than revocation of statehood, that could satisfy this third element. Such an expansive reading was not intended by the majority in *National League of Cities*.

If the Court had properly applied the third prong, its requirements would clearly have been met. By using ADEA to preempt state retirement policy, Congress placed itself in a decision-making role traditionally reserved to the states. The Court in *National League of Cities* specifically held that state park and wildlife management were traditional state governmental functions.[51]

National League of Cities further emphasized "[i]f Congress may withdraw from the States the authority to make those

49. 103 S. Ct. at 1062.
50. 426 U.S. at 845 (quoting Lane County v. Oregon, 74 U.S. (7 Wall.) 71, 76 (1869)).
51. 426 U.S. at 851.

fundamental employment decisions upon which their systems for performance of these functions must rest, we think there would be little left of the States' 'separate and independent existence.' "[52] The extension of ADEA to the states directly impairs their ability to structure fundamental employment guidelines for state law enforcement personnel. It "directly supplants the considered policy choices of the States' elected officials" of how to structure retirement programs for their employees.[53] This intrusion into state sovereignty closely parallels the wage and hour provisions struck down in *National League of Cities*, because "it directly penalizes the States for choosing to hire [or retire] governmental employees on terms different from those which Congress has sought to impose."[54] Although an examination of all state functions that might be significantly penalized or altered by the implementation of ADEA would be impossible, two examples will illustrate ADEA's intrusion into state sovereignty.

An obvious example is the increased financial costs associated with forced retention of older individuals. Generally, older employees are at the upper end of the pay scale. The cost of their employment is greater than that of other workers. Further, since most pension plans calculate retirement benefits on the basis of maximum salary or years of service, pension costs are also greater for older employees. If older workers are retained, less money is available for other state programs.

The noneconomic burdens can be equally severe. Forced retention of older employees occupying upper-level positions will substantially impede promotional opportunities for younger workers and inhibit states in their efforts to implement affirmative action programs. Perhaps more importantly, states can thereby be prevented from hiring those most physically able to perform the job. In the context of law enforcement and wildlife management, this practice could needlessly endanger the public safety and welfare. These considerations are the same ones that satisfied the third prong and warranted invalidation of FLSA in *National League of Cities*.[55] Under similar reasoning, the third prong is satisfied in *EEOC v. Wyoming*.

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52. *Id.* (citing Coyle v. Oklahoma, 221 U.S. 559, 580 (1911)).

53. 426 U.S. at 848.

54. *Id.* at 849.

55. *Id.* at 846-50.

2. Justice Blackmun's balancing approach

The balancing approach articulated by Justice Blackmun in *National League of Cities* is the final inquiry in determining the constitutionality of commerce clause regulations under the tenth amendment.[56] Under this test, federal legislation will be upheld, even though it usurps state authority in a manner forbidden by the first three prongs of the *National League of Cities* test, if the federal interest is shown to substantially outweigh the state interest involved. Although the Court confused this balancing procedure with the third prong articulated in *Hodel*, the majority opinion implied that the federal interest underlying ADEA was sufficient to warrant submission of the state interest.[57] However, the Court's finding and rationale are flawed.

a. Inconsistent federal practice. Congressional legislation concerning age discrimination indicates that the elimination of age discrimination in employment is not an urgent federal concern. Not only did Congress specifically exempt the federal government from the requirements of ADEA,[58] but in 1974, the same year in which FLSA extended ADEA to the states, Congress passed legislation reducing the mandatory retirement age from seventy to fifty-five for most federal law enforcement officers and firefighters.[59] Similar involuntary retirement schemes exist for military personnel,[60] foreign service officers,[61] air traffic controllers,[62] and postal inspectors.[63] The constitutionality of these retirement plans has been upheld.[64] As a result, federal employers remain free to discriminate on the basis of age, while states are precluded from doing so by ADEA. In light of this inconsistency, it is difficult to imagine how the Court can suggest that ADEA responds to such a compelling federal interest that state sovereignty must yield.

b. Misapplication of the balancing test. The Court's insistence that an alternative way exists for states to achieve their objectives does not justify burdening the states with increased

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56. *See supra* notes 45-46 and accompanying text.
57. 103 S. Ct. at 1064 n.17; *see also supra* note 28 and accompanying text.
58. 29 U.S.C. § 630(b)(2) (1982).
59. 5 U.S.C. § 8335(b) (1982).
60. 10 U.S.C. § 1251(a) (1982).
61. 22 U.S.C. § 4052(a) (1982).
62. 5 U.S.C. § 8335(a) (1982).
63. 5 U.S.C. § 8335(b) (1982).
64. Vance v. Bradley, 440 U.S. 93 (1979); Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1979); *see infra* notes 83-90 and accompanying text.

