Constitutional Law - Tenth Amendment - Commerce Clause - Application of ADEA to State and Local Governments

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CONSTITUTIONAL LAW—TENTH AMENDMENT—COMMERCE CLAUSE—APPLICATION OF ADEA TO STATE AND LOCAL GOVERNMENTS—The Supreme Court of the United States has held that the extension of the Age Discrimination in Employment Act to state and local governments was a valid exercise of Congress’ powers under the commerce clause and was not precluded by virtue of tenth amendment constraints.


In 1967, Congress enacted the Age Discrimination in Employment Act (ADEA or Act), which prohibits an employer from discriminating against an employee or a potential employee on the basis of age. In 1974, Congress extended the definition of employer under the Act to include state and local governments. This case examines the constitutionality of that amendment in light of external restraints placed upon Congress’ commerce clause powers pursuant to the tenth amendment.

Bill Crump, a district game supervisor for the Wyoming Game and Fish Department, was forced to retire at age fifty-five, pursuant to a Wyoming statute. Subsequently, Crump filed a complaint with the Equal Employment Opportunity Commission (EEOC), al-

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4. 103 S. Ct. at 1060. Prior to the district court’s decision in this case, EEOC v. Wyoming, 514 F. Supp. 595 (D. Wyo. 1981), every federal court that considered the constitutionality of the 1974 extension of the ADEA to state and local governments upheld the Act as a valid exercise of Congress’ power under either the commerce clause or the fourteenth amendment. See 103 S. Ct. at 1059 n.6.

5. 103 S. Ct. at 1059. The Wyoming State Highway Patrol and Game and Fish Warden Retirement Act, Wyo. Stat. § 31-3-107 (1977), only allows those employees to continue working past age 55 who have received the approval of their employer, and allows no one to continue working past age 65, even with approval. 103 S. Ct. at 1059 n.7.
leging violation of the ADEA. The EEOC then filed suit in the United States District Court for the District of Wyoming, on behalf of Crump and others similarly situated, against the state and several of its officials seeking declaratory and injunctive relief. The defendants moved to dismiss the suit, and the district court did so, holding that the doctrine of tenth amendment immunity, as set forth in National League of Cities v. Usery, had been violated by Congress' attempt to regulate Wyoming's employment relationship with its game wardens and other law enforcement officials. Additionally, the district court held that the ADEA could not be upheld under the fourteenth amendment since there was no explicit statement by Congress that it was relying on this power.

The EEOC filed a direct appeal under 28 U.S.C. § 1252. The United States Supreme Court noted probable jurisdiction and reversed the district court's ruling.

Justice Brennan, writing for the Court, began his discussion with the history of the 1967 Age Discrimination in Employment Act and the 1974 amendment which extended the Act to state governments. Justice Brennan noted that the ADEA was not challenged in this case on the theory that Congress had exceeded its powers under the commerce clause, but instead was challenged on the theory that Congress is precluded from imposing the

6. 103 S. Ct. at 1059. Conciliation efforts between the EEOC and the Game and Fish Department were not successful. Id.
7. Id. The EEOC also sought back pay and liquidated damages on behalf of Crump and others similarly situated. Id. at 1060.
9. 103 S. Ct. at 1060.
10. Id. See infra note 83 and accompanying text.
12. 103 S. Ct. at 1057.
13. Id. Justice Brennan's majority opinion was joined by Justices White, Marshall, Blackmun and Stevens. Justice Stevens filed a concurring opinion. Chief Justice Burger filed a dissenting opinion in which Justices Powell, Rehnquist and O'Connor joined. Justice Powell filed a dissenting opinion in which Justice O'Connor joined. Id. at 1054.
16. 103 S. Ct. at 1060. The source of Congress' commerce clause powers is found in U.S. Const. art. I, § 8, cl. 3, which provides: "The Congress shall have the power . . . [t]o regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes." Id.
ADEA upon the states by virtue of the tenth amendment,17 which places an external restraint upon Congress.18

Justice Brennan then discussed several relevant cases, beginning with National League of Cities, which dealt with the Fair Labor Standards Act (FLSA).19 Congress had attempted to extend the FLSA's wage and hour provisions to state and local governments, but the Court in National League of Cities held that the federal government would devour the essentials of state sovereignty if it were permitted to impose federal regulations on state governments without restraint.20 Justice Brennan observed that the Court in National League of Cities interpreted the tenth amendment as an "affirmative limitation on the [congressional power under the commerce clause] akin to other commerce power affirmative limitations contained in the Constitution."21 Justice Brennan noted, however, that the principal which has emerged from National League of Cities is a functional doctrine which allows the states to function effectively in certain core state functions, but does not create a "sacred province of state autonomy."22

Justice Brennan next discussed Hodel v. Virginia Surface Mining & Reclamation Association,23 which also concerned the issue of state immunity to federal regulation of commerce.24 The Court in Hodel, he explained, developed a three-pronged test which must be satisfied for the court to strike down legislation under the principles of National League of Cities.25 Hodel required that the federal legislation must regulate the "states as states," must address matters that are indisputably "attributes of state sovereignty," and that it must be clear that compliance with the federal law would directly impair the state's ability "to structure integral operations in areas of traditional governmental functions."26 Even if all of

17. Under the tenth amendment, "[t]he 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.
18. 103 S. Ct. at 1060.
21. 103 S. Ct. at 1060. See 426 U.S. at 841.
22. 103 S. Ct. at 1060.
24. 103 S. Ct. at 1060-61.
25. Id.
26. Id. See 452 U.S. at 287-88.
these requirements are met, Justice Brennan noted, under *Hodel*, the nature of the federal interest may still require state submission to the federal regulation, if the federal interest involved is of a crucial nature.\(^{27}\)

Justice Brennan then applied these requirements to the present case.\(^{28}\) Justice Brennan found it unnecessary to dwell on the first two prongs of the *Hodel* test,\(^ {29}\) his main concern being instead with the third requirement.\(^{30}\)

Although Justice Brennan conceded that the management of state parks was a traditional state function,\(^ {31}\) he emphasized that the doctrine of immunity set forth in *National League of Cities* was only meant to insulate the states from those federal regulations which threaten the states' very existence.\(^ {32}\) Justice Brennan considered the issue to be one of the degree of the federal intrusion into the states' ability to structure their integral operations.\(^ {33}\) Justice Brennan then held that the federal regulation in the present case is so much less intrusive than was the legislation in *National League of Cities*, that the Court need not strike down Congress' decision to extend the ADEA to the states.\(^ {34}\)

