TENTH AMENDMENT PROTECTS STATE MANDATORY RETIREMENT POLICY AGAINST FEDERAL AGE DISCRIMINATION IN EMPLOYMENT ACT

EEOC v. Wyoming, 514 F. Supp. 595 (D. Wyo. 1981), *cert. granted,* 50 U.S.L.W. 3527 (U.S. Jan. 12, 1982) (No. 81-554)

In *EEOC v. Wyoming*[1] a federal district court ruled that application of the Age Discrimination in Employment Act (ADEA)[2] to Wyoming's mandatory retirement policy for game wardens who exercise police powers contravenes the tenth amendment[3] protection of state sovereignty under the principles established by *National League of Cities v. Usery*.[4]

The Wyoming Game and Fish Department, in accordance with a mandatory retirement policy,[5] retired Bill Crump at age fifty-five from his position as game warden. On behalf of Crump and others similarly situated, the Equal Employment Opportunity Commission (EEOC)[6] brought suit against the State of Wyoming, the State of Wyoming Retirement System, and nine of the state's officials.[7] The suit alleged that

1. 514 F. Supp. 595 (D. Wyo. 1981), *cert. granted,* 50 U.S.L.W. 3527 (U.S. Jan. 12, 1982) (No. 81-554).

2. 29 U.S.C. §§ 621-34 (1976), *as amended by* the Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-236, 92 Stat. 189 [hereinafter cited as ADEA]. The definition of "employer" in the current code was broadened in 1974 to include state and local governments. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 28, 88 Stat. 55.

3. "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.

4. 426 U.S. 833 (1976).

5. The Wyoming State Highway Patrol and Game and Fish Warden Retirement Act, WYO. STAT. § 31-3-107(c) (1977), states: "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." Pursuant to the authority granted by this statute, the Wyoming Game and Fish Commission on November 3, 1977 adopted a mandatory retirement policy for all employees not serving in administrative positions. The court in *EEOC v. Wyoming* found that under the Table of Organization of the Game Division of the State Game and Fish Department, game wardens were employed in non-administrative positions. 514 F. Supp. at 597.

6. The Equal Employment Opportunity Commission (EEOC) was established by the Civil Rights Act of 1964, 42 U.S.C. § 2000e-4(a) (1976), *as amended by* Act of Mar. 27, 1978, Pub. L. No. 95-251, § 2(a)(11), 92 Stat. 183. Congress directed the EEOC to "prevent any person from engaging in any unlawful employment practice," 42 U.S.C. § 2000e-5(a), and empowered it with various enforcement procedures, including the authority to bring a civil suit on behalf of a person or persons charging an unfair labor practice. Under Reorganization Plan No. 1 of 1978, enforcement of the ADEA was transferred from the Department of Labor to the EEOC. Exec. Order No. 12,144, 44 Fed. Reg. 37,193 (1979). *See also* note 55 *infra.*

7. The individual defendants included the governor, the members and directors of the Wyo-

the mandatory retirement policy constituted an unfair labor practice in violation of the ADEA.[8] The defendants moved to dismiss the complaint for failure to state a claim upon which relief could be granted,[9] arguing that under the protection granted the states by the tenth amendment and the Supreme Court's holding in *National League of Cities v. Usery*, the ADEA could not be applied to a state's retirement policy for employees engaged in law enforcement.[10] Granting the motion, the district court *held*: The federal interest and policy promoted through application of the ADEA to the states does not sufficiently outweigh the states' interest in maintaining the integrity of its employer-employee relationship in providing traditional state law enforcement and wildlife management functions so as to make such an exercise of congressional commerce clause authority constitutional under the tenth amendment.[11]

Congressional authority to regulate commerce[12] is plenary in scope, subject only to the affirmative limitations contained in the Constitution and those limits derived from the nation's federalist constitutional structure.[13] Chief Justice Marshall first outlined the expansive breadth of the commerce clause in the 1824 decision of *Gibbons v. Ogden*.[14] The Supreme Court, however, inconsistently enforced judicial limits on

---

ming 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 official capacities. The court dismissed the complaint against them in their individual capacities, holding that they were "entitled to a qualified privilege or immunity." 514 F. Supp. at 596.

8. 29 U.S.C. § 623(a)(1) (1976) states that "[i]t shall be unlawful for an employer to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." *Id.* 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." *Id.* § 623(f)(2) (Supp. III 1979).

9. FED. R. CIV. P. 12(b)(6).

10. 514 F. Supp. at 596. Two sections of the Wyoming Code include game wardens, along with police officers, highway patrolmen, and other law enforcement officials, in the definition of "peace officer." WYO. STAT. § 7-2-101 (1981) (Criminal Procedure Act); *id.* § 9-3-1901(vii) (1977) (Peace Officers Training Act). The Game and Fish Act, WYO. STAT. § 23-6-101 (1977), grants game wardens the power of arrest over persons found violating the Act.

11. 514 F. Supp. at 600.

12. U.S. CONST. art. I, § 8, cl. 3 grants Congress the power "[t]o regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes."

13. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 5-1 to 5-8 (1978).

14. 22 U.S. (9 Wheat.) 1 (1824). "This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than those prescribed in the constitution." *Id.* at 196.

congressional use of the power in the century following Marshall's tenure.[15] The Court often found congressional regulation of private economic activity violative of the tenth amendment,[16] while federal police regulation of activities often withstood challenge.[17] Beginning with