regulation in the absence of an overriding federal interest. The majority, citing *FERC v. Mississippi*,[65] held that the extension of ADEA was warranted because states could "continue to do *precisely what they are doing now*, if they can demonstrate that age is a 'bona fide occupational qualification' for the job."[66] In other words, the extension of ADEA did not require Wyoming to abandon its goal of dismissing unfit game wardens, but only obliged the state to do so "in a more individualized and careful manner."[67]

The Court's reliance on *FERC* is misplaced because *FERC* is without precedential weight in *EEOC v. Wyoming*. The majority in *FERC* emphasized that its holding would "not foreclose a Tenth Amendment challenge to federal interference with the State's ability 'to structure employer-employee relationships,' while providing 'those governmental services which [its] citizens require.' "[68] *FERC* is inapplicable precisely because *EEOC v. Wyoming* involved the ability of the states to "structure employer-employee relationships" to provide such essential services as law enforcement and wildlife management. In addition, Congress had specifically targeted the legislation at issue in *FERC* to combat the nationwide energy crisis.[69] Hence, a real and overriding federal interest justified extending the Public Utility Regulatory Policies Act to the states. No such federal interest existed in *EEOC v. Wyoming*.

The Court also circumvented the central requirement of the balancing test by holding that the bona fide occupational qualification alternative justified application of ADEA to the states. Contrary to the Court's suggestion, the test is not whether there exists a congressionally acceptable means for the states to achieve their objectives, but whether there exists a federal interest so substantial that Congress can require the states to adopt such an alternative. Under the "federal alternative" test espoused by the majority, the Constitution would not, as a practical matter, limit federal regulation of state governments because such an "alternative" would invariably exist. In fact, the "fed-

65. 102 S. Ct. 2126 (1982).

66. 103 S. Ct. at 1062.

67. *Id.*

68. 102 S. Ct. at 2143 n.32 (quoting National League of Cities v. Usery, 426 U.S. 833, 851 (1976)).

69. *FERC* involved the application of the Public Utility Regulatory Policies Act of 1978 (PURPA), Pub. L. No. 95-617, 92 Stat. 3117, to the states in an emergency effort to counter the national energy crisis. 102 S. Ct. at 2130.

eral alternative" test would require a different result in *National League of Cities* because states could have avoided FLSA by "choosing" to dismiss all employees subject to the Act, thereby closing those branches of state government.

c. Lack of case authority. The Court's assertion that its decision was consistent with "every federal court that considered the question"[70] is misleading. With the exception of *EEOC v. Wyoming* and one other case,[71] the lower federal courts have uniformly upheld the validity of ADEA as applied to the states.[72] Many of those courts, however, circumvented commerce clause analysis by finding that ADEA was extended pursuant to Congress's "appropriate legislation" power under the fourteenth amendment. By avoiding the federalism issue, those courts were able to sidestep the principles enunciated in *National League of Cities*—the same principles upon which the Court purports to rely in *EEOC v. Wyoming*.

Imposition of ADEA on the states pursuant to Congress's commerce power is precluded because the three requirements of *Hodel* were satisfied and there was no compelling national need requiring the extension of ADEA to the states. However, rejection of ADEA under commerce clause analysis does not terminate the constitutional inquiry. As previously stated, the majority of lower federal courts that have considered the question have recognized the difficulty of supporting ADEA under the commerce clause, and have chosen instead to sustain it as "appropriate legislation" enacted to enforce the fourteenth amendment.[73] Nevertheless, a careful application of fourteenth amend-

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70. 103 S. Ct. at 1059.

71. Taylor v. Dep't of Fish & Game of Montana, 53 F. Supp. 514 (D. Mont. 1981). The district court cited EEOC v. Wyoming, 514 F. Supp. 595 (D. Wyo. 1981) as authority for its decision to prohibit extending ADEA provisions to Montana's game warden retirement policy.

