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Constitutional Law—Tenth Amendment Challenges to Federal Laws, Promulgated under the Commerce Power, Which Regulate States

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CONSTITUTIONAL LAW—TENTH AMENDMENT CHALLENGES TO FEDERAL LAWS, PROMULGATED UNDER THE COMMERCE POWER, WHICH REGULATE STATES. *E.E.O.C. v. Wyoming,* 103 S. Ct. 1054 (1983).

Bill Crump, a District Game Division supervisor for the Wyoming Game and Fish Department, was forced to retire at age fifty-five under a Wyoming law.[1] Crump filed a complaint with the Equal Employment Opportunity Commission (E.E.O.C.) alleging that, in retiring him, the Wyoming Game and Fish Department had violated the Age Discrimination in Employment Act of 1967 (ADEA).[2] The E.E.O.C. filed suit against the state of Wyoming seeking declaratory relief, back pay, and liquidated damages on behalf of Mr. Crump and others similarly situated. The district court dismissed the suit upon a motion by the defendant, holding that the ADEA, as applied to the states, violated the tenth amendment.[3] The E.E.O.C. then filed a direct appeal to the United States Supreme Court.

The issues before the Court was whether the ADEA as applied to the states was precluded by the tenth amendment restraint on Congress' Commerce Clause power. The Court found that ADEA did not " 'directly impair' the State's ability to 'structure integral operations in areas of traditional government functions,' "[4] a factor which must be present for a successful tenth amendment challenge. The Court held that the extension of the ADEA to cover the states was a valid exercise of Congress' Commerce Clause authority and therefore reversed the judgment of the district court. *E.E.O.C. v. Wyoming,* 103 S. Ct. 1054 (1983).

The tenth amendment states simply, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the

1. Wyoming State Highway Patrol and Game and Fish Warden Retirement Act, WYO. STAT. § 31-3-107 (1977), provides that once a covered employee reaches age fifty-five he may continue in his job only with the approval of his employer. The Act also provides for mandatory retirement of all covered employees who reach age sixty-five.

2. 29 U.S.C. §§ 621-634 (1976 & Supp. III 1983), makes it unlawful for an employer to discriminate against any employee between the ages of forty and seventy on the basis of age, except where age is a "bona fide occupational qualification" reasonably necessary to the normal operation of the particular business.

3. E.E.O.C. v. Wyoming, 514 F. Supp. 595 (D. Wyo. 1981).

4. E.E.O.C. v. Wyoming, 103 S. Ct. 1054, 1062 (1983).

States, are reserved to the States respectively, or to the people."[5] The Commerce Clause gives Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[6] These two brief statements have generated much litigation and discussion as scholars and courts have disagreed concerning the balance between the two provisions.[7] The federal judiciary has continually monitored the expansion of congressional authority under the Commerce Clause and since the late 1930s, the courts have even upheld congressional regulation of primarily local activities if the activities have an economic impact on more than one state.[8]

In the early part of the twentieth century, the Supreme Court viewed the tenth amendment's reservation of powers to the states as placing a limit on the reach of Congress' commerce power. The 1918 case of *Hammer v. Dagenhart*[9] is representative of the Court's approach. The Court in *Hammer* held unconstitutional a law prohibiting the interstate transportation of goods produced through child labor.[10] The majority opinion stated that sustaining the law "would sanction an invasion by the Federal power of the control of a matter purely local in its character, and over which no authority had been delegated to Congress in conferring the power to regulate commerce among the states."[11] The Court during that period attempted to distinguish local matters, such as manufacturing, from the national matter of commerce.[12] However, even during that period, the Court recognized the supremacy of federal law over areas recognized as legitimately affecting interstate commerce. In *Sanitary District of Chicago v. United States,*[13] a city agency was enjoined from diverting water from a lake in excess of the amount authorized by the Secretary of War, the Court stating that "this power [of the United States to remove obstructions to interstate commerce] is superior to that of the states to provide for the

5. U.S. CONST. amend. X.

6. U.S. CONST. art. I, § 8, cl. 3.

7. *See, e.g.,* Comment, *Redefining the National League of Cities State Sovereignty Doctrine,* 129 PA. L. REV. 1460 (1981) [hereinafter cited as *Redefining*]; Lopach, *The New Federalism of the Supreme Court: Diminished Expectations of National League of Cities,* 43 MONT. L. REV. 181 (1982); Mosk, *Rediscovering the 10th Amendment,* 20 JUDGES J. No. 4, 16 (1981).

8. *Redefining, supra* note 7, at 1460.

9. 247 U.S. 251 (1918).

10. Act of Sept. 1, 1916, 39 Stat. 675, c. 432 (Comp. st. 1916).

11. 247 U.S. at 276.