15. *Compare* Carter v. Carter Coal Co., 298 U.S. 238 (1936) (Coal Conservation Act of 1935 held unconstitutional on ground that its regulation of wages, hours, and working conditions touched intrastate commerce beyond the scope of congressional commerce clause power); Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935) (National Industrial Recovery Act held unconstitutional); Railroad Retirement Bd. v. Alton R.R., 295 U.S. 330 (1935) (federal statute establishing a compulsory retirement and pension plan for railroad employees held invalid); Hammer v. Dagenhart, 247 U.S. 251 (1918) (federal Child Labor Act of 1916 held unconstitutional on ground that Congress could not control working conditions for children by prohibiting the transportation of goods produced in interstate commerce), *overruled,* United States v. Darby, 312 U.S. 100 (1941); The Employers' Liability Cases, 207 U.S. 463 (1908) (federal statute abolishing contributory negligence and fellow servant rules for railroad employees held unconstitutional); *and* United States v. E.C. Knight Co., 156 U.S. 1 (1895) (application of the Sherman Anti-Trust Act to the horizontal monopolization of the sugar refining industry denied) *with* Brooks v. United States, 267 U.S. 432 (1925) (Motor Vehicle Theft Act held constitutional); Weeks v. United States, 245 U.S. 618 (1918) (Pure Food and Drug Act held constitutional); Caminetti v. United States, 242 U.S. 470 (1917) (Mann Act forbidding the transportation of women across state lines for immoral purposes held constitutional); Houston E. & W. Texas Ry. v. United States, 234 U.S. 342 (1914) (ICC regulation of intrastate freight rates affirmed); Hoke v. United States, 227 U.S. 308 (1913) (Mann Act held constitutional); Hipolite Egg Co. v. United States, 220 U.S. 45 (1911) (Pure Food and Drug Act held constitutional); Southern Ry. v. United States, 222 U.S. 20 (1911) (railroad federal safety appliance legislation held inapplicable to intrastate trains); Swift & Co. v. United States, 196 U.S. 375 (1905) (Sherman Anti-Trust Act held applicable to intrastate meat dealers); *and* Champion v. Ames (The Lottery Case), 188 U.S. 321 (1903) (Federal Lottery Act of 1895 prohibiting interstate commerce of lottery tickets held constitutional). *See generally* Barber, National League of Cities v. Usery: *New Meaning For the Tenth Amendment?,* 1976 SUP. CT. REV. 161; Stern, *The Commerce Clause and the National Economy, 1933-1946: Part I,* 59 HARV. L. REV. 635 (1946).

16. The Constitution established a national government with powers deemed to be adequate, as they have proved to be in both war and peace, but these powers of the national government are limited by the constitutional grants. Those who act under these grants are not at liberty to transcend the imposed limits because they believe that more or different power is necessary. Such assertions of extra-constitutional authority were anticipated and precluded by the Tenth Amendment . . . .

Schecter Poultry Corp. v. United States, 295 U.S. 495, 528-29 (1935). *See also* Carter v. Carter Coal Co., 298 U.S. 238 (1936); Hammer v. Dagenhart, 247 U.S. 251 (1918), *overruled,* United States v. Darby, 312 U.S. 100 (1941). *Cf.* United States v. Butler, 297 U.S. 1 (1936) (tenth amendment limit on the spending power); Bailey v. Drexel Furniture Co. (Child Labor Tax Case), 259 U.S. 20 (1922) (tenth amendment limit on the use of federal taxation to prevent child labor). *See generally* LIBRARY OF CONGRESS, THE CONSTITUTION OF THE UNITED STATES, ANALYSIS AND INTERPRETATION 1263-71 (2d ed. 1972).

17. *See, e.g.,* Brooks v. United States, 267 U.S. 432 (1925) (Motor Vehicle Theft Act held constitutional); Caminetti v. United States, 242 U.S. 470 (1917) (Mann Act forbidding the transportation of women across state lines for immoral purposes held constitutional); Champion v. Ames (The Lottery Case), 188 U.S. 321 (1903) (Federal Lottery Act of 1895 prohibiting interstate commerce of lottery tickets held constitutional). *See also* note 15 *supra.*

NLRB v. Jones & Laughlin Steel Corp.,[18] however, the Court reversed its earlier position and upheld the National Labor Relations Act of 1935 as a valid exercise of congressional commerce clause authority.[19] *Jones & Laughlin* signaled the abandonment by the Court of its search for an objective and judicially enforceable limit on congressional use of the commerce clause power to regulate private activity.[20] Ultimately, in *United States v. Darby*,[21] a unanimous Court adopted Chief Justice Marshall's language[22] in upholding the validity of the Fair Labor Standards Act of 1938 (FLSA).[23] This decision firmly established the plenary scope of the commerce clause power, unlimited by the tenth amendment.[24]

After *Darby* and before 1976, Congress acted under the commerce clause in an almost limitless fashion, regulating intrastate activities that

18. 301 U.S. 1 (1937).

19. The Court stated that intrastate activities may be regulated by Congress under the commerce clause "if they have such a close and substantial relationship to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions." *Id.* at 37.

20. Professor Wechsler contended that the Supreme Court failed to articulate a neutral principle limiting congressional exercise of any enumerated powers. It was this failure that forced the Court to relinquish its search for such limits. Wechsler, *Toward Neutral Principles of Constitutional Law,* 73 HARV. L. REV. 1 (1959). Professor Barber argued that the Court need not have abandoned the tenth amendment as a limit on Congress' exercise of the commerce power. He stated that use of Chief Justice Marshall's construction of the tenth amendment would properly have allowed the Court to uphold economic regulations, including those governing labor conditions, wages, hours, pricing, and competitive practices, as valid exercises of federal authority to regulate economic activities as "commerce." Barber, *supra* note 15, at 170-71. The tenth amendment, however, deteriorated as a valid check on congressional power when the Court upheld federal police regulation. *Id.* at 171-72. *See* Gooch v. United States, 297 U.S. 124 (1936) (upholding constitutionality of the Lindbergh Act); Hoke v. United States, 227 U.S. 308 (1913) (upholding constitutionality of the Mann Act). Professor Barber appeared to be arguing that the Court should distinguish between federal economic regulation and police regulation and allow the former, but not the latter, as a constitutional exercise of the commerce clause power. Whether such a distinction could be sufficiently articulated as a limitation on congressional exercise of the commerce clause power is open to debate.

21. 312 U.S. 100 (1941).

22. *See* note 14 *supra.*

23. 29 U.S.C. §§ 201-19 (1976).

24. The court concluded:

> 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 government 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.

United States v. Darby, 312 U.S. at 124. *See generally* 13 URB. L. ANN. 169 (1977).

had only a slight or remote impact upon interstate commerce.[25] The Bill of Rights provided the only substantive limitation on Congress' otherwise unrestrained power to regulate commerce.[26] The Supreme Court repeatedly rejected tenth amendment challenges to congressional regulation of state and local governments under the commerce clause,[27] thereby delegating to the legislative branch the task of placing substan-

25. *See, e.g.,* Perez v. United States, 402 U.S. 146 (1971) (upholding the application of the federal loan shark statute to a purely intrastate extortionate credit transaction); Katzenbach v. McClung, 379 U.S. 294 (1964) (upholding application of the Civil Rights Act of 1964 to a restaurant on the ground that food purchased by the restaurant moved in interstate commerce); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964) (upholding application of the Civil Rights Act of 1964 against a motel that served out-of-state guests); Wickard v. Filburn, 317 U.S. 111 (1942) (upholding enforcement of the Agricultural Adjustment Act of 1938 against individual farmers producing insubstantial amounts of grain for sale in interstate markets under an aggregate market theory). *See generally* Stern, *The Commerce Clause Revisited—The Federalization of Intrastate Crime,* 15 ARIZ. L. REV. 271 (1973). *See also* Tribe, *Unraveling* National League of Cities: *The New Federalism and Affirmative Rights to Essential Governmental Services,* 90 HARV. L. REV. 1065, 1071 (1977).