72. *See* Arritt v. Grisell, 567 F.2d 1267, 1271 (4th Cir. 1977); Carpenter v. Pennsylvania Liquor Control Bd., 508 F. Supp. 148, 149-50 (E.D. Pa. 1981); EEOC v. Calumet County, 26 Fair Empl. Prac. Cas. (BNA) 20, 25-26 (E.D. Wis. 1981); Johnson v. Mayor of Baltimore, 26 Fair Empl. Prac. Cas. (BNA) 44, 47-49 (D. Md. 1981); Marshall v. Delaware River & Bay Auth., 471 F. Supp. 886, 891-93 (D. Del. 1979); EEOC v. Florissant Valley Fire Dist., 21 Fair Empl. Prac. Cas. (BNA) 973, 975 (E.D. Mo. 1979); Marshall v. City of Philadelphia, 17 Fair Empl. Prac. Cas. (BNA) 869, 870 (E.D. Pa. 1978); Remmick v. Barnes County, 435 F. Supp. 914, 916 (D.N.D. 1977); Aaron v. Davis, 424 F. Supp. 1239, 1241 (E.D. Ark. 1976); Usery v. Board of Educ., 421 F. Supp. 718, 721 (D. Utah 1976).

73. If the majority in *EEOC v. Wyoming* had concluded that ADEA did not survive commerce clause analysis, it would have been necessary for the Court to investigate the Act's validity under Congress's fourteenth amendment enforcement power.

ment principles indicates that Congress's action cannot be justified under fourteenth amendment provisions either.

B. Fourteenth Amendment Analysis

Congress's enforcement power under the fourteenth amendment is not subject to the same restrictions discussed previously in connection with the commerce clause, but is "plenary within the terms of the constitutional grant."[74] Nevertheless, legislation that does not "enforce" the provisions of the equal protection clause cannot be justified as "appropriate legislation" under the power granted in section five of the amendment.

1. Limitations on Congress's enforcement power

Congress's enforcement power under the fourteenth amendment was restricted by the Supreme Court in *Oregon v. Mitchell*.[75] The Court invalidated that portion of the Voting Rights Acts Amendments of 1970[76] that lowered the voting age in state elections from twenty-one to eighteen as an inappropriate use of the fourteenth amendment enforcement power. Justice Black, writing for the majority, identified three specific limitations on congressional authority to legislate pursuant to section five of the amendment:

> First, Congress may not by legislation repeal other provisions of the Constitution. Second, the power granted to Congress was not intended to strip the States of their power to govern themselves or to convert our national government of enumerated powers into a central government of unrestrained authority over every inch of the whole Nation. Third, Congress may only "enforce" the provisions of the amendments and may do so only by "appropriate legislation."[77]

As applied to the states, ADEA exceeds the first two limits identified in *Mitchell*. ADEA effectually "repeals" the tenth amendment by usurping the states' authority to set reasonable qualifications for their own employees, and strips the states of the

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74. Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976); *see also supra* note 34.

75. 400 U.S. 112 (1970).

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

77. 400 U.S. at 128.

power to govern themselves by interfering with their provision of essential services.[78]

The parameters of *Mitchell*'s third restriction, that Congress may only "enforce" by "appropriate legislation," are somewhat vague, but have recently been examined in two Supreme Court decisions, *City of Rome v. United States*[79] and *Fullilove v. Klutznick*.[80] In each case, the Court implied that Congress's enforcement power is remedial in nature. That is, Congress is restricted under section five to "remedying" conduct that has been identified as unconstitutional and enacting legislation that is necessary to rectify past discrimination or to protect against the encroachment of fundamental rights. The enforcement power may not be invoked unless Congress or the Court determines that such a violation has occurred.[81]

2. *ADEA does not "enforce" the fourteenth amendment*

In light of federal policy exempting the federal government from the provisions of ADEA and permitting mandatory retirement of its employees,[82] Congress cannot be said to have found ADEA to be necessary to prevent encroachment of constitutional rights. Nor has the Court made any such finding. To the contrary, the Supreme Court has twice upheld the constitutionality of involuntary retirement schemes under the equal protection clause.

In *Massachusetts Board of Retirement v. Murgia*,[83] the Court held that a state statute requiring the early retirement of policemen at age fifty was constitutional. The Court found that age, unlike race or religion, was not a suspect classification, and that government employment was not a fundamental right guaranteed by the Constitution.[84] Hence, retirement plans based on

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78. *See supra* notes 42-69 and accompanying text.

79. 446 U.S. 156 (1980).

80. 448 U.S. 448 (1980).

81. In *City of Rome*, the Court examined portions of the Voting Rights Act of 1965 and held that Congress was acting under its "remedial" powers in prohibiting changes in the city of Rome's voting system that would have a disparate discriminatory impact on Negroes' voting power. 446 U.S. at 177-78. In *Fullilove*, the Court upheld the constitutional validity of the "minority business enterprise" provision of the Public Works Employment Act of 1977 and implied that Congress's enforcement of such provision was "remedial" in nature. 448 U.S. at 477-78.

82. *See supra* text accompanying notes 58-63.

83. 427 U.S. 307 (1976).

