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Steven Scott Stephens
University of Baltimore School of Law

CONSTITUTIONAL LAW — COMMERCE POWER AUTHORIZES EXTENSION OF ADEA TO PROTECT EMPLOYEES OF STATE GOVERNMENTS. *EEOC v. Wyoming,* 103 S. Ct. 1054 (1983).

In *EEOC v. Wyoming*[1] the United States Supreme Court held that states may not arbitrarily force law enforcement officials[2] to retire at age 55. Wyoming had asserted immunity from the Age Discrimination in Employment Act (ADEA),[3] invoking the federalism doctrine enunciated in *National League of Cities v. Usery.*[4] The 1974 amendments[5] to the Fair Labor Standards Act (FLSA)[6] extended both the FLSA and the ADEA to state employment. In contrast to FLSA's wage and hour provisions stricken in *National League*,[7] ADEA does not encroach so deeply into state sovereignty as to constitute an impermissible exercise of Congress' commerce power.[8] While the ability of states to comply with ADEA without compromising the quality of their law enforcement structures is the fundamental premise of the majority's opinion,[9] it is the dissent's primary point of disagreement. *Wyoming* affects two distinct areas of the law. First, it underscores the narrowness of *National League* federalism as a limitation on the commerce power. Second, *Wyoming* casts doubt upon the validity of state mandatory retirement laws, suggesting that states develop new means for assuring the physical preparedness of their law enforcement officials.

Political and economic exigencies have caused the growth of national power for nearly two centuries.[10] In accordance with the principle of limited government,[11] courts must identify some constitutional basis for congressional action.[12] The commerce clause[13] has served to expand federal authority,[14] and nearly every exercise of that authority

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1. 103 S. Ct. 1054 (1983).
2. A Wyoming game warden who reached age 55 was retired under WYO. STAT. § 31-3-107 (1977). He complained to the EEOC, which filed suit under ADEA.
3. 29 U.S.C. §§ 621-634 (Supp. 1983).
4. 426 U.S. 833 (1976).
5. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 28(a)(4), 88 Stat. 55, 74 (1974).
6. 29 U.S.C. §§ 201-219 (Supp. 1983).
7. National League of Cities v. Usery, 426 U.S. 833 (1976).
8. EEOC v. Wyoming, 103 S. Ct. 1054, 1062 (1983).
9. The Court relied on the ability of states to maintain their policies if they demonstrated an adequate empirical justification for them. *Id. But see id.* at 1071 (Burger, C.J., dissenting).
10. *See generally* C. SWISHER, THE GROWTH OF CONSTITUTIONAL POWER IN THE UNITED STATES 77-102 (1946).
11. That the federal government may exercise only those powers delegated to it by the people was considered "universally admitted" in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819). *See* T. COOLEY, CONSTITUTIONAL LIMITATIONS 9 (1868).
12. *See* Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 282-84 (1981).
13. U.S. CONST. art. I, § 8, cl. 2.
14. *See* SWISHER, *supra* note 10, at 79-90. The commerce clause is the most expansive grant of authority to Congress. Although the taxing and spending power has a

arguably overlaps an area within the scope of state police power.[15] Since national power is constitutionally supreme,[16] states may not interfere with federal regulation of interstate commerce.[17]

Attempts to limit federal intrusion into state sovereignty have enjoyed limited success. The bulk of state sovereignty arguments were mooted in 1865.[18] In the early 1900's the Court struck several congressional acts as invading the reserved powers of the states,[19] but the immediate and practical problems created by the Depression outweighed the Court's view of constitutionalism.[20] The Court reversed itself in several decisions, holding the tenth amendment a "truism" with no substantive force of its own.[21] The commerce power contemporaneously transformed from an authority to regulate only interstate commerce[22] into an authority for dictating detailed standards to every segment of the economy.[23]

Since 1936[24] *National League*[25] has been the sole successful tenth

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similarly broad reach, *see* Buckley v. Valeo, 424 U.S. 1, 90-91 (1976); Steward Machine Co. v. Davis, 301 U.S. 548 (1937); Comment, *The Federal Conditional Spending Power: A Search For Limits,* 70 NW. U.L. REV. 293 (1975), remedies available under the commerce clause range from civil to criminal actions, and may enlist the help of private entities by providing them with statutory causes of action. *E.g.,* 15 U.S.C. §§ 1-15 (1976); 18 U.S.C. §§ 1962-1964 (1976).