26. *See, e.g.,* Leary v. United States, 395 U.S. 6 (1968) (commerce clause power limited by fifth amendment); United States v. Jackson, 390 U.S. 570 (1968) (commerce clause power limited by sixth amendment). *But see* Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946) (first amendment does not bar application of the Fair Labor Standards Act to publishers).

27. Even before NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937), *see* notes 18-19 *supra* and accompanying text, the Court rejected a tenth amendment challenge to congressional regulation of state activities under the commerce clause, holding that a state owned and operated railroad was subject to federal safety regulation. United States v. California, 297 U.S. 175 (1936). The Court later extended this holding, allowing application of the Railway Labor Act, 45 U.S.C. §§ 151-64 (1976), to the same state operated railway. California v. Taylor, 353 U.S. 553 (1957). In Parden v. Terminal Ry. of Alabama State Docks Dept., 377 U.S. 184 (1964), the Court also applied the Federal Employers Liability Act, 45 U.S.C. §§ 51-60 (1976), to a state owned railway. Congressional use of the commerce clause to regulate state activity reached its greatest breadth in Maryland v. Wirtz, 392 U.S. 183 (1965), *overruled,* National League of Cities v. Usery, 426 U.S. 833 (1976), and Fry v. United States, 421 U.S. 542 (1975). In *Wirtz*, the Supreme Court upheld application of the Fair Labor Standards Act, Pub. L. No. 89-601 § 102(a)(1), 80 Stat. 830, 831 (1966) (repealed 1976), which had brought under the FLSA employees of state hospitals, institutions, and schools. *Wirtz*, however, was overruled by National League of Cities v. Usery, 426 U.S. 833 (1976). Fry v. United States, 421 U.S. 542 (1975), upheld, over tenth amendment objections, the application of the Economic Stabilization Act of 1970, Pub. L. No. 91-379, 84 Stat. 799 (expired 1974), to the states. In a footnote in the majority opinion, however, Justice Marshall stated:

> While the Tenth Amendment has been characterized as a "truism," stating merely that "all is retained which has not been surrendered," United States v. Darby, 312 U.S. 100, 124 . . . (1941), it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system.

421 U.S. at 547 n.7. *See generally* Case v. Bowles, 327 U.S. 92 (1945) (Emergency Price Control Act held applicable to the states under the war power); Note, National League of Cities v. Usery: *Its Implications for the Equal Pay Act and the Age Discrimination in Employment Act,* 10 U. MICH. J. L. REF. 239, 245 & n.36 (1977).

tive limits on its own power.[28]

In *National League of Cities v. Usery*[29] the Court reasserted the tenth amendment as an affirmative limitation on the commerce clause power. Under the Fair Labor Standards Amendments of 1974,[30] Congress extended coverage of the FLSA to include virtually all state and local government employees.[31] A divided Court[32] declared the wage and hour provisions of the amendments unconstitutional. Writing for the majority, Justice Rehnquist[33] stated that the Court never doubted the existence of limits on the power of Congress to override state[34] sovereignty and concluded that the tenth amendment is an express constitutional declaration of such limitations.[35] Justice Rehnquist reasoned that one attribute of state sovereignty to be protected is the authority of state and local governments to control employer-employee relationships in areas of traditional governmental functions.[36] The Court held that applying the wage and hour provisions of the FLSA to the states would displace this control and impair the freedom of the states "to structure integral government operations"[37] in providing these traditional governmental services. Such action by Congress under the com-

28. Professor Wechsler argued that the political process is the chief factor restraining Congress' use of its delegated powers. Wechsler, *The Political Safeguards of Federalism: The Role of the States In The Composition and Selection of the National Government,* 54 COLUM. L. REV. 543 (1954). *See also* Tribe, *supra* note 25, at 1071. Tribe contended that a state's influence as an entity in the political process may have been lessened in recent years. *Id.* at 1072-73.

29. 426 U.S. 833 (1976).

30. Pub. L. No. 93-259, 88 Stat. 55.

31. 29 U.S.C. § 203(d) -(s)(5), -(x) (1976 & Supp. III 1979).

32. Chief Justice Burger and Justices Stewart, Powell, Rehnquist, and Blackmun, who filed a concurring opinion formed the majority. Justice Brennan dissented in an opinion in which Justices White and Marshall joined. Justice Stevens filed a separate dissenting opinion. Because of the sharp split among the justices, it will be difficult to predict the outcome of similar future cases, especially in light of the position taken by Justice Blackmun in his concurrence. *See* notes 42-47 *infra.*

33. Many of the foundations for the Court's opinion can be found in Justice Rehnquist's dissent in Fry v. United States, 421 U.S. 542, 549-59 (1975) (Rehnquist, J., dissenting).

34. As the denomination "political subdivision" implies, the local governmental units which Congress sought to bring within the Act derive their authority and power from these respective States. Interference with integral governmental services provided by such subordinate arms of a state government is therefore beyond the reach of congressional power under the Commerce Clause just as if such services were provided by the State itself.

426 U.S. at 855 n.20.

35. *Id.* at 845.

36. *Id.* at 852.

37. *Id.*

merce clause "would impair the states' ability to function in a federal system"[38] and is therefore unconstitutional.

National League of Cities left unanswered numerous questions concerning the continued constitutionality of applying other federal regulation to the states through the commerce clause.[39] The opinion did not exhaustively list[40] or establish criteria for determining what constitutes a traditional state function essential to a state's "separate and independent existence."[41] Justice Rehnquist also failed to state what degree of intrusion, if any, would be tolerated before congressional action would be held an unconstitutional exercise of the commerce clause power.[42]

---

38. *Id.* (quoting Fry v. United States, 421 U.S. 542, 547 n.7 (1975)).

39. 426 U.S. at 874 (Brennan, J., dissenting).

40. In the text of the opinion Justice Rehnquist listed the areas of fire protection, police protection, sanitation, public health, and parks and recreation as examples of traditional governmental functions. 426 U.S. at 851. In a footnote he added that "[t]hese examples are obviously not an exhaustive catalogue of the numerous line and support activities which are well within the area of traditional operations of state and local governments." *Id.* at 851 n.6.