12. *See* Carter v. Carter Coal Co., 298 U.S. 238 (1936); *Hammer,* 247 U.S. 251; Nagel, *Federalism as a Fundamental Value: National League of Cities in Perspective,* 1981 SUP. CT. REV. 81, 98.

13. 266 U.S. 405 (1925).

welfare or necessities of their inhabitants."[14]

As the following cases indicate, the Court initially refused to distinguish, for the purpose of determining the validity of Commerce Clause legislation, between state governmental and private commercial activity, at least where the state was performing a function normally done by the private sector.[15] The first major case testing the constitutionality of a congressional commerce power regulation of a state activity was *United States v. California*.[16] California had challenged the application of the Federal Safety Appliance Act of 1893[17] to a state-owned railroad. The Court, in holding that the Act was constitutionally applied to a state, declared that "[t]he sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution."[18] To emphasize its holding that a state-owned railroad stood on the same footing as any other railroad with regard to Congressional regulation, the Court stated that "[t]he state can no more deny the power [to regulate commerce] if its exercise has been authorized by Congress than can an individual."[19] The Court in subsequent cases consistently held that federal Commerce Clause regulations constitutionally could be applied to both state-owned and privately operated railroads.[20] In answer to a state's assertion that the tenth amendment prevented the application of the Federal Employers' Liability Act[21] to a state-owned railroad, the Court replied that "the States surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce."[22] The Court stated that "when a State leaves the sphere that is exclusively its own and enters into activities subject to congressional regulation [i.e., operation of a railroad], it subjects itself to that regulation as fully as if it were a private person or corporation."[23]

By the late 1930s, the tide had begun to turn from the restrictive view of interstate commerce expressed in cases such as *Hammer*. In *NLRB v. Jones & Laughlin Steel Corp.*,[24] the Court upheld a National

14. *Id.* at 426.
15. *Redefining, supra* note 7, at 1464.
16. 297 U.S. 175 (1936).
17. 45 U.S.C. §§ 1-7 (1982).
18. 297 U.S. at 184.
19. *Id.* at 185.
20. *See, e.g.*, Parden v. Terminal Ry. of Ala. State Docks Dept., 377 U.S. 184 (1964); California v. Taylor, 353 U.S. 553 (1957).
21. 45 U.S.C. §§ 51-60 (1982).
22. 377 U.S. at 191.
23. *Id.* at 196.
24. 301 U.S. 1 (1937).

Labor Relations Board ruling that Jones & Laughlin had engaged in unfair labor practices in violation of the National Labor Relations Act of 1935[25] by discriminating against and intimidating union members. The Court stated that "[a]lthough activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control."[26] The Court rationalized that Congress could regulate labor relations at any manufacturing plant selling its products across state lines because a work stoppage at any such plant "would have a most serious effect upon interstate commerce."[27]

In *United States v. Darby*[28] the Court specifically overruled *Hammer* and held that the Fair Labor Standards Act of 1938 (FLSA),[29] which prohibited the interstate shipment of goods produced by employees whose wages and hours did not conform to stated minimums, was a valid exercise of the commerce power. *Darby* was a major departure from prior case law which had classified manufacturing as a "local" activity not subject to federal regulation. In dismissing the state sovereignty challenge to the FLSA, the Court stated:

> The [tenth] amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers.[30]

Darby ended at least for a time the tenth amendment's use as an independent limitation on the commerce power.[31]

The FLSA was amended in 1966[32] to cover employees of state and local nursing homes, hospitals, and educational institutions. Twenty-

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25. 29 U.S.C. §§ 151-169 (1982).
26. 301 U.S. at 37.
27. *Id.* at 41.
28. 312 U.S. 100 (1941).
29. 29 U.S.C. §§ 201-219 (1982) sets the minimum wage workers must be paid and requires one-and-one-half times the worker's regular wage to be paid for each hour over 40 he works per week.
30. 312 U.S. at 124.
31. *Redefining, supra* note 7, at 1464.
32. 29 U.S.C. § 203(d) (1982).

eight states joined together in *Maryland v. Wirtz*[33] and challenged the application of the Act to states as unconstitutional because of the tenth amendment. In ruling that the amendments to the FLSA were constitutional, the Court stated, "If a State is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons [as settled in *Darby*], the State too may be forced to conform its activities to federal regulation."[34] The Court declared it would not "carve up the commerce power to protect enterprises indistinguishable in their effect on commerce from private businesses, simply because those enterprises happen to be run by the States for the benefit of their citizens."[35] The Court noted that the extension of the FLSA to hospital and educational employees was justified because of the significant impact they exert on interstate commerce due to the large amount of interstate supplies they receive.[36]

The FLSA was amended in 1974[37] to apply to virtually all state employees. In the trend-bucking and much criticized[38] case of *National League of Cities v. Usery*,[39] the Court overruled *Wirtz* and held that the extension of the FLSA to the states was an unconstitutional violation of the tenth amendment. The Court stated that "States as States stand on a quite different footing from an individual or a corporation when challenging the exercise of Congress' power to regulate commerce"[40]— a rather different view than that taken in previous cases.[41] The FLSA unconstitutionally infringed on the tenth amendment guarantee of state sovereignty because "[o]ne undoubted attribute of state sovereignty is the States' power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions, what hours those persons will work, and what compensation will be provided where these employees may be called upon to

33. 392 U.S. 183 (1968).