Justice Brennan noted the ADEA does not require that the state abandon its goals, but merely requires that the state achieve its goals in a more careful and individualized manner.\(^ {35}\) Justice Brennan determined that if age is found to be a "bona fide occupational qualification" (BFOQ),\(^ {36}\) for the job of game warden, the ADEA

\(^{27}\) 103 S. Ct. at 1060-61. See 452 U.S. at 288 n.29.
\(^{28}\) 103 S. Ct. at 1061-64.
\(^{29}\) *Id.* at 1061. The first prong of the test is that the challenged legislation must regulate the "states as states." Justice Brennan conceded that this requirement was clearly satisfied. *Id.* He did not find it necessary to determine whether the second prong had also been met, since he found that the third prong of the test had not been satisfied. *Id.*
\(^{30}\) *Id.* at 1062.
\(^{31}\) *Id.*
\(^{32}\) *Id.*
\(^{33}\) *Id.* Justice Brennan noted that the decision in *National League of Cities* also centered on questions of degree. *Id.* See 426 U.S. at 845.
\(^{34}\) 103 S. Ct. at 1062.
\(^{35}\) *Id.* Justice Brennan pointed out that the state may still dismiss those game wardens whom it reasonably finds to be unfit, after they have been individually assessed. *Id.* The appellees did not claim any other substantial stake in their retirement policy other than assuring the physical preparedness of their game wardens. *Id.* The only other interest which the appellees claimed was in maintaining the integrity of the pension system. *Id.* at 1063 n.15.
\(^{36}\) *Id.* at 1062. Justice Brennan referred to the ADEA, 29 U.S.C. § 623(f)(1) (1976 & Supp. V 1981) which provides that neutral criteria not dependent on age be used "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than
would not prohibit appellees' conduct. Justice Brennan also observed that there is no threat of the same far-reaching nature to the structure of state governance by the application of the ADEA to the states as would have resulted from the effects of the FLSA on the states in *National League of Cities*. Justice Brennan then concluded the ADEA would neither have a direct effect nor work a significant hardship on state finances, unlike the effect of the FLSA in *National League of Cities*. Justice Brennan reiterated the test for the financial effect set forth in *National League of Cities*, which, he pointed out, was not an individualized inquiry, but a legal question which seeks to establish a direct and obvious effect of the federal legislation on the states' ability to allocate their resources. Justice Brennan concluded that the ADEA does not have such an effect on state resources. Although he conceded that older workers may get paid more than younger workers, and older workers may retire with increased benefits, these factors would be balanced by other considerations. Justice Brennan also found that the ADEA did not impede the states in pursuing their broad social and economic policies beyond the present circumstances of this case. He thus noted the distinc-
tion between this case and state policies which were infringed upon in National League of Cities.\textsuperscript{44}

In conclusion, the Court held that Congress' extension of the ADEA to state and local governments was a valid exercise of its commerce clause powers, both facially and as applied in the present case.\textsuperscript{46} The Court did not further decide if the ADEA is valid under the fourteenth amendment.\textsuperscript{48} Accordingly, the Court reversed and remanded the district court's decision.\textsuperscript{47}

In a concurring opinion, Justice Stevens joined in the majority opinion, but maintained that the underlying issues must be viewed in a larger perspective.\textsuperscript{48} Justice Stevens first discussed the manner in which the Court had construed the commerce clause and the framers' intent in granting Congress this power.\textsuperscript{49} Justice Stevens admitted that the commerce clause has been interpreted narrowly at times by the Court,\textsuperscript{50} but maintained that the clause has evolved with the nation to accommodate the growth of the nation's economy.\textsuperscript{51} Accordingly, Justice Stevens pointed out, the Court has overruled these earlier cases,\textsuperscript{52} and is once again in line with the

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\textsuperscript{44} Id. One of the broader social or economic policies which Justice Brennan identified from National League of Cities was the states' ability to offer jobs at below the minimum wage to those who do not meet the minimum employment requirements. Id. See 426 U.S. at 848.

\textsuperscript{45} 103 S. Ct. at 1064. The Court observed that although the degree of federal intrusion in this case is not sufficient to strike down the ADEA's application to state governments under the third prong of the Hodel test, even if the third prong had been satisfied, the nature of the federal interest in this case would possibly force the Court to find it justifies state submission. Id. at 1064 n.17.

\textsuperscript{46} Id. at 1064. The Court did note, however, that when Congress exercises its powers under § 5 of the fourteenth amendment, in contrast to its commerce clause powers, Congress is not subject to the same tenth amendment constraints. Id. at 1064 n.18. See infra note 83 and accompanying text.

\textsuperscript{47} 103 S. Ct. at 1064.

\textsuperscript{48} Id. at 1064-68 (Stevens, J., concurring).

\textsuperscript{49} Id. at 1064-65 (Stevens, J., concurring). Justice Stevens maintained that the commerce clause was enacted for the very reasons that inspired the Constitution itself. Id. He then quoted several passages from Justice Rutledge which support his premise that the reason the nation was founded was to reduce trade restrictions, and the commerce clause was the answer to this problem. See W. Rutledge, A Declaration of Legal Faith 25-26 (1947).

\textsuperscript{50} See 103 S. Ct. at 1066 n.2 (Stevens, J., concurring).

\textsuperscript{51} Id. at 1066. Justice Stevens observed that the Court's interpretation of the clause has changed as our nation has evolved from a purely local, to a regional, to a national economy, until today where our economy is part of the international network. Id.