41. *Id.* at 851. In distinguishing United States v. California, 297 U.S. 175 (1936), the Court appeared to make a distinction between federal regulation of "proprietary" and "governmental" functions, a classification used in the tax immunity cases. 426 U.S. at 843, 854 n.18. Relying upon *United States v. California*, among other cases, Justice Brennan argued that such a distinction proved to be unworkable in the tax cases and was never extended to the commerce clause. *Id.* at 863-67 (Brennan, J., dissenting). *See* Barber, *supra* note 15, at 178. Justice Rehnquist never gave content to the terms "traditional" and "integral" beyond the short listing, *see* note 40 *supra*, and the analysis distinguishing *United States v. California*. *See* Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in* National League of Cities v. Usery, 86 Yale L.J. 1165, 1172 (1977). Without a developed standard, identifying those activities that are immune from federal regulation may be difficult, especially during an era of expanding state activity in economic and social affairs. *See* Tribe, *supra* note 25, at 1072; Note, *supra* note 27, at 248. The decisions since *National League of Cities* do not clarify the issue. *See, e.g.,* Hughes Air Corp. v. Public Utils. Comm'n, 644 F.2d 1334 (9th Cir. 1981) (regulation of air traffic held not an integral state function); Vehicle Equip. Safety Comm'n v. National Highway Traffic Safety Administration, 611 F.2d 53 (4th Cir. 1979) (setting of automobile safety standards held not an integral state function); Amersbach v. City of Cleveland, 598 F.2d 1033 (6th Cir. 1979) (operation of municipal airport an integral state function); Public Serv. Co. of N.C., Inc. v. Federal Energy Regulatory Comm'n, 587 F.2d 716 (5th Cir. 1979) (state operation of an oil and gas company held not an integral state function); United States v. Best, 573 F.2d 1095 (9th Cir. 1978) (state licensing of drivers held an integral state function); Davids v. Akers, 549 F.2d 120 (9th Cir. 1977) (rules of state legislature held an integral state function).

42. The Court extensively outlined the fiscal effect of the wage and hour provisions of the FLSA on state and local governments. 426 U.S. at 846-57. Justice Rehnquist specifically held, however, that the decision was not premised upon a finding of the financial burdens that the FLSA would have on the states. He stated that "[w]e do not believe particularized assessments of actual impact are crucial to resolution of the issue presented, however. For even if we accept appellee's assessments concerning the impact of the amendments, their application will nonethe-

Justice Blackmun's concurrence adopted a balancing approach that weighed the federal interest for regulation and the necessity of state compliance against the state interest and function to be protected.[43] In support of his position Justice Blackmun pointed to an apparent balancing approach used by Justice Rehnquist in one section of the majority opinion.[44] That section distinguished the level of intrusion caused by the Economic Stabilization Act of 1970, held valid in *Fry v. United States*,[45] from the question presented by the Fair Labor Standards Amendments of 1974.[46] Since *National League of Cities*, lower courts have used this approach when confronted with questions regarding the application of federal regulation to state activities.[47]

---

less significantly alter or displace the States' abilities to structure employer-employee relationships . . . ." *Id.* at 851. The Court's disclaimer of its only analysis of FLSA effects on the states establishes no standard against which a level of intrusion can be measured. This absence of an articulated standard could have serious consequences. As Justice Brennan stated in his dissent,

> My Brethren boldly assert that the decision as to wages and hours is an "undoubted attribute of state sovereignty," and then never say why. Indeed, they disclaim any reliance on the costs of compliance with the amendments in reaching today's result. . . . This would enable my Brethren to conclude that, however insignificant that cost, any federal regulation under the commerce power "will nonetheless significantly alter or displace the States' abilities to structure employer-employee relationships."

Id. at 873-74 (Brennan, J., dissenting) (citation omitted). *See generally* Note, *Constitutionality of the ADEA After Usery*, 30 ARK. L. REV. 363 (1976); Note, *supra* note 27, at 257. Justice Rehnquist appears to have established a standard when he stated that the FLSA operates directly to displace the states' freedom to structure integral operations. 426 U.S. at 852. The question, however, remains as to what constitutes "direct" impairment of a state's freedom in light of the Court's distinguishing of Fry v. United States, 421 U.S. 542 (1975). *See* note 46 *infra*. *See also National League of Cities*, 426 U.S. at 872-73 (Brennan, J., dissenting); Note, *supra*, at 367.

43. 426 U.S. at 856.

44. *Id.*

45. 421 U.S. 542 (1975).

46. 426 U.S. at 853. Justice Rehnquist distinguished *National League of Cities* from *Fry* on four grounds: (1) The problem at which the legislation in *Fry* was directed endangered all parts of the federal structure and could be remedied only by federal action, (2) the means selected only temporarily interfered with the states' freedom, (3) the federal action did not displace any state choices as to how state governmental functions were structured, and (4) the Economic Stabilization Act actually reduced budgetary pressures on the states by placing a ceiling on wages. *Id.* The Court's recognition of the first factor apparently upholds Justice Blackmun's contention that when the federal interest is great and state compliance is necessary, interference with state autonomy will be permitted. *But see id.* at 872 (Brennan, J., dissenting).

47. *See, e.g.*, United States v. Ohio Dep't of Highway Safety, 635 F.2d 1195 (6th Cir. 1980) (federal interest in controlling air pollution weighed against state interest in permitting noncomplying vehicle to use public streets and highways), *cert. denied*, 451 U.S. 949 (1981); United States v. Best, 573 F.2d 1095 (9th Cir. 1978) (the federal interest in a nonstatutory equitable remedy for driving while intoxicated within federal enclave not sufficient enough to outweigh the states' interest in controlling the privilege of driving on its highways).

Congress extended both the ADEA and the Equal Pay Act[48] to cover state and local governmental employees in the Fair Labor Standards Amendments of 1974.[49] The Court in *National League of Cities* failed to comment on whether the ADEA or the Equal Pay Act may constitutionally be applied to the states, leaving the continued validity of these statutes in doubt.[50]

The Age Discrimination in Employment Act of 1967[51] was enacted to address the special problems of age discrimination.[52] The ADEA makes unlawful discrimination on the basis of age in all aspects of employment, including the decision to hire[53] or discharge,[54] the level of compensation and other terms of employment,[55] and membership in a labor organization.[56] The statute, however, excuses discrimination on the basis of age under a bona fide occupational qualification "reasonably necessary to the normal operation of the particular business."[57]

Although a separate statutory scheme, the ADEA is linked to both Title VII of the Civil Rights Act of 1964 (Title VII)[58] and the FLSA. Both the ADEA and Title VII are aimed at eliminating employment

48. 29 U.S.C. § 206(d) (1976).