15. *See, e.g.,* United States v. Turkette, 452 U.S. 576, 586-87 (1981); Carter v. Carter Coal Co., 298 U.S. 238, 294 (1936); Cushman, *The National Police Power Under the Commerce Clause of the Constitution,* 3 MINN. L. REV. 289 (1919).
16. U.S. CONST. art. VI, cl. 2.
17. States are subject to federal regulation of such details as net weight labels on flour bags. Jones v. Rath Packing Co., 430 U.S. 519 (1977). States are also barred from adopting rules that burden interstate commerce. Bibb v. Navajo Freight Lines, 359 U.S. 520 (1959) (cannot require that truck tire mudguard be a certain shape when the bulk of other jurisdictions require a different shape); Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945) (cannot unnecessarily limit train lengths).
18. The Civil War constituted a literal "enforcement" of the supremacy clause. For a discussion of the conflict's constitutional significance, see A. KELLY & W. HARBISON, THE AMERICAN CONSTITUTION 377-486 (1970).
19. *See* EEOC v. Wyoming, 103 S. Ct. 1054, 1066 n.2 (1983) (Stevens, J., concurring).
20. One scholar suggested that the invalidation of New Deal legislation was an incident of the Court's doctrinaire "laissez faire" economic policy, which resisted governmental social planning by invoking "substantive due process." E. CORWIN, CONSTITUTIONAL REVOLUTION, LTD. 30-32 (1941) [hereinafter cited as E. CORWIN, CONSTITUTIONAL REVOLUTION]; E. CORWIN, THE TWILIGHT OF THE SUPREME COURT 49-112 (1934); *cf.* Note, *Separating Myth from Reality in Federalism Decisions,* 35 VAND. L. REV. 161, 176-77 (1982).
21. *E.g.,* United States v. Darby, 312 U.S. 100, 123-24 (1941); Steward Machine Co. v. Davis, 301 U.S. 548 (1937). *See generally* E. CORWIN, CONSTITUTIONAL REVOLUTION, *supra* note 20, at 30-32 (discussing effect of the "revolution" on the tenth amendment).
22. *See* Carter v. Carter Coal Co., 298 U.S. 238, 297 (1936) (direct effect on commerce required).
23. *See* Wickard v. Filburn, 317 U.S. 111 (1942); Stern, *The Commerce Clause and the National Economy,* 59 HARV. L. REV. 645 (1939).
24. Carter v. Carter Coal Co., 298 U.S. 238 (1936).
25. National League of Cities v. Usery, 426 U.S. 833 (1976).

amendment challenge to federal commerce legislation.[26] In *National League*, Justice Rehnquist's plurality opinion drew a similarity between the tenth amendment and other provisions contained in the Bill of Rights:[27] both act as limitations on federal power and are carved from the sphere of national authority. The federal government, therefore, may not "directly impair the States' ability to structure integral operations in the area of traditional governmental functions."[28]

The imprecision of Justice Rehnquist's opinion was criticized by Justice Brennan and constitutional scholars.[29] The *National League* Court expressly reserved whether the same logic would apply to any exercise of national power,[30] thus threatening to disturb the carefully developed centralized power structure. These ominous predictions failed to materialize, however, as the Court immediately declined to establish *National League* as a broad conceptual limitation on federal authority.[31] In subsequent decisions the Court refused to extend the doctrine beyond its original scope and formulated the criteria for its applicability.[32] *Wyoming*, however, presented a challenge to another section of the same act that the Court struck in *National League.*[33] Thus, while *Wyoming* presented the strongest case yet for extension of the doctrine, the Court declined to do so.