\textsuperscript{52} See id. at 1066 n.3.
framers' intent. 53

Justice Stevens observed that in enacting the ADEA, Congress was exercising its power to regulate the labor market, which, in order to be effective, must include not only the private, but also the public sector. 54 Justice Stevens conceded that Congress may not violate another constitutional limitation when acting under its commerce clause powers; however, he vehemently stated there was no such applicable limitation in the present case. 55 He further discounted the limitation which the Court set forth in National League of Cities, 56 and found no limitation on Congress' commerce clause powers in the tenth amendment, 57 or any other constitutional provision. 58 In addition to believing that the Court improperly decided National League of Cities, Justice Stevens advocated a prompt reversal of that case, in spite of his belief of the doctrine of stare decisis. 59

Justice Stevens concluded by emphasizing that his personal views on the particular legislation in this case are irrelevant to his conclusions. 60 He noted the issue is not one of personal feelings about a particular piece of legislation but instead one of constitutional power: whether Congress may prescribe employment relations in both the private and public sectors. 61 Justice Stevens stated that in order for the national government to function effectively, Congress must have this power. 62

Chief Justice Burger, in a dissenting opinion, 63 maintained that

53. Id. at 1066. Justice Stevens again stated that the framers' intent was to give Congress adequate power to enable it to function effectively. Id.

54. Id. at 1066-67 (Stevens, J., concurring). Justice Stevens reasoned that the enormous growth of the public sector has made it necessary for Congress to regulate both sectors in order to be effective. Id.

55. Id. at 1067 (Stevens, J., concurring).

56. Id. Justice Stevens explained that the limitation which the Court placed on Congress in National League of Cities was "pure judicial fiat." Id. See infra note 129 and accompanying text.

57. 103 S. Ct. at 1067 (Stevens, J., concurring). See supra note 17.

58. 103 S. Ct. at 1067 (Stevens, J., concurring).

59. Id. Justice Stevens stated that since the central purpose of the Constitution itself conflicts with the doctrine set forth in National League of Cities, that case does not deserve the usual deference which is paid to the Court's decisions. Id.

60. Id. at 1068 (Stevens, J., concurring). Justice Stevens pointed out that he believes the burdens of the ADEA will outweigh the benefits. Id. He also did not believe the legislation in National League of Cities was beneficial, as he stated in his dissent in that case. Id. He stated, however, that these inquiries are outside the realm of judicial decisions. Id.

61. Id.

62. Id.

63. Id. (Burger, C.J., dissenting). Justices Powell, Rehnquist and O'Connor joined in the Chief Justice's dissent.
the ADEA was unconstitutional as applied to the states and thus, he would uphold the district court's ruling. Chief Justice Burger found no constitutional provision, nor any judicial holding, which grants to Congress the power to govern the states in making employment decisions.

Chief Justice Burger first discussed the rationale of the commerce clause, eventually focusing on the tenth amendment as a restraint on Congress' power under the commerce clause. He then enumerated the Hodel three pronged test, which the Court has adopted in determining whether a particular piece of legislation runs afoul of the tenth amendment.

Focusing on the second prong of the test, Chief Justice Burger maintained the ADEA does address matters that are "attributes of state sovereignty." He noted that parks and recreation must surely be an attribute of state sovereignty, since it was specifically identified in National League of Cities as a traditional state activity protected by the tenth amendment. He also pointed out that when examining whether a particular piece of legislation addresses an attribute of state sovereignty, it is helpful to determine whether other states have enacted similar legislation. Chief Justice Burger emphasized that Congress, in extending the ADEA to the federal government, specifically exempted many classes of federal employ-

64. Id.
65. Id.
66. Id. at 1068-69 (Burger, C.J., dissenting). He first discussed the commerce clause, because, as he maintained, it was this power upon which Congress expressly relied in enacting the ADEA. Id. at 1068 (Burger, C.J., dissenting).
68. 103 S. Ct. at 1069 (Burger, C.J., dissenting). See supra notes 23-27 and accompanying text.
69. 103 S. Ct. at 1069 (Burger, C.J., dissenting) (quoting National League of Cities, 426 U.S. at 845). Chief Justice Burger did not discuss the first prong of the Hodel test, since he felt there was no dispute as to whether the ADEA is aimed at regulating the states as states. Id. He noted that Congress specifically extended the provisions of the ADEA to state and local governments at Pub. L. No. 93-259, § 28(a)(2), 88 Stat. 74 (1974) (current version at 29 U.S.C. § 630(b) (1976 & Supp. V 1981)). 103 S. Ct. at 1069 (Burger, C.J., dissenting).
70. 103 S. Ct. at 1069 (Burger, C.J., dissenting). See National League of Cities, 426 U.S. at 851, where the Court stated that parks and recreation was an area where the state traditionally has had control.
71. 103 S. Ct. at 1069 (Burger, C.J., dissenting). Chief Justice Burger stated that more than one half of the states had enacted mandatory retirement laws similar to Wyoming's law. See id. at 1069-70 n.2 (Burger, C.J., dissenting).
ees, such as law enforcement officers, from the coverage of the Act.\textsuperscript{72} He thus concluded that the ADEA, by defining qualifications of state employees, addresses an essential area of state sovereignty.\textsuperscript{73}

In discussing the third prong of the test, whether the ADEA impairs the state’s ability to structure integral operations, Chief Justice Burger focused on both the economic and non-economic hardships that are imposed upon the states by the enforcement of the ADEA.\textsuperscript{74} He pointed out several economic hardships which will result if the ADEA is applied to the states, such as increased employment costs,\textsuperscript{75} and then considered the non-economic hardships.\textsuperscript{76}

Chief Justice Burger did not believe that the hardships the ADEA imposes upon the states are eased by any of the exceptions to the Act.\textsuperscript{77} He further maintained that Congress, by permitting mandatory early retirement “where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business,”\textsuperscript{78} has not provided a practical solution to the problem.\textsuperscript{79} Chief Justice Burger then concluded that the excep-


\textsuperscript{73} 103 S. Ct. at 1070 (Burger, C.J., dissenting).

\textsuperscript{74} Id. at 1070-72 (Burger, C.J., dissenting).

\textsuperscript{75} Id. at 1070 (Burger, C.J., dissenting). Among the several increased employment costs which Chief Justice Burger determined will result from the application of the ADEA are increased pension costs, higher wages of workers with more years, higher insurance costs, and increased disability costs of older workers. Id.

\textsuperscript{76} Id. at 1071 (Burger, C.J., dissenting). Chief Justice Burger pointed out that the workers who are the most physically capable of doing a job are not the ones who will be employed under the ADEA. Also, the incentive for promotions will be hindered since older workers will remain on the job longer, thus impeding the advancement opportunities of younger workers. Id.

\textsuperscript{77} Id. See 29 U.S.C. § 623(f)(2) (1976 & Supp. V 1981), which provides that an employer may “observe the terms of a bona fide employee benefit plan such as retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter.” Id. Chief Justice Burger contended that to fit within this exception to the Act, the states will be forced to enact new laws which will also be an increased employment cost to the states. 103 S. Ct. at 1071 (Burger, C.J., dissenting).