49. Pub. L. No. 93-259, §§ 6(a)(1), 28(a)(2), 88 Stat. 55 (Equal Pay Act and ADEA).

50. For discussion of both the ADEA and the Equal Pay Act, see generally Note, *Civil Rights Suits Against State and Local Governmental Entities and Officials: Rights of Action, Immunities, and Federalism,* 53 S. CAL. L. REV. 945 (1980); Note, *supra* note 27. For discussion of the Equal Pay Act, see generally Note, *Applying the Equal Pay Act to State and Local Governments: The Effect of* National League of Cities v. Usery, 125 U. PA. L. REV. 665 (1977); 19 URB. L. ANN. 228 (1980). For discussion of the ADEA, see generally Gillan, *The Applicability of the Federal Age Discrimination In Employment Act to State Employees:* National League of Cities v. Usery, 10 CLEARINGHOUSE REV. 442 (1976); Note, *supra* note 42.

51. Pub. L. No. 90-202, 81 Stat. 602 (codified at 29 U.S.C. §§ 621-34 (1976)).

52. The U.S. Department of Labor study out of which the ADEA evolved stated that age discrimination, unlike racial discrimination, is not based on dislike for or prejudice against the injured person. Rather, age discrimination is founded on incorrect assumptions about the effects of age on job performance. Note, *The Age Discrimination In Employment Act of 1967,* 90 HARV. L. REV. 380, 383 (1976) (citing U.S. DEP'T OF LABOR, REPORT TO THE CONGRESS ON AGE DISCRIMINATION IN EMPLOYMENT UNDER SECTION 715 OF THE CIVIL RIGHTS ACT OF 1964 at 8 (1965)).

53. 29 U.S.C. § 623(a)(1) (1976).

54. *Id.*

55. *Id.* § 623(a)(3).

56. *Id.* § 623(c).

57. *Id.* § 623(f)(1). Title VII contains the same bona fide occupational qualification for all classifications but race. 42 U.S.C. § 2000e-2(e) (1976). "The existence of the bfoq defense under both statutes indicates the congressional recognition that under certain circumstances, an employer may be justified in taking into account an applicant's sex or age in order to determine his or her suitability for a particular job." Note, *supra* note 52, at 400.

58. 42 U.S.C. §§ 2000e to 2000e-17 (1976).

discrimination based on arbitrary criteria. The almost identical language contained in the prohibition sections of the two statutes[59] reflects this similarity of purpose. Some of the procedural provisions of the ADEA also parallel those of Title VII.[60] Because of this similarity of purpose, enforcement of the ADEA was transferred in 1979 from the Department of Labor to the EEOC, placing under the control of a single executive agency the effectuation of congressional policy against employment discrimination based on arbitrary criteria.[61] The enforcement provisions of the FLSA were, however, incorporated into the ADEA.[62]

This ADEA link to both the FLSA and Title VII has led to confusion regarding the congressional power under which the ADEA was enacted.[63] The statute's statement of purpose,[64] incorporation of the FLSA enforcement provisions into the ADEA,[65] and extension of the ADEA to the states through the 1974 amendments to the FLSA[66] lend support to the conclusion that the ADEA was enacted pursuant to the commerce clause.[67] Conversely, the ADEA's similarity to Title VII in its fundamental purpose, the existence of similar statutory language,[68] and elements of the legislative history of the Act[69] and its amend-

59. *Compare* 29 U.S.C. § 623 (1976 & Supp. III 1979) *with* 42 U.S.C. § 2000e-2 (1976). "[T]he prohibitions of the ADEA were derived *in haec verba* from Title VII." Lorillard v. Pons, 434 U.S. 575, 584 (1978).

60. *Compare* 29 U.S.C. § 633 (1976) *with* 42 U.S.C. § 2000e-5(c) (1976).

61. Exec. Order No. 12,144, 44 Fed. Reg. 37,193 (1979). *See* President's Message to Congress Transmitting Reorganization Plan No. 1 of 1978, 14 WEEKLY COMP. OF PRES. DOC. 400 (Feb. 23, 1978).

62. 29 U.S.C. § 626(a) (Supp. III 1979) (incorporating §§ 9 and 11 of the Fair Labor Standards Act, 29 U.S.C. §§ 209, 211 (1976)); *id.* § 626(b) (1976) (incorporating 29 U.S.C. §§ 211(b), 216-17 (1976)).

63. *See generally* Note, *Civil Rights Suits Against State and Local Governmental Entities and Officials: Rights of Action, Immunities, and Federalism, supra* note 50, at 1000; Note, *supra* note 27, at 260.

64. 29 U.S.C. § 621(a)(4) (1976) states that "the existence in industries affecting commerce of arbitrary discrimination in employment because of age burdens commerce and the free flow of goods in commerce."

65. *See* note 62 *supra*.

66. Pub. L. No. 93-259, § 28(a)(2), 88 Stat. 55.

67. EEOC v. Wyoming, 514 F. Supp. 595, 600 (D. Wyo. 1981), *cert. granted,* 50 U.S.L.W. 3527 (U.S. Jan. 12, 1982) (No. 81-554). *See* Note, *supra* note 42, at 368; Note, *Civil Rights Suits Against State and Local Governmental Entities and Officials: Rights of Action, Immunities, and Federalism, supra* note 50, at 1000; Note, *supra* note 27, at 260. *See generally* Note, *supra* note 52, at 381.

68. *Compare* 29 U.S.C. § 623 (1976 & Supp. III 1979) *with* 42 U.S.C. § 2000e-2 (1976).

69. Senator Javits originally proposed the inclusion of age discrimination in Title VII, but

ments[70] create an arguable basis for the ADEA's enforcement pursuant to section 5 of the fourteenth amendment.[71] Courts generally have construed the provisions of the ADEA according to Title VII precedents, basing these holdings on the similarities between the two.[72] Recent Supreme Court decisions are inconclusive on this issue, although they do suggest that each provision of the ADEA should be construed according to the statute after which it was modeled.[73]

Since *National League of Cities* courts have consistently held that application of the ADEA to the states is within the constitutional power of Congress.[74] The rationale usually advanced to support the contin-

---

Congress rejected that proposal. Arritt v. Grissell, 567 F.2d 1267, 1270 n.11 (1977). Section 715 of the Civil Rights Act of 1964, however, did direct the Secretary of Labor to make a study of the problem of age discrimination in employment. This study formed the basis for the legislative proposals resulting in the ADEA. H.R. REP. No. 805, 90th Cong., 1st Sess. 2, *reprinted in* [1967] U.S. CODE CONG. & AD. NEWS 2213, 2214.