In writing for the majority,[34] Justice Brennan recast *National League*'s import as that of a "specialized immunity doctrine"[35]

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26. Of course, the eleventh amendment does have current vitality. *See* Edelman v. Jordan, 415 U.S. 651 (1974). In addition, the commerce power's "negative implication," *see supra* note 17, does not always supersede state interests. *See* South Carolina State Highway Dep't v. Barnwell Bros., 303 U.S. 177 (1938).
27. U.S. CONST. amends. I-X.
28. EEOC v. Wyoming, 103 S. Ct. 1054, 1061 (1983). This passage is part of the current formulation of the *National League* doctrine.
29. National League of Cities v. Usery, 426 U.S. 833, 862, 875 (1976) (Brennan, J., dissenting); *see also* Gibbons, *Keynote Address—Symposium: Constitutional Adjudication and Democratic Theory,* 56 N.Y.U.L. REV. 260, 269-70 (1981) (criticizing *National League*); Michelman, *State's Rights and States' Roles: Permutations of Sovereignty in* National League of Cities v. Usery, 86 YALE L.J. 1103 (1977) (same).
30. *National League,* 426 U.S. at 852 n.17.
31. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) (states' reserved powers do not limit fourteenth amendment legislation).
32. Federal Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 764 n.28, 758-59 (1982); Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 (1981); City of Rome v. United States, 446 U.S. 156, 179 (1980); Massachusetts v. United States, 435 U.S. 444, 456 n.13 (1978); *see* Flax, *In the Wake of* National League of Cities v. Usery, *A "Derelict" Makes Waves,* 34 S.C.L. REV. 649 (1983).
33. *See supra* notes 5-7 and accompanying text.
34. In accordance with Supreme Court procedure, the senior member of the majority decides which Justice will write for the Court. R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE 8 (1978) (*quoting* Rehnquist, *Sunshine in the Third Branch,* 16 WASHBURN L.J. 559, 559-60 n.1 (1977)).
35. EEOC v. Wyoming, 103 S. Ct. 1054, 1060 (1983). Although Justice Brennan applied the test that he deplored in his *National League* dissent, *National League,* 426 U.S. at 856-80, he emasculated the conceptual basis for the *National League*

designed to require that the federal government show some minimal level of respect for state autonomy. The opinion makes clear that a federal law must intrude on state sovereignty to an extensive degree before *National League* limitations apply. Dictating to states how much they must pay their employees is going too far; requiring them to refrain from arbitrary discrimination is not far enough.[36] Furthermore, even an extreme degree of federal intrusion may be justified by an overriding national interest.[37] Congressional action will thus be invalidated only in the most narrow of circumstances.

Wyoming came to the Supreme Court directly from the district court,[38] which had granted a motion to dismiss. In this respect, the decision was neither remarkable nor difficult. The state had asserted a right to discriminate arbitrarily; it had not tried to show that mandatory retirement was necessary.[39] The Court simply held that ADEA applied, and that states must base forced retirement decisions on a more circumspect process.[40] ADEA does not ban mandatory retirement per se, but merely demands that states establish an empirical justification for these policies. The Court thus reasoned that states may therefore comply with ADEA without abandoning their admittedly essential goal of assuring physical preparedness of law enforcement officials. States may "continue to do *precisely what they are doing now*, if they can demonstrate that age is a 'bona fide occupational qualificaton' ["BFOQ"] for the job. . . ."[41]

Chief Justice Burger's dissent rejected the majority's contention that the BFOQ provision limited the ADEA's intrusion into state sovereignty.[42] In citing a United States Court of Appeals for the Fourth Circuit opinion that affords the exception a miserly interpretation,[43]

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holding. Rather than an affirmative limitation on national power akin to the Bill of Rights, the doctrine is now more analogous to a qualified affirmative defense such as an interspousal or charitable tort immunity.