\textsuperscript{79} 103 S. Ct. at 1071 (Burger, C.J., dissenting). Chief Justice Burger noted that while this exception may appear to ease the burden on the state of evaluating each employee individually, the standards the courts have set for what constitutes a bona fide occupational
tions to the ADEA do not constitute an alternative method which still allows the states to structure their integral government operations.  

After concluding that the ADEA violates all three prongs of the test, Chief Justice Burger then addressed the balancing test which was introduced by Justice Blackmun in National League of Cities and continued in Hodel. He nevertheless concluded that under the commerce clause, Congress’ powers are inadequate to prevent the states from making their employment decisions when such decisions are made in a rational manner.

Chief Justice Burger then turned to a discussion of the ADEA under Congress’ powers under section five of the fourteenth amendment, which enables Congress to enact legislation under its equal protection powers. He noted that although Congress’ powers are more expansive under this section of the Constitution than under the commerce clause, Congress still may not act with total abandon. Congress may only act under the fourteenth amendment when there is an existing violation and Chief Justice Burger reasoned that no such violation existed in this case, whether committed by the Court or Congress. He thus concluded that Con-


80. 103 S. Ct. at 1072 (Burger, C.J., dissenting).
81. Id. See supra note 27 and accompanying text.
82. 103 S. Ct. at 1072 (Burger, C.J., dissenting). Chief Justice Burger noted that the EEOC argued that the federal interest in preventing arbitrary discrimination, protecting the social security system, and in establishing a free flow of commerce outweighed the state’s interest in its decision to be arbitrary. Id. Chief Justice Burger did not feel, however, the state was merely asserting its sovereign right to be arbitrary. Id. Instead, he felt the state was setting standards to meet local needs. Id. Hence, Chief Justice Burger maintained that the state’s interest in protecting its environment and citizens outweighs the federal interest. Id.

83. Id. at 1072-75 (Burger, C.J., dissenting). See U.S. CONST. amend. XIV, § 5.
84. 103 S. Ct. at 1072 (Burger, C.J., dissenting). Chief Justice Burger conceded that under § 5 of the fourteenth amendment, Congress may enact legislation affecting the states, however, the tenth amendment was not repealed when the fourteenth amendment was enacted. Id. He stated the inquiry must be made whether the fourteenth amendment permits Congress to take from the states certain local decision making powers. Id.

85. Id. at 1073 (Burger, C.J., dissenting). Chief Justice Burger pointed out that the Court has twice considered whether mandatory retirement policies violate the fourteenth amendment, in Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) and Vance v. Bradley, 440 U.S. 93 (1979), and it was decided in both instances, under a rational basis standard, that such policies do not violate the fourteenth amendment. 103 S. Ct. at 1073 (Burger, C.J., dissenting).
gress in extending the ADEA to the states did not act pursuant to Court-defined fourteenth amendment guarantees. Chief Justice Burger failed to find that Congress attempted to define constitutional law independently of the Court-defined law, in extending the ADEA. He also pointed out that even assuming Congress did have this power, he would still reject it in this case in light of the federal mandatory retirement schemes which Congress passed for federal law enforcement officers and firefighters in the very same year that they extended the ADEA to the states.

Chief Justice Burger concluded that Congress does not have the power, under the Constitution or any of its amendments, to substitute its judgment for that of the states to select the states' employees. He reasoned that Congress was not given this power since it lacks the basis for making informed decisions into local matters, for the very reason that these decisions are better left to local government. Additionally, even if Congress were able to make well informed decisions, he asserted, a uniform rule made applicable to all of the states, not taking into account the diversity of the states, would cause the states to lose their flexibility. He observed that with no flexibility, the states will not only be unable to find the best solution to their own problems, but they also will not have the benefit of learning from the experiences of other states. Chief Justice Burger concluded that it was not the framers' intent to have each state identical, with no concern for local diversity.

Justice Powell, in another dissenting opinion, began by re-

86. 103 S. Ct. at 1073 (Burger, C.J., dissenting).
87. Id. at 1073-74 (Burger, C.J., dissenting). Chief Justice Burger stated he does not believe that Congress has the power to substitute its own judgment for that of the Court's, but even if he did concede Congress could do that, he did not find that that is what Congress did in this case. Id.
89. 103 S. Ct. at 1074 (Burger, C.J., dissenting).
90. Id. at 1075 (Burger, C.J., dissenting).
91. Id. Chief Justice Burger listed several factors which bear on well informed decision-making such as diversity of occupational risks, climate, geography and demography. Id.
92. Id. Chief Justice Burger contrasted the state of Wyoming, which is large with sparsely populated areas and requires its law enforcers to be substantially more physically capable, with that of Rhode Island, which is smaller with no wilderness. Id.
93. Id.
94. Id.
95. Id. (Powell, J., dissenting). Justice Powell, who was also joined by Justice O'Connor, wrote a separate dissenting opinion "to record a personal dissent from Justice Stevens' novel view of our Nation's history." Id.
counting Justice Stevens' view of our nation's history. Justice Powell disagreed with Justice Stevens' view of the central purpose of the Constitution, and instead proposed that the framers' intent in writing the commerce clause is of minor significance in today's world.

Justice Powell discussed the Constitution itself, pointing to the provisions he contended were of greatest importance, and judged the commerce clause to be of no great significance. He further maintained that if the central mission of the constitutional convention had been the enactment of the commerce clause, the Constitution would never have been ratified.

Justice Powell then discussed the tenth amendment as an express limitation on the national government. He explained that the concepts of federalism and state sovereignty have always been prevalent and an important part of our nation's political history. He illustrated this point with several decisions which the Court has handed down in its most recent Term which express the state sovereignty principle.

96. Id. at 1075-76 (Powell, J., dissenting). Justice Powell specifically quoted from Justice Stevens' opinion concerning the framers' intent and the central purpose of the Constitution, with respect to the commerce clause. Id.

97. Id. at 1076 (Powell, J., dissenting). Justice Powell maintained that the central purpose of the constitutional convention was to create a national government within a federal system, although he admits the commerce clause was possibly a minor concern. Id.