70. The court in EEOC v. County of Calumet, 26 Fair Empl. Prac. Cas. (BNA) 20 (E.D. Wis. June 12, 1981), quoted numerous passages from the legislative histories of both the 1974 amendment and the ADEA Amendments of 1978, Pub. L. No. 95-256, 92 Stat. 189, in support of the proposition that the ADEA was passed pursuant to § 5 of the fourteenth amendment. *See* note 77 *infra* and accompanying text. None of the statements that the court in *Calumet* quoted specifically stated that the ADEA was enacted pursuant to § 5 of the fourteenth amendment. Rather, the references are to general statements regarding age discrimination as a protected civil right. *See* S. REP. No. 493, 95th Cong., 1st Sess. 1-3, 34, *reprinted in* [1978] U.S.CODE CONG. & AD. NEWS 504-06, 527; H.R. REP. No. 913, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 2849; Gillan, *supra* note 50, at 442.

71. *See* Gillan, *supra* note 50, at 442-44; Note, *supra* note 42, at 372-75; notes 73-75 *infra*. *See generally* Note, *Civil Rights Suits Against States and Local Governmental Entities and Officials: Rights of Action, Immunities, and Federalism, supra* note 50, at 1105-13; Note, *supra* note 27, at 266-72.

72. *See, e.g.*, Geller v. Markham, 635 F.2d 1027 (2d Cir. 1980); Smithers v. Bailer, 629 F.2d 892 (3d Cir. 1980); Rodriguez v. Taylor, 569 F.2d 1231 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978); Hodgson v. First Fed. Sav. & Loan Ass'n, 455 F.2d 818 (5th Cir. 1972). *But see* Lorillard v. Pons, 434 U.S. 575 (1978) (ADEA § 7(c), 29 U.S.C. § 626(c) (1976), amended in 1978 to include the right to a jury trial, interpreted according to the FLSA section upon which it was based). *See also* Marshall v. Chamberlain Mfg. Corp., 601 F.2d 100, 104 (3d Cir. 1979) (commenting on Oscar Mayer & Co. v. Evans, 441 U.S. 750 (1979), and Lorillard v. Pons, 434 U.S. 575 (1978)).

73. *See* Oscar Mayer & Co. v. Evans, 441 U.S. 750 (1979); Lorillard v. Pons, 434 U.S. 575 (1978). *Oscar Mayer* held that because the language of ADEA § 14(6), 29 U.S.C. § 633 (1976), was adopted from Title VII § 706(c), 42 U.S.C. §§ 2000e-s(c) (1976), it could be concluded Congress also adopted the judicial construction of § 706 of Title VII and that construction of ADEA § 14(b) should follow that of § 706. *Lorillard* held that ADEA § 7(c), 29 U.S.C. § 626(c) (1976) (current version in Supp. III 1979), should be interpreted according to the construction of FLSA procedures incorporated into the ADEA, including the right to a jury trial.

74. *See, e.g.*, Arritt v. Grissell, 567 F.2d 1267 (4th Cir. 1977); EEOC v. County of Calumet, 26 Fair Emp. Prac. Cas. (BNA) 20 (E.D. Wis. June 12, 1981); Johnson v. Mayor of Baltimore, 515 F. Supp. 1287 (D. Md. 1981); EEOC v. Florissant Valley Fire Protection Dist., 21 Fair Emp. Prac. Cas. (BNA) 973 (E.D. Mo. Dec. 6, 1979); Marshall v. Delaware River & Bay Auth., 471 F. Supp.

ued validity of the 1974 amendments to the ADEA is that Congress, in extending the ADEA to the states, acted pursuant to its authority under section 5 of the fourteenth amendment.[75] This conclusion is based on the similarity between Title VII and the ADEA[76] and statements contained in the latter's legislative history.[77] In *Fitzpatrick v. Bitzer*[78] the Supreme Court sustained Title VII as a valid exercise of congressional authority under section 5 of the fourteenth amendment against an attack based on the eleventh amendment's[79] protection of state

886 (D. Del. 1979); Remmick v. Barnes County, 435 F. Supp. 914 (D.N.D 1977); Aaron v. Davis, 424 F. Supp. 1238 (E.D. Ark. 1976); Usery v. Board of Educ., 421 F. Supp. 718 (D. Utah 1976). The Equal Pay Act has also consistently been held constitutional. *See, e.g.,* Pearce v. Wichita Co., 590 F.2d 128 (5th Cir. 1979); Marshall v. Owensboro-Daviess County Hosp., 581 F.2d 116 (6th Cir. 1978); Marshall v. City of Sheboygan, 577 F.2d 1 (7th Cir. 1978); Usery v. Charlestown County School Dist., 558 F.2d 1169 (4th Cir. 1977); Usery v. Allegheny County Inst. Dist., 544 F.2d 148 (3d Cir. 1976), *cert. denied,* 430 U.S. 946 (1977). *See generally* note 50 *supra*.

75. U.S. CONST. amend. XIV, § 5 states, "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."

> In light of the similar statutory and constitutional objectives of Title VII and Section 623(a) of the ADEA to prohibit arbitrary and discriminatory employment criteria based on race, color, religion, sex, national origin, or age and in the absence of a clear expression by Congress in the ADEA of the constitutional foundation for this legislation in the Commerce Clause or the Fourteenth Amendment, this court interprets the ADEA's age discrimination limitations on state employers in 29 U.S.C.A. § 623(a) (1975) as constitutionally permissible under either the Commerce Clause or the Fourteenth Amendment. The Fourteenth Amendment is particularly applicable in the present circumstances where allegations of arbitrary discrimination in employment practices by a state employer, contrary to Section 623(a) of the ADEA, if proven, would constitute forbidden state action that denies equal protection of the law. The Court in *National League of Cities* specifically expressed no view on whether Congress could achieve "different results [in] affect[ing] integral operations of state governments by exercising authority granted it under other sections of the constitution such as . . . § 5 of the Fourteenth Amendment."

Usery v. Board of Educ., 421 F. Supp. 718, 721 (D. Utah 1976).

76. *See* notes 68-72 *supra* and accompanying text.