34. *Id.* at 197.

35. *Id.* at 198-99.

36. *Id.* at 194.

37. 29 U.S.C. § 213(a)(1) (1982).

38. *See, e.g.*, Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065, 1066 (1977); Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in National League of Cities v. Usery*, 38 YALE L.J. 1165, 1166 (1977); Nagel, *supra* note 12, at 82 (lists several other articles which have criticized *National League of Cities*).

39. 426 U.S. 833 (1976).

40. *Id.* at 854.

41. *See Wirtz*, 392 U.S. at 199; *Parden*, 377 U.S. at 197; United States v. California, 297 U.S. at 185.

work overtime."[42] The Court thus held that requiring the states to conform to the minimum wage and maximum hour provisions of the FLSA would "impermissibly interfere with the integral government functions"[43] of the states and struck down the amendment. The Court noted that the FLSA would have had both a financial impact, that of increased labor costs, and a policy-making impact, that of forcing states to cut public services or raise taxes to compensate for the increased labor costs.[44]

The Court's decision was vague concerning treatment of future federal laws affecting states. The Court implied that a direct/indirect test would be used to determine whether Congress had violated the tenth amendment — i.e., Congress could not use the commerce power "to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions [were] to be made."[45] Justice Blackmun, in his concurring opinion, suggested that a balancing approach between state and federal needs should be taken in deciding whether a federal law violated the tenth amendment.[46] Cases and commentators reviewing *National League of Cities* have considered both the direct/indirect and the balancing tests in reaching their conclusions.[47]

National League of Cities was interpreted, refined, and narrowed in *Hodel v. Virginia Surface Mining and Reclamation Association.*[48] In rejecting a tenth amendment challenge to the Surface Mining Control and Reclamation Act of 1977,[49] the Court set out a three-pronged test which must be met for a successful tenth amendment challenge to a federal law promulgated under the commerce power. The law must (1) regulate the "States as States," (2) address the matters that are indisputably "attribute[s] of state sovereignty," and (3) directly impair the state's ability to "structure integral operations in areas of traditional governmental functions."[50] However, even if all three parts of this test are met, a tenth amendment challenge is not guaranteed to

42. 426 U.S. at 845.

43. *Id.* at 851.

44. *Id.* at 846-47.

45. *Id.* at 855.

46. *Id.* at 856.

47. *See, e.g.*, Weissman, *United Transportation Union v. Long Island Rail Road: National League of Cities Derailed?*, 34 RUTGERS L. REV. 189, 205 (1981); Note, *The Unconstitutionality of the Age Discrimination in Employment Act*, 17 TULSA L.J. 782, 786-87 (1982).

48. 452 U.S. 264 (1981).

49. 30 U.S.C. §§ 1201-1328 (1982).

50. 452 U.S. at 287-88.

succeed. For even if the test is met, "[t]here are situations in which the nature of the federal interest advanced may be such that it justifies state submission."[51] Thus, while relying on *National League of Cities* to reach its decision, the Court's statements in *Hodel* tend to indicate that *National League of Cities* was limited to its facts, or those very similar, and was not a signal that the commerce power was being greatly restricted as in the days of *Hammer*.[52]

The Court had further opportunity to interpret and limit *National League of Cities* in *United Transportation Union v. Long Island Railroad Co.*[53] The Court was faced with the question of whether the Railway Labor Act (RLA),[54] which permitted strikes as a last resort tactic for settling disputes, or the Taylor Law,[55] a New York act which prohibited strikes by public employees, applied to a state-owned railroad. The Court held the Railway Labor Act controlling and turned back the argument that it came under a tenth amendment restriction to the commerce power.[56] The Court found that the RLA failed to meet the third prong of the *Hodel* test since "operation of a railroad engaged in interstate commerce is not an integral part of traditional state activities generally immune from federal regulation."[57] The cases discussed above indicate that because of the ambiguities of *National League of Cities* and the far reaching impact a liberal construction of it would have on Congress' commerce power, the few courts interpreting *National League of Cities* have been unwilling to use it as a basis for invalidating other commerce power legislation which has a different impact on state sovereignty than the FLSA.[58]

E.E.O.C. v. Wyoming was not the first challenge to state and local mandatory retirement laws or to the ADEA.[59] The Court in *E.E.O.C.*

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51. *Id.* at 288 n.29.