98. Id. at 1076-77 (Powell, J., dissenting). Justice Powell considered the first three articles of the Constitution which establish the government and the system of checks and balances to be of greatest importance; he also noted that the central purpose of the Constitution is that which is set out in the preamble to the Constitution. Id.

99. Id. at 1077 (Powell, J., dissenting). Justice Powell observed the position of the commerce clause in the Constitution in art. I, § 8, and pointed out that although it was given a position of prominence, it was merely one of a long list of powers which Congress was given. Id.

100. Id.

101. Id. at 1078 (Powell, J., dissenting). Justice Powell stated that the tenth amendment was not even necessary since the concept of reserved powers in the states was clear from the Constitution itself and the structure of the federal government. Id.

102. Id. at 1078-80 (Powell, J., dissenting). Justice Powell cited many pre-civil war instances which exemplify the concept of federalism in the south. Id. at 1078-79 (Powell, J., dissenting). See 4 J. Elliot, Debates on the Federal Constitution, 528-29 (2d ed. 1863); The Works of John C. Calhoun, 1-57 (R. Cralle ed. 1859). He also premised this view on various instances which were not solely limited to the south, but also included the New England states. 103 S. Ct. at 1079-80. (Powell, J., dissenting).

103. 103 S. Ct. at 1080 (Powell, J., dissenting). Justice Powell admitted that although the concept of state sovereignty has changed over time, it has nevertheless been continually recognized. Id.

104. Id. Justice Powell pointed to the following cases: Federal Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742 (1982) (deciding whether the Public Utility Regulatory Policies Act was an invasion of state sovereignty); United Transp. Union v. Long Island
Justice Powell concluded that all of these factors lead to the conclusion that the principles of federalism have always been recognized as an important part of our government, with the reserved powers of the states limiting Congress’ powers under the commerce clause.\textsuperscript{106} Finally, Justice Powell expressed his view that under Justice Stevens’ concept of the commerce clause and its importance over state sovereignty, there would be no state function “however sovereign—that could not be preempted.”\textsuperscript{106}

The commerce clause power of Congress has long been recognized by the Court as broad, although not without limits.\textsuperscript{107} In \textit{National League of Cities v. Usery},\textsuperscript{108} the Court held, for the first time since 1936,\textsuperscript{109} that a congressional enactment under the commerce clause power unconstitutionally infringed upon state sovereignty.\textsuperscript{110} This is not to say this conflict has never been debated by the Court; to the contrary, for many years prior to \textit{National League of Cities}, the Court has juggled this issue.\textsuperscript{111}

In \textit{Coyle v. Smith},\textsuperscript{112} a 1911 decision, the Court held that a congressional enactment was an unconstitutional usurpation of state sovereignty.\textsuperscript{113} Again in 1936, in \textit{United States v. California},\textsuperscript{114} the


105. 103 S. Ct. at 1080-81 (Powell, J., dissenting). Justice Powell still considered the commerce clause to be vital to our national government, but only as one provision in our federal system. \textit{Id.} at 1081 n.13 (Powell, J., dissenting).

106. \textit{Id.} at 1081 (Powell, J., dissenting).

107. In Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824), in discussing the commerce power of Congress, Chief Justice Marshall stated: “It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. 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 are prescribed in the Constitution.” \textit{Id.} at 196.


110. 426 U.S. at 842. The Court has held that other constitutional amendments have been violated by Congress’ otherwise valid exercise of its commerce clause powers. \textit{See Leary v. United States}, 395 U.S. 6 (1969) (involving the due process clause of the fifth amendment); \textit{United States v. Jackson}, 390 U.S. 570 (1968) (right to trial by jury which is contained in the sixth amendment).

111. \textit{See infra} notes 112-128 and accompanying text.

112. 221 U.S. 559 (1911).

113. \textit{Id.} at 565-68. In \textit{Coyle}, the federal statute involved was the Enabling Act, which conditioned Oklahoma’s admittance to the union upon its choice of its own local seat of government, which the Court held was an unconstitutional infringement within “essentially and peculiarly state powers.” \textit{Id.} at 565.
Court inferred that there was some difference in congressional regulation of a state when it is engaged in sovereign functions, as opposed to when the state is acting as a private competitor, thus leaving open the question of whether Congress may regulate the states in areas of state sovereignty.\textsuperscript{118} The Court has also recognized limitations on Congress' power to tax the state where the activity under question involves an area of state sovereignty.\textsuperscript{118}

In \textit{Maryland v. Wirtz},\textsuperscript{117} the Court took a strong stance in refusing to recognize any limits on Congress' powers to regulate the states, regardless of whether the activity involved was in an area of state sovereignty.\textsuperscript{118} Although the majority of the Court in \textit{Wirtz} found no limitations upon Congress' power, the issue of state sovereignty was kept alive in a dissent by Justice Douglas, in which

\begin{enumerate}
\item \textsuperscript{114} 297 U.S. 175 (1936).
\item \textsuperscript{115} \textit{Id.} at 183-84. In \textit{United States v. California}, Congress was regulating state-owned railroads. \textit{Id.} at 180. In \textit{National League of Cities}, Justice Rehnquist specifically noted that the holding in \textit{United States v. California} was consistent with the Court's holding, since the activity in \textit{United States v. California} was not in an area of integral state operations. 426 U.S. at 854 & n.18. While Justice Rehnquist believed the holding was consistent with \textit{National League of Cities}, he did point out that some of the language from \textit{United States v. California}, which was quoted in the \textit{National League of Cities} opinion, was inconsistent with the holding. \textit{Id.}
\item \textsuperscript{116} In \textit{New York v. United States}, 326 U.S. 572 (1946), the Court considered the constitutionality of a federal tax on mineral water which was being sold by the State of New York. In upholding the tax, the Court stated:

\begin{quote}
A state may, like a private individual, own real property and receive income. But in view of our former decisions, we could hardly say that a general non-discriminatory real estate tax (apportioned), or an income tax laid upon citizens and states alike could be constitutionally applied to the State's capital, its statehouse, its public school houses, public parks, or its revenues from taxes on school lands, even though all real property and all income of the citizen is taxed.
\end{quote}

\textit{Id.} at 587-88.