77. After a review of the relevant legislative history, *see* note 70 *supra*, the court in EEOC v. County of Calumet, 26 Fair Empl. Prac. Cas. (BNA) 20 (E.D. Wis. June 12, 1981), concluded:

> By this point, it should be unnecessary to cite the many other references in the legislative history to show that Congress, when it passed the 1978 ADEA amendments, considered age discrimination a denial of equal protection. Thus, although the ADEA itself does not explicitly state that the 1974 and 1978 amendments extended ADEA protections to state and local government employees pursuant to Congress' Fourteenth Amendment enforcement power, the legislative history is more than sufficient to reach that conclusion.

Id. at 24.

78. 427 U.S. 445 (1976).

79. U.S. CONST. amend. XI states, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

sovereignty.[80]

Lower courts have held that because of *Fitzpatrick*, enforcement of the ADEA pursuant to section 5 of the fourteenth amendment survives a similiar constitutional attack based on the tenth amendment.[81] With the recent decision in *Pennhurst State School v. Halderman*,[82] however, the Supreme Court now appears to require that Congress state clearly its intent to act under the fourteenth amendment before congressional policy will be imposed on the states.[83] Because this clear statement of intent was lacking when Congress expanded the coverage of the ADEA to include the states, the validity of this lower court thesis is left in doubt.[84]

---

80. 427 U.S. at 445-46. The Court specifically upheld the validity of Title VII, § 703(a), 42 U.S.C. § 2000e-2(a) (1976), which authorized federal courts to award money damages to a private individual against a state government found guilty of employment discrimination. 427 U.S. at 448. Handed down four days after *National League of Cities*, *Fitzpatrick* recognized 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.

81. *See* Arritt v. Grisell, 567 F.2d 1267, 1271 (4th Cir. 1977); EEOC v. County of Calumet, 26 Fair Empl. Prac. Cas. (BNA) 20, 21 (E.D. Wis. June 12, 1981); Johnson v. Mayor of Baltimore, 515 F. Supp. 1287, 1292 (D. Md. 1981); Remmick 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). *See generally* Gillan, *supra* note 50, at 443; Tribe, *supra* note 25, at 1097-99; Note, *supra* note 42, at 373-74; Note, *Civil Rights Suits Against State and Local Governmental Entities and Officials: Rights of Action, Immunities, and Federalism*, *supra* note 50, at 1097-1111; Note, *supra* note 27, at 266-72.

82. 101 S. Ct. 1531 (1981).

83. Although this Court has previously addressed issues going to Congress' power to secure the guarantees of the Fourteenth Amendment, *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966); *Oregon v. Mitchell*, 400 U.S. 112 (1970); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1975), we have had little occasion to consider the appropriate test for determining when Congress intends to enforce those guarantees. Because such legislation imposes congressional policy on a State involuntarily, and because it often intrudes on traditional state authority, we should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment. Our previous cases are wholly consistent with that view, since Congress in those cases expressly articulated its intent to legislate pursuant to § 5. *See* Katzenbach v. Morgan, *supra* (intent expressly stated in the Voting Rights Act of 1965); *Oregon v. Mitchell*, *supra* (intent expressly stated in the Voting Rights Act Amendments of 1970); *Fitzpatrick v. Bitzer*, *supra* (intent expressly stated in both the House and Senate Reports of the 1972 Amendments to the Civil Rights Act of 1964); cf. *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (intent to enforce the Fifteenth Amendment expressly stated in the Voting Rights Act of 1965).

Id. at 1539.

84. No explicit statement of the authority under which Congress enacted the ADEA amendments appears in either the statute or the legislative history. The court in EEOC v. County of Calumet, 26 Fair Empl. Prac. Cas. (BNA) 20 (E.D. Wis. June 12, 1981), however, found sufficient evidence of congressional intent in the legislative history supporting a finding under the *Pennhurst* standard that Congress acted pursuant to the fourteenth amendment. *Id.* at 22-23. *See* notes 67-70 & 75 *supra* and accompanying text.

Courts have also upheld application of the ADEA to the states under the commerce clause.[85] Using a balancing test apparently derived from Justice Blackmun's concurrence in *National League of Cities*,[86] the courts have found that the federal interest in preventing employment discrimination on the basis of arbitrary criteria outweighs any insignificant intrusion into integral state functions caused by the ADEA.[87]

EEOC v. Wyoming[88] rejected those precedents established since *National League of Cities*[89] and held conversely that application of the ADEA to the mandatory retirement policy of the Wyoming Game and Fish Commission unconstitutionally violates the tenth amendment. Judge Brimmer, writing for the Federal District Court for Wyoming, began his analysis by rejecting the EEOC's contention that Congress extended the ADEA to the states pursuant to its authority under section 5 of the fourteenth amendment.[90] Based on its reading of the standards established by *Pennhurst State School v. Halderman*,[91] the Wyoming district court was unable to discover the necessary statement of con-

85. Aaron v. Davis, 424 F. Supp. 1238 (E.D. Ark. 1976). *Accord,* EEOC v. County of Calumet, 26 Fair Empl. Prac. Cas. (BNA) 20, 25 (E.D. Wis. June 12, 1981); Marshall v. Delaware River & Bay Auth., 471 F. Supp. 886, 892 (D. Del. 1979). *Cf.* Pearce v. Wichita County, 590 F.2d 128 (5th Cir. 1979) (Equal Pay Act, as an exercise of congressional commerce clause power, not an unconstitutional intrusion into state sovereignty); Marshall v. City of Sheboygan, 577 F.2d 1 (7th Cir. 1978) (same).

86. *See* notes 43-47 *supra* and accompanying text.

87. It is the opinion of the Court that although the Age Discrimination Act does alter the state's ability to structure employer-employee relationships by forbidding the states to discriminate between employees on the basis of age, that alteration does not significantly interfere with the policy choices of the state's elected officials and administrators as to how best to allocate the state's financial resources in discharging the state's primary function (within the framework of the Constitution) of administering the public law and maintaining the public health and welfare. Furthermore, there is no evidence before this Court from which to conclude that the Age Discrimination Act significantly alters the manner in which the City of Little Rock allocates its financial resources to provide its citizens with fire protection. There is absolutely no basis for this Court to conclude that the very separate and independent existence of the states' ability to function effectively within the federal system is endangered by a law which prohibits the City of Little Rock from discriminating between firemen age 62 and firemen age 65 without an empirical justification for doing so.

Aaron v. Davis, 424 F. Supp. 1238, 1241 (E.D. Ark. 1976). *Accord,* EEOC v. County of Calumet, 26 Fair Empl. Prac. Cas. (BNA) 20, 25 (E.D. Wis. June 12, 1981); Marshall v. Delaware River & Bay Auth., 471 F. Supp. 886, 892 (D. Del. 1979). *See generally* Note, *supra* note 42, at 368-72; Note, *supra* note 27, at 261-66.