36. This is the essence of the factual distinction between *Wyoming* and *National League*. *See* 3 A. LARSON, EMPLOYMENT DISCRIMINATION § 98.42, at 21-18 (1982).
37. Justice Blackmun, who provided the crucial fifth vote in both *Wyoming* and *National League*, posited a balancing approach in his *National League* concurrence. *National League,* 426 U.S. at 86 (Blackmun, J., concurring). This view has subsequently been engrafted onto Justice Rehnquist's formulation as a test to apply once the other elements have been established. Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 n.29 (1981). Since Justice Blackmun views the balancing approach as the most realistic approach to the federalism question, the future of the *National League* doctrine may well depend upon where he chooses to strike the balance.
38. EEOC v. Wyoming, 514 F. Supp. 595 (1981).
39. *Id.*
40. EEOC v. Wyoming, 103 S. Ct. 1054, 1062 (1983).
41. *Id.* (emphasis supplied).
42. *Id.* at 1071 (Burger, C.J., dissenting).
43. *Id.* at 1071-72 (citing Arritt v. Grisell, 567 F.2d 1267 (4th Cir. 1977)). *Arritt* adopted a test used in sex discrimination cases, such as Weeks v. Southern Bell Telephone & Telegraph Co., 408 F.2d 228, 235 (5th Cir. 1969).

Chief Justice Burger concluded that compliance with ADEA will directly impair the states' ability to function.[44] While the Justices agreed on the proper analytical framework,[45] they differed in their respective estimations of the practical effects of the statute.

As a constitutional matter, the inefficacy of the BFOQ defense would not necessarily invalidate the statute. A conjunctive three-prong test triggers the applicability of *National League.*[46] The first prong is satisfied since the ADEA regulates the "states as states."[47] The BFOQ exception eliminates the second prong because the challenged federal act does not directly impair the state's ability to direct its functions.[48] Thus the third inquiry, whether the act invades an indisputable attribute of state sovereignty,[49] was unnecessary. Similarly, the weighing of respective state and federal interests[50] was unnecessary to the *Wyoming* holding. Consequently, three additional alternative bases existed for denying *National League*'s applicability. First, a state's right to discriminate against its elderly employees may not be an attribute of state sovereignty. Second, the federal interest in eliminating age discrimination in employment may outweigh the state interest in forcing retirements. Third, ADEA may be supportable under the fourteenth amendment. Congress clearly intended to apply ADEA to state employment,[51] and its constitutional basis for so doing is quite strong.

The *Wyoming* Court's intention further to limit *National League* is made plain by the deliberate selection of the commerce power as an adequate basis for extending the ADEA to state employment. Several lower courts had selected the fourteenth amendment as a basis of support[52] in cases involving state discrimination against this congression-

44. EEOC v. Wyoming, 103 S. Ct. 1054, 1072 (1983).

45. In *Wyoming,* the majority and dissent both utilized the *Hodel* test. *Wyoming,* 103 S. Ct. at 1061, 1069.

46. In Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981), the Court set forth three prerequisites to a successful tenth amendment challenge to federal commerce legislation. The challenged statute must: (1) regulate the states "as states"; (2) address an indisputable attribute of state sovereignty; and (3) directly impair the state's ability to structure integral operations in areas of traditional governmental functions. *Id.* at 287-88. The textual discussion reverses the order of the latter two prongs to clarify the basis of the *Wyoming* holding. Once these elements are established, situations may remain in which the federal interest is so important that it "justifies state submission." *Id.* at 288 n.29.

47. ADEA in this case bears directly upon the manner in which the state operates its own affairs rather than on the way it regulates the affairs of its citizens. EEOC v. Wyoming, 103 S. Ct. 1054, 1061 n.10 (1983).

48. *Id.* at 1062.

49. *Id.*

50. This factor, though, may have been the unstated basis of the Court's ability to forge a majority. *See supra* note 36.

51. *See supra* note 5 and accompanying text.

52. *See, e.g.,* EEOC v. County of Calumet, 686 F.2d 1249, 1253 (7th Cir. 1982); 1 H. EGLIT, AGE DISCRIMINATION § 16.11 n.11 (1983); LARSON, *supra* note 36, § 98.42, at 21-17.

ally protected class.[53] While the commerce clause supports laws against private discrimination,[54] the power to enforce the fourteenth amendment specifically applies to discriminatory state action.[55] As the *National League* doctrine is irrelevant to fourteenth amendment legislation,[56] ADEA can thereby apply to the states without those limitations.