Although in \textit{National League of Cities}, Justice Rehnquist cited \textit{New York v. United States} as controlling, 426 U.S. at 843-44, Justice Brennan maintained that the Court based its decision on the principle of implied immunity of the states and the federal government from taxation by each other, not on Congress' restraints on its commerce clause powers by virtue of state sovereignty. \textit{Id.} at 863-64 (Brennan, J., dissenting).
\item \textsuperscript{117} 392 U.S. 183 (1968). The issue was whether the \textit{Fair Labor Standards Act} (FLSA), which imposed minimum wages and overtime pay requirements, could constitutionally be applied to schools and hospitals which were run by the state. \textit{Id.} at 186-87.
\item \textsuperscript{118} \textit{Id.} at 195-99. The \textit{Wirtz} Court quoted the following language from the \textit{United States v. California} opinion which it felt was controlling:

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

Justice Stewart concurred.\textsuperscript{119} Citing a long line of state sovereignty cases,\textsuperscript{120} Justice Douglas concluded that if the sovereign power of the state could be infringed upon to such a degree, "the National Government could devour the essentials of state sovereignty, though that sovereignty is attested by the Tenth Amendment."\textsuperscript{121}

Seven years later, however, and only one year before \textit{National League of Cities} was decided, a majority of the Court recognized in \textit{Fry v. United States}\textsuperscript{122} that the tenth amendment does limit Congress in exercising its commerce clause powers.\textsuperscript{123} The Court upheld the legislation in \textit{Fry} as constitutional,\textsuperscript{124} but pointed out that the tenth amendment is not without significance.\textsuperscript{125} "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."\textsuperscript{126} The Court held that the legislation involved in \textit{Fry} was even less intrusive than was the legislation in \textit{Wirtz}, and balanced many factors in concluding the benefits of the federal legislation were significant.\textsuperscript{127} It should be noted that Justice Rehnquist dissented in \textit{Fry}, one year before writing the majority opinion in \textit{National League of Cities}.\textsuperscript{128}

In \textit{National League of Cities}, the Court finally affirmed that when acting under its commerce clause powers, Congress is precluded from infringing upon state and local governments in areas of traditional state functions which impair the states' ability to structure integral operations.\textsuperscript{129} The legislation involved was the Fair Labor Standards Act (FLSA),\textsuperscript{130} which was amended in 1974 to apply to state and local governments, and imposed upon them

\begin{thebibliography}{130}
\bibitem{119} 392 U.S. at 201-05 (Douglas, J., dissenting).
\bibitem{121} 392 U.S. at 205 (Douglas, J., dissenting).
\bibitem{122} 421 U.S. 542 (1975).
\bibitem{123} \textit{Id.} at 547 n.7.
\bibitem{124} \textit{Id.} at 548.
\bibitem{125} \textit{Id.} at 547 n.7.
\bibitem{126} \textit{Id.} at 547-48 & n.7. The Court still held that the legislation in this case did not invade state sovereignty to an impermissible degree. \textit{Id.} at 548.
\bibitem{127} \textit{Id.} at 548.
\bibitem{128} See \textit{id.} at 549 (Rehnquist, J., dissenting).
\bibitem{129} 426 U.S. 833 (1976).
\end{thebibliography}
maximum hour and minimum wage provisions.\textsuperscript{131}

As noted, Justice Rehnquist, speaking for the Court,\textsuperscript{133} stated the issue was not whether the FLSA was not within Congress' commerce clause powers, but whether it was constitutional as applied to the states.\textsuperscript{132} The Court found that this legislation was within an area of state sovereignty,\textsuperscript{134} and then examined whether these decisions which Congress has taken away from the states are “functions essential to separate and independent existence.”\textsuperscript{135} In making this determination, Justice Rehnquist discussed the economic\textsuperscript{136} and non-economic\textsuperscript{137} hardships which the states will suffer by their adherence to the FLSA.\textsuperscript{138} Justice Rehnquist then concluded that the extension of the FLSA to the states is not within Congress' power under the commerce clause, since it “directly displaced the states' freedom to structure integral operations in areas of traditional governmental functions.”\textsuperscript{139} The Court also expressly overruled \textit{Maryland v. Wirtz},\textsuperscript{140} but maintained that \textit{Fry v. United States}\textsuperscript{141} was consistent with its present holding.\textsuperscript{142}

\begin{itemize}
  \item \textsuperscript{132} 426 U.S. 833 (1976). Justice Blackmun filed a concurring opinion; Justice Brennan filed a dissenting opinion in which Justices White and Marshall joined; Justice Stevens filed a separate dissenting opinion.
  \item \textsuperscript{133} \textit{Id.} at 842.
  \item \textsuperscript{134} \textit{Id.} at 845. The Court maintained that determining minimum wages and maximum hours of the state's employees was unquestionably an attribute of state sovereignty, although the Court gave no justification or reasoning for this conclusion. \textit{Id.}
  \item \textsuperscript{135} \textit{Id.}
  \item \textsuperscript{136} \textit{Id.} at 845-46. He noted the increased costs in essential police and fire protection, citing the actual amounts several states had predicted their increases would be. \textit{Id.} Justice Rehnquist stated, “[j]udged solely in terms of increased costs in dollars, the FLSA had a significant impact on the functioning of the governmental bodies involved.” \textit{Id.} at 846.
  \item \textsuperscript{137} \textit{Id.} at 846-51. Non-economic hardships which the Court noted included curtailment of affirmative action programs for women in law enforcement, loss of discretion in hiring part-time employees and those with less than minimum employment requirements, changes in overtime policies and changes in usage of volunteers in performing certain functions. \textit{Id.} Justice Rehnquist stated “quite apart from the substantial costs imposed upon the states and their political subdivisions, the Act displaces state policies regarding the manner in which they will structure delivery of those governmental services which their citizens require.” \textit{Id.} at 847.
  \item \textsuperscript{138} \textit{Id.} at 845-51.
  \item \textsuperscript{139} \textit{Id.} at 852.
  \item \textsuperscript{140} 392 U.S. 183 (1968). The Court in \textit{Wirtz} had held that there was no limitation on Congress in regulating the state, even in areas of state sovereignty. \textit{Id.} at 195. See supra notes 117-121 and accompanying text. The Court in \textit{National League of Cities} overruled this since it held the states as states are to be treated differently than private individuals. 426 U.S. at 854.
  \item \textsuperscript{141} 421 U.S. 541 (1975).
  \item \textsuperscript{142} 426 U.S. at 852-53. The Court maintained that since the legislation in \textit{Fry} was
Justice Blackmun in a concurring opinion, while noting the magnitude of the Court’s decision, adopted a balancing approach between the state and federal governments. Justice Brennan wrote a dissenting opinion, joined by Justices White and Marshall, and asserted a considerably stronger position than the position he took in EEOC v. Wyoming. Justice Brennan maintained in National League of Cities that the majority was merely unhappy with Congress’ judgment in extending the FLSA to the states. After recounting a history of the cases which have evolved in this area, Justice Brennan concluded: “I cannot recall another instance in this Court’s history when the reasoning of so many decisions covering so long of a span of time has been discarded in such a roughshod manner.” Justice Brennan also observed that the decision not only restructured the relationship between the federal government and the states, but also the role of the federal judiciary, in allowing the Court to disturb Congress’ findings. Justice Stevens also dissented in National League of Cities, recognizing no limitation upon Congress’ power over the labor market, irrespective of his personal views with regards to this particular legislation.