88. 514 F. Supp. 595 (D. Wyo. 1981), *cert. granted,* 50 U.S.L.W. 3527 (U.S. Jan. 12, 1982) (No. 81-554).

89. *See* notes 74-87 *supra* and accompanying text.

90. 514 F. Supp. at 598-99. *See* notes 68-70 & 75-81 *supra* and accompanying text.

91. 101 S. Ct. 1531 (1981). *See* notes 82-83 *supra* and accompanying text.

gressional intent supporting a finding that the ADEA extension by the 1974 amendments was to be enforced via the fourteenth amendment.[92] Congress' incorporation of the FLSA enforcement provisions into the ADEA, unrefuted by anything contained in the 1974 amendments or their history, also contributed to the court's conclusion that Congress acted under its commerce clause power.[93]

Pursuant to this finding the court in *EEOC v. Wyoming* then applied the limitations of the tenth amendment outlined by *National League of Cities* to the issue presented.[94] Relying upon Justice Rehnquist's enumeration of traditional state functions contained in the majority opinion of *National League of Cities*,[95] the court held that wildlife management by game wardens exercising police functions lies within the protected categories of state governmental services.[96] Judge Brimmer concluded that a rational state policy interest—the need for young law enforcement officers—would be displaced by application of the ADEA to the Wyoming Game and Fish Department.[97] Any such displacement would affect Wyoming's ability to provide services traditionally afforded its citizens and would therefore be contrary to the tenth amendment and the holding of *National League of Cities*.[98]

Judge Brimmer concluded by referring to Justice Blackmun's "balancing approach" as central to a proper understanding of *National League of Cities*.[99] The court first noted that mandatory retirement policies exist for various federal law enforcement agencies. The federal interest shown by such policies, like Wyoming's interest in its retirement policy, was inconsistent with the federal interest against age discrimination that the EEOC was attempting to impose on the states. Using this information in its balancing analysis, the court found that the state's interest in having young officers for police protection and wildlife management outweighed the federal interest in prohibiting age discrimination.[100]

92. 514 F. Supp. at 599-600.
93. *Id.* at 600.
94. *Id.*
95. 426 U.S. at 851. *See* note 40 *supra*.
96. 514 F. Supp. at 600.
97. *Id.*
98. *Id.*
99. *Id. See* notes 43-47 *supra* and accompanying text.
100. 514 F. Supp. at 600.

Considering the relevant precedents,[101] the core of Judge Brimmer's holding is that Congress extended coverage of the ADEA to the states through its commerce clause power and not pursuant to section 5 of the fourteenth amendment.[102] The evidence marshaled by the court, however, inconclusively supports its contention. Reliance on the incorporation of FLSA enforcement provisions into the ADEA as circumstantial evidence that Congress acted pursuant to the commerce clause[103] is without merit. Numerous provisions of the ADEA, including the statement of prohibition, were modeled after Title VII which was enacted pursuant to the fourteenth amendment.[104] The hybrid nature of the ADEA provides inconclusive support for either argument.

The legislative history upon which the court relies[105] also fails to provide clear support. Following the lead of *Pennhurst*,[106] the court appropriately required a clear statement of congressional intent before approving extension of the ADEA to the states pursuant to section 5 of the fourteenth amendment.[107] Judge Brimmer's findings that neither the statutory language nor the legislative history contain a sufficient expression of congressional intent[108] conflict, however, with the explicit findings of another court.[109] Furthermore, Judge Brimmer did not consider the similarity of purpose that exists between the ADEA and other congressional prohibitions against discrimination enforced pursuant to the fourteenth amendment.[110] Without a full consideration of this aspect of the issue, the inconclusive nature of the other evidence offered by the court leaves suspect its finding that Congress enacted the ADEA under its commerce clause power.

After concluding that Congress enacted the ADEA amendments pursuant to its commerce clause authority,[111] *EEOC v. Wyoming* inconsistently applied *National League of Cities*. The court properly found that law enforcement and wildlife management constitute integral state

101. *See* notes 74-87 *supra* and accompanying text.
102. 514 F. Supp. at 598-600.
103. *Id.* at 600.
104. *See* notes 59-61 *supra* and accompanying text.
105. *See* notes 67 & 77 *supra*.
106. *See* notes 91-92 *supra* and accompanying text.
107. 514 F. Supp. at 599-600.
108. *Id.*
109. EEOC v. County of Calumet, 26 Fair Empl. Prac. Cas. (BNA) 20 (E.D. Wis. June 12, 1981). *See* note 77 *supra*.
110. *See* note 59 *supra*.
111. 514 F. Supp. at 600.

functions protected by the tenth amendment and *National League of Cities*.[112] Authority also exists for the finding that compulsory retirement for law enforcement officials is a legitimate state interest.[113] Nevertheless, the court failed to apply properly the "balancing approach" that was the stated basis for its decision.[114] The ADEA's disruptive effect on Wyoming's mandatory retirement policy was inadequately assessed in light of the bona fide occupational qualification contained in the statute.[115] Proper balancing of federal and state interests involves an accurate assessment of the degree of federal intrusion into the protected state function. The decision in *EEOC v. Wyoming* is lacking in this important respect because Judge Brimmer protected the integral state function from any federal intrusion rather than considering at what point the intrusion becomes intolerable. Until the Supreme Court clarifies *National League of Cities*,[116] such a rigid application of the balancing principle is unwarranted. The court should have properly applied Justice Blackmun's balancing approach,[117] weighing the ADEA, with its bona fide occupation qualification exception allowing age discrimination for rational ends, against Wyoming's mandatory retirement policy.

EEOC v. Wyoming therefore represents an application of *National League of Cities* that is inconsistent with precedent and that improperly applies the standards established for review of federal intrusions into traditional state activities. On certiorari, the Supreme Court should reverse the decision, and hold that application of the ADEA against the states is constitutional as either a proper exercise of commerce clause power or a proper exercise of congressional authority pursuant to section 5 of the fourteenth amendment.

N.L.M.

112. *See* notes 29-46 *supra* and accompanying text.

113. *See* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) (mandatory retirement policy for law enforcement officials does not violate the equal protection clause of the fourteenth amendment). The issues presented in *Murgia* did not raise the question of the application of the ADEA to the same compulsory retirement scheme.

114. 514 F. Supp. at 600.

115. *See* note 57 *supra*.

116. *See* notes 39-42 *supra* and accompanying text.

117. *See* notes 43-47 *supra* and accompanying text.