Prior to *Wyoming* the Supreme Court had not addressed the BFOQ issue in the context of ADEA. The *Wyoming* opinion yields scant guidance in defining that term. The test currently favored by the federal courts of appeals, borrowed from sex discrimination cases, requires that an employer demonstrate that substantially all of the class members would be unable to perform the job.[57] An alternate showing that "it is impossible or highly impractical to deal with [class members] on an individualized basis"[58] might also support the BFOQ defense. The test has proved less demanding in the context of jobs that involve public safety,[59] reflecting realizations that certain capacities do deteriorate with age and that some discrimination may be tolerated in the interest of preserving human life.[60]

An even greater accommodation of the public safety factor was presented by *Hodgson v. Greyhound Lines, Inc.*,[61] where the Seventh Circuit held that an employer need only demonstrate that it has a reasonable, factual basis for concluding that elimination of its employ-

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53. Age is not a suspect classification for equal protection purposes. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976); *see also* 1 EGLIT, *supra* note 52, §§ 2.02-2.22, 15.02-15.12 (constitutional status of age-based classifications). Although the 1974 amendments to the ADEA were not in effect when *Murgia* arose, the Court retains its view that age discrimination is not constitutionally prohibited. Vance v. Bradley, 440 U.S. 93 (1979).
54. Katzenbach v. McClung, 379 U.S. 294 (1964); *see* G. GUNTHER, CONSTITUTIONAL LAW 195-211 (1980); Choper, *Congressional Power to Expand Judicial Definitions of the Substantive Terms of the Civil War Amendments,* 67 MINN. L. REV. 299 (1982).
55. *See, e.g.,* EEOC v. County of Calumet, 686 F.2d 1249, 1253 (7th Cir. 1982); EEOC v. Elrod, 674 F.2d 601, 604-09 (7th Cir. 1982).
56. City of Rome v. United States, 446 U.S. 156, 179-80 (1980).
57. Under the *Weeks* test, an employer must show "a factual reason for believing that all or substantially all [of the class members] . . . would be unable to perform safely and efficiently the duties of the job involved." Weeks v. Southern Bell Telephone & Telegraph Co., 408 F.2d 228, 235 (5th Cir. 1969). The strictness of the test therefore depends on the demands of the position. *See* LARSON, *supra* note 36, § 100.16, at 21-52.
58. Weeks v. Southern Bell Telephone & Telegraph Co., 408 F.2d 228, 235 (5th Cir. 1969); *see also* Arritt v. Grisell, 567 F.2d 1267, 1271 (4th Cir. 1977) (applying *Weeks*).
59. See Usery v. Tamiami Trail Tours, 531 F.2d 224, 235-36 (5th Cir. 1981). *But see* Houghton v. McDonnell Douglas Corp., 553 F.2d 561 (8th Cir.), *cert. denied,* 434 U.S. 966 (1977).
60. EGLIT, *supra* note 52, § 16.29; LARSON, *supra* note 36, § 100.13, at 21-52.
61. 499 F.2d 859 (7th Cir. 1974), *cert. denied,* 419 U.S. 1122 (1975). *See generally* EGLIT, *supra* note 52, § 16.25 (discussing BFOQ tests); LARSON, *supra* note 36, § 100.14 (same); Annot., 63 A.L.R. FED. 610 (1983).

ment policy would create a "minimal increase in risk of harm."[62] Apparently only the District of Columbia Circuit follows *Greyhound.*[63]

In view of the inter-circuit conflict, the Supreme Court will likely decide the BFOQ issue.[64] Such a case will pose a dilemma for Chief Justice Burger, who will either stand by his *Wyoming* dissent and construe the provision as relatively meaningless, or revise that view and thereby lessen ADEA's intrusion into state sovereignty.[65] Since the majority emphasized the BFOQ defense[66] as a constitutional matter, they probably will give it life when it appears before them as an issue of statutory construction. The confusion that attends the meaning of the BFOQ provision was ably pointed out by the Chief Justice in his dissent,[67] but the Supreme Court will have to give the provision a meaningful interpretation.[68]