Since National League of Cities, the Court has had several occasions to reconsider the restriction placed upon Congress’ commerce clause power by the tenth amendment. In Hodel v. Virginia Surface Mining & Reclamation Association, Justice Marshall set out a three-pronged test for determining whether a federal regulation runs afoul of the tenth amendment. The Court found that the legislation involved in Hodel did not meet the test be-

143. 426 U.S. at 856 (Blackmun, J., concurring). Justice Blackmun joined the majority opinion, but interpreted the majority’s decision as allowing Congress to enact legislation in a response to federal problems which outweigh the state interest in certain areas, such as environmental protection. *Id.*

144. *Id.* at 856 (Brennan, J., dissenting).

145. *See infra* notes 158-165 and accompanying text.

146. 426 U.S. at 871-72 (Brennan, J., dissenting).

147. *Id.*

148. *Id.* at 875-76 (Brennan, J., dissenting). Justice Brennan maintained that the only role the Court should have in this matter should be to examine whether Congress made a reasonable judgment into what is “commerce.” *Id.* at 876 (Brennan, J., dissenting).

149. *Id.* at 880-81 (Stevens, J., dissenting).

150. *See infra* notes 151-167 and accompanying text.


152. *Id.* at 287-88. *See supra* notes 23-27 and accompanying text.

cause it did not regulate the states as states, but merely as private individuals.\textsuperscript{154} The \textit{Hodel} Court also noted that even if satisfying each of the three prongs of the test does not insure that the regulation will be struck down, there will be cases where the "nature of the federal interest advanced may be such that it justifies state submission."\textsuperscript{156}

Since \textit{Hodel}, the Court has applied the three-pronged test to federal regulations, but the Court has never held that Congress has exceeded its commerce clause power because of tenth amendment constraints.\textsuperscript{156} \textit{Hodel}, however, has kept alive the principles of \textit{National League of Cities}, and although no legislation has been found to violate this doctrine, the Court has left open the door for such a finding to be made. \textit{EEOC v. Wyoming} did not prove to be the case, although some commentators thought the Court would expand this doctrine.\textsuperscript{157}

The Court in \textit{EEOC v. Wyoming} had before it the opportunity either to reverse the district court's decision and overrule the principles which had been set forth in \textit{National League of Cities}, or by affirming the decision, recognize \textit{National League of Cities} as a firm limitation on Congress' power under the commerce clause, thus clarifying that decision's importance. The Court chose neither of these alternatives, however, and instead adopted a compromised position. The Court recognized \textit{National League of Cities} as controlling, but distinguished \textit{EEOC v. Wyoming} on a factual basis.\textsuperscript{158}

\textsuperscript{154} 452 U.S. at 288. The provisions of the legislation governed only the activities of private coal mine operators. \textit{Id.}

\textsuperscript{155} \textit{Id.} at 288 n.29. Justice Marshall seems to have adopted the balancing test set forth by Justice Blackmun in \textit{National League of Cities}. See 426 U.S. at 852-53 (Blackmun, J., concurring).

\textsuperscript{156} In United Transp. Union v. Long Island R.R., 455 U.S. 678 (1982), the Court held the application of the Railway Labor Act to a state-owned railway did not interfere with the state's ability to structure integral operations, nor was it a traditional state function. \textit{Id.} at 685-86. \textit{See also} FERC v. Mississippi, 456 U.S. 742 (1982) in which the Court upheld the challenged provision, the Public Utility Regulatory Policies Act of 1978 (PURPA), Pub. L. No. 95-617, 92 Stat. 3117 (1978), as not violating the \textit{Hodel} test. \textit{Id.}

\textsuperscript{157} 103 S. Ct. 1054 (1983). \textit{See} Kilpatrick, \textit{Three Cheers For The 10th Amendment}, Pittsburgh Press, Oct. 22, 1982, at B-2, col. 3, where Mr. Kilpatrick predicted the Court would have to either overturn \textit{National League of Cities} or affirm the district court's opinion in \textit{EEOC v. Wyoming}.

\textsuperscript{158} 103 S. Ct. 1053 (1983), Justice Brennan set forth in his opinion the rulings which had emerged from \textit{National League of Cities} and \textit{Hodel}, but found that the ADEA, unlike the FLSA did not "directly impair" the State's ability to "structure integral operations in areas of traditional governmental operations." \textit{Id.} at 1062. \textit{See generally supra} notes 20-50.
Justice Brennan, in giving such deference to *National League of Cities* and conceding it to be controlling in *EEOC v. Wyoming* has changed his position significantly on the state sovereignty issue since his dissent in *National League of Cities*.\(^{159}\) Justice Stevens, on the other hand, has consistently held to his belief that regardless of the wisdom of the particular piece of legislation which is involved, the federal government has the power to regulate the labor market in the private as well as public sectors.\(^{160}\)

The dissenters in *EEOC v. Wyoming* also remained consistent with their majority opinion in *National League of Cities*, in holding both the FLSA and the ADEA unconstitutional as applied to the states.\(^{161}\) Justice Blackmun proved to be the crucial vote in upholding the legislation, unlike his position in *National League of Cities*, where he struck down Congress' attempt to extend the FLSA to the states.\(^{162}\) The determining factor that led Justice Blackmun to strike down the FLSA in *National League of Cities* and uphold the ADEA in *EEOC v. Wyoming* is difficult to identify.\(^{163}\) By recognizing *National League of Cities* as controlling, and distinguishing *EEOC v. Wyoming* on factual considerations, Justice Brennan was possibly able to include Justice Blackmun in

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\(^{159}\) In his dissent in *National League of Cities*, Justice Brennan took a firm position in stating: "[M]y Brethren do not successfully obscure today's patent usurpation of the role reserved for the political process by their purported discovery in the Constitution of a restraint derived from sovereignty of the States on Congress' exercise of the commerce power." 426 U.S. at 858. (Brennan, J., dissenting). He also asserted "[t]here is no restraint based on state sovereignty requiring or permitting judicial enforcement anywhere expressed in the Constitution; our decisions over the last century and a half have explicitly rejected the existence of any such restraint on the commerce power." Id. See supra notes 144-148 and accompanying text.