84. *Id.* at 312-13 (citing San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1973); Lindsey v. Normet, 405 U.S. 56 (1972); Dandridge v. Williams, 397 U.S. 471 (1970)).

age do not require strict scrutiny for purposes of equal protection analysis.[86] The Court sustained the law as rationally related to the state's goal of "protect[ing] the public by assuring [the] physical preparedness of its uniformed police."[86]

In *Vance v. Bradley*,[87] the Court reaffirmed the principles established in *Murgia*. The Court held that the retirement of foreign service officers at age sixty, as required by section 1002 of the Foreign Service Act of 1946,[88] was constitutional.[89] The Court emphasized that the Act's objective of "stimulating the highest performance in the ranks of the Foreign Service by assuring that opportunities for promotion would be available" was a legitimate goal under the rational basis test.[90]

The same state objectives found to be sufficient to legitimize the retirement schemes in *Murgia* and *Bradley* exist in *EEOC v. Wyoming*. The Wyoming statute should survive a rational basis analysis. Since *Murgia* and *Bradley* clearly establish that the age classification at issue in *EEOC v. Wyoming* does not merit heightened scrutiny under equal protection analysis, Congress lacks the power to extend ADEA to the states as legislation "enforcing" the fourteenth amendment. In *Mitchell* the Court recognized that the right to vote is fundamental and held that Congress could not, by statute, set age standards applicable to the states in state elections.[91] If Congress cannot statutorily regulate a state's age standards in matters concerning fundamental rights, then surely Congress is precluded from using the fourteenth amendment to regulate age standards where no fundamental right is involved. Only by unilaterally creating a new suspect classification for the aged could Congress validly claim that ADEA enforces the equal protection clause. Congress has not done so, and indeed, is prohibited from independently creating such a classification.[92]

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85. 427 U.S. at 314.
86. *Id.*
87. 440 U.S. 93 (1979).
88. 22 U.S.C. §§ 801-1204 (1982).
89. 440 U.S. at 108-09.
90. *Id.* at 101.
91. *Mitchell*, 400 U.S. at 125-31.
92. In *City of Rome* and *Fullilove* the Court concluded that, in order to enforce its ban on intentional discrimination, it was necessary to prohibit legislation that had a discriminatory effect. The Court's rulings in these cases appear to treat the congressional enforcement power as a "remedial" power broad enough to go beyond explicit Court findings, but not so broad as to directly conflict with them or to create new constitutional rights.

3. ADEA is not "appropriate legislation"

Even if age were an unreasonable basis upon which to classify individuals, ADEA would not qualify as "appropriate legislation" to remedy the purported flaws in Wyoming's retirement policy because ADEA itself dilutes the guarantees of the equal protection clause. ADEA expressly limits its coverage to "individuals who are at least 40 years of age but less than 70 years of age."[93] The effect of creating such a protected class of individuals and defining the class solely by age would permit the states to discriminate against persons outside the class. To precisely the same extent age discrimination is prohibited by the equal protection clause, ADEA abrogates equal protection for persons outside the protected class.

III. Conclusion

The Supreme Court erred in its holding. The overwhelming factual and legal similarities between *National League of Cities* and *EEOC v. Wyoming* created only two viable courses of action for the Court to take: (1) sustaining the district court's dismissal, thus reaffirming *National League of Cities* and finding that *EEOC v. Wyoming* was consistent with that decision, or (2) reversing the district court's dismissal, thus overruling *National League of Cities* and establishing a new standard. Rather than decide between these alternatives, the Court chose to straddle them, and distinguished the two decisions on unimportant grounds. The result was the misapplication of case precedent and the further erosion of fundamental federalism principles.

A careful application of the principles and language of *National League of Cities* stands firmly as a bar to the congressional extension of ADEA to the states. The majority not only misapplied *Hodel*'s third prong, but by placing excessive weight on a perceived "federal interest" in eliminating age discrimination in employment, the Court lost sight of the importance of the tenth amendment's safeguards.

Although the majority did not reach the issue, ADEA cannot be justified as appropriate legislation under Congress's fourteenth amendment enforcement power. As evidenced by past Supreme Court decisions and current federal practice, rational classifications based on age do not conflict with equal protection

93. 29 U.S.C. § 631(a) (1982).

clause guarantees and are, therefore, beyond the reach of Congress's section five remedial powers.

The extent of Congress's commerce power is a troubled area in constitutional analysis. The Court's decision in *EEOC v. Wyoming* added little clarification, merely deferring the final showdown between *National League of Cities* and *EEOC v. Wyoming*.

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