States currently have three alternatives in light of *Wyoming.* First, a state may simply replace mandatory retirement provisions with programs of individualized testing to determine competency. Second, a state may undertake studies and accumulate evidence to formulate specific legislative findings that determine the age at which it becomes unreasonable to base retention on individualized testing. Third, a state may stand fast and assert the BFOQ defense to any suits brought against it.

States can ensure compliance with ADEA by instituting a program of individualized testing across the board. Articulation of specific legislative findings regarding the effects of aging on performance of individual jobs, although a less certain method of compliance, is more practical. This approach is less burdensome on the states, and will prove more persuasive to courts than would *post hoc* rationalizations. Several courts have indicated that strong evidence is needed to support a BFOQ defense.[69] Stereotypical assumptions about the effects of aging are clearly inadequate.[70] Moreover, medical evidence will not suf-

62. Hodgson v. Greyhound Lines, Inc., 499 F.2d 859, 863 (7th Cir. 1974), *cert. denied,* 419 U.S. 1122 (1975).
63. Murnane v. American Airlines, Inc., 667 F.2d 98 (D.C. Cir. 1981), *cert. denied,* 456 U.S. 915 (1982).
64. *See* SUP. CT. R. 17.1(a).
65. Curiously, the dissent did not cite *Greyhound* or *Murnane*, nor did it note that the *Arritt* court upheld the BFOQ defense.
66. EEOC v. Wyoming, 103 S. Ct. 1054, 1062 (1983).
67. *Id.* at 1071 (Burger, C.J., dissenting).
68. The Court has denied writs of certiorari in cases that appear inconsistent with each other. *Compare* Murnane v. American Airlines, Inc., 667 F.2d 98 (D.C. Cir. 1981) (broader reading of BFOQ exception), *cert. denied,* 456 U.S. 915 (1982) *with* Johnson v. Mayor of Baltimore, 515 F. Supp. 1287 (D. Md. 1981) (exception narrowly construed), *cert. denied,* 455 U.S. 944 (1982). *See generally* James & Alaimo, *BFOQ: An Exception Becoming the Rule,* 26 CLEV. ST. L. REV. 1 (1977) (criticizing broad application of BFOQ exception).
69. *See* LARSON, *supra* note 36, § 100.12, at 21-50; *id.* § 100.13, at 21-52.
70. *See* Johnson v. Mayor of Baltimore, 515 F. Supp. 1287 (D. Md. 1981), *cert. denied,* 455 U.S. 944 (1982). *But see* Hodgson v. Greyhound Lines, Inc., 499 F.2d

fice unless it can be shown that individual testing will not uncover incapacities that might ultimately jeopardize human safety.[71]

Wyoming signals the continued constriction of the *National League* federalism doctrine. Although the fourteenth amendment has intuitive appeal as a basis for supporting ADEA's applicability to state employment, the Court held that the commerce clause authorizes ADEA's extension. It is significant, however, that the Court retained the conceptual basis of *National League* without limiting it to such a degree as to overrule it *sub silentio.* The *Wyoming* decision is consistent with this notion because the existence of the BFOQ defense renders the ADEA relatively inoffensive to state sovereignty. States remain in control of their employment policies so long as the policies survive comparison to a reasonable federal standard.

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859, 863 (7th Cir. 1974), *cert. denied,* 419 U.S. 1122 (1975). Excellent reasons for rejecting popular beliefs concerning the effects of aging are found in C. EDELMAN & I. SIEGLER, FEDERAL AGE DISCRIMINATION LAW 11-36 (1978).

71. *See* Johnson v. Mayor of Baltimore, 515 F. Supp. 1287 (D. Md. 1981), *cert. denied,* 455 U.S. 944 (1982).