\(^{160}\) In *National League of Cities*, Justice Stevens dissented, believing the FLSA was constitutionally valid. 426 U.S. at 881. (Stevens, J., dissenting). See supra note 149 and accompanying text. In *EEOC v. Wyoming*, after an in depth discussion of the commerce clause and state sovereignty, Justice Stevens again found no limitation on Congress' commerce clause powers in the tenth amendment, nor any other constitutional provision. He also expressed his belief that *National League of Cities* was improperly decided and should be reversed. 103 S. Ct. at 1064-68 (Stevens, J., dissenting). See supra notes 48-62 and accompanying text.

\(^{161}\) In *National League of Cities*, the majority was comprised of Chief Justice Burger, Justices Stewart, Powell and Rehnquist, with Justice Blackmun concurring. 426 U.S. 833. In *EEOC v. Wyoming*, Chief Justice Burger, Justices Powell, Rehnquist and O'Connor dissented. 103 S. Ct. at 1068 (Burger, C.J., dissenting). So except for the exchange of Justice Stewart for Justice O'Connor, and Justice Blackmun switching his position, the majority in *National League of Cities* was comprised of the dissenters in *EEOC v. Wyoming*.

\(^{162}\) See supra note 143 and accompanying text.

\(^{163}\) Justice Blackmun did not write a separate opinion, but merely joined in the majority opinion in *EEOC v. Wyoming*. 
the majority, while sacrificing his earlier convictions.\footnote{164}

While the Court in \textit{EEOC v. Wyoming} distinguished the case on a factual basis from \textit{National League of Cities}, it is difficult to perceive that these differences are, as Justice Brennan stated, "sufficiently less serious than [they were] in \textit{National League of Cities} so as to make it unnecessary for us to override Congress' express choice to extend its regulatory authority to the states."\footnote{165} While an in-depth discussion of the differences in the financial effects of the FLSA and the ADEA on the states' ability to structure integral operations is beyond the scope of this analysis,\footnote{166} looking to the non-economic hardships, it is difficult to perceive what the differences are between the effects of the two acts.\footnote{167} In his dissent in \textit{EEOC v. Wyoming}, Chief Justice Burger maintained that the non-economic hardships were critical, pointing to several factors,\footnote{168} which seem comparable to those noted by Justice Rehnquist in \textit{National League of Cities}.\footnote{169}

By overruling the district court decision in \textit{EEOC v. Wyoming} and distinguishing it on a factual basis from \textit{National League of Cities}, the Court has left the tenth amendment state sovereignty doctrine in limbo. It may appear that no case shall arise which will overturn Congress' decision to extend a particular piece of legislation to the states. By recognizing and reaffirming the principles which the Court set forth in \textit{National League of Cities} but distinguishing \textit{EEOC v. Wyoming} on a factual basis, the Court has given itself the opportunity to eventually strike down a federal regula-

\footnote{164. See \textit{supra} note 159 and accompanying text.}
\footnote{165. 103 S. Ct. at 1062.}
\footnote{166. Justice Brennan concluded that the increased costs of the ADEA will be offset by many other factors. 103 S. Ct. at 1062-63. See \textit{supra} notes 30-44 and accompanying text. For a contrary view, see Comment, \textit{The Unconstitutionality of the Age Discrimination in Employment Act}, 17 TULSA L.J. 782 (1982).}
\footnote{167. Justice Brennan maintained that in \textit{National League of Cities}, the Court was concerned with the states' "ability to use their employment relationship with their citizens as a tool for pursuing social and economic policies beyond their immediate managerial goals." 103 S. Ct. at 1063-64. See 426 U.S. at 848. In \textit{EEOC v. Wyoming}, Justice Brennan stated there had been no such similar claim, and even if there had been, it would not have been of the same magnitude as was the case in \textit{National League of Cities}. 103 S. Ct. at 1064.}
\footnote{168. See \textit{supra} note 76.}
\footnote{169. In \textit{National League of Cities}, the effect of the FLSA on the states was shown by Justice Rehnquist to have forced the states to reduce the training time of highway patrolmen, which would in turn effect the safety and welfare of state highways. 426 U.S. at 846-47. In \textit{EEOC v. Wyoming}, Chief Justice Burger pointed out "that a fire may burn out of control because the firefighters are not physically able to cope, or a criminal may escape because a law-enforcement officer's reflexes are too slow to react swiftly enough to apprehend an offender . . . ." 103 S. Ct. at 1072 (Burger, C.J. dissenting).}
tion, although it is difficult to conceive that the present Court would do so, unless Justice Blackmun once again changes his position.

The 5-4 decision in *EEOC v. Wyoming*, while keeping the state sovereignty principle alive, makes any prediction of the future of this doctrine mere speculation in light of the likelihood that the composition of the Court may soon change. As it stands now, the Court has overruled the district court's decision in *EEOC v. Wyoming*, which had appeared to intrude upon state sovereignty to a larger degree than any past cases which the Court has considered since *National League of Cities*.170 Although with this decision the Court has firmly entrenched the state sovereignty doctrine in our constitutional law, it seems the doctrine has once again taken a position similar to the pre-*National League of Cities* era.171

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170. *Post-National League of Cities* and pre-*EEOC v. Wyoming* cases were more easily decided by the Court. See supra notes 150-157 and accompanying text.

171. Before the Court decided *National League of Cities*, the state sovereignty issue had been raised, but usually in dissents, and not since 1936 had a federal regulation been struck down as not within Congress' commerce clause powers. See supra notes 107-128.