52. *See, e.g.*, Weissman, *supra* note 47, at 199; Note, *Constitutional Challenges to the Surface Mining Control and Reclamation Act*, 43 MONT. L. REV. 235, 242 (1982).

53. 455 U.S. 678 (1982).

54. 45 U.S.C. §§ 151-163 (1976 and Supp. V 1981).

55. N.Y. CIV. SERV. LAW §§ 200-214 (McKinney 1973 and Supp. 1980-1981).

56. 455 U.S. at 688.

57. *Id.* at 685.

58. Note, *The Constitutionality of the ADEA After Usery*, 30 ARK. L. REV. 363, 370 (1976) [hereinafter cited as *ADEA After Usery*].

59. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976), is an example. The Court in *Murgia* held that a state law providing for the mandatory retirement of uniformed police officers at age fifty [MASS. GEN. LAWS ANN. ch. 32 § 26(3)(a)(1969)], was not a violation of equal protection guaranteed by the fourteenth amendment. The Court noted that while the aged may have been subject to some discrimination, they did not constitute a suspect class for the purpose of equal protection analysis. It must be noted that the ADEA did not apply to the states when *Murgia* was litigated; therefore, the Massachusetts law was not challenged as a violation of the

v. Wyoming noted that lower courts which had passed on the constitutionality of the ADEA as applied to state and local governments had upheld the Act.[60] In *Usery v. Board of Education of Salt Lake City,*[61] the district court reasoned that *National League of Cities* required a balancing of state and federal interests and that the national interest in preventing age discrimination was "particularly significant when balanced against the defendant's nominal interest in arbitrarily discriminating in its employment decisions on the basis of age."[62] In a case from Arkansas, *Aaron v. Davis,*[63] the district court struck down a city ordinance setting mandatory retirement for fireman at age sixty-two. The court stated:

> [A]lthough the Age Discrimination [in Employment] 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.[64]

Justice Brennan, in delivering the opinion of the Court in *E.E.O.C. v. Wyoming,* noted the strong evidence brought before the Congress that age discrimination does exist and is harmful to both the nation's economy and to the older worker's well-being[65] and recognized the valid federal interest in passing the ADEA. In ruling that the ADEA could be constitutionally applied to the states, the Court cited *National League of Cities* and *Hodel* throughout its opinion and attempted to distinguish *E.E.O.C. v. Wyoming* from *National League of Cities.* However, similarities between the cases also existed, considering that the ADEA is integrated with FLSA enforcement provisions, the ADEA and FLSA are similarly rooted in the Commerce Clause, and the provisions of both Acts were extended to the states by the same 1974 amendments.[66]

Whether a federal law impermissibly directly impairs a state's sov-

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ADEA and no tenth amendment challenge to the commerce power was raised.

60. 103 S. Ct. at 1059 n.6.
61. 421 F. Supp. 718 (C.D. Utah 1976).
62. *Id.* at 720.
63. 424 F. Supp. 1238 (E.D. Ark. 1976).
64. *Id.* at 1241.
65. 103 S. Ct. at 1057-58.
66. *ADEA After Usery, supra* note 58, at 363.

ereignty depends on the magnitude of the intrusion. The Court found that, since the degree of intrusion in *E.E.O.C. v. Wyoming* was significantly less than in *National League of Cities,* Congress' regulation was a permissible exercise of the commerce power.[67] The Court also distinguished *National League of Cities* by noting that compliance with the Fair Labor Standards Act would have had a tremendous financial impact on the states while the effect of the Age Discrimination in Employment Act on a state's finances was debatable.[68] The dissenting opinion in this five to four decision disagreed with that assumption, claiming that compliance with the Act would have a noticeable financial impact.[69]

The Court used the three-pronged test set out in *Hodel* to determine whether the ADEA was an unconstitutional intrusion into state sovereignty protected by the tenth amendment.[70] The decision conceded that the ADEA regulates the "States as States" and it assumed, for the purpose of this case, that the Act addresses an "undoubted attribute to state sovereignty."[71] However, the Court found the ADEA did not "directly impair the state's ability to structure integral operations in areas of traditional government functions."[72] The Court reached this conclusion by finding that the state's purpose in passing the mandatory retirement law — assuring the physical preparedness of its game wardens to perform their duties — could still be met within the framework of the ADEA.[73] The state could still force its game wardens to retire before age seventy on an individual basis if it could be shown that age was a "bona fide occupational qualification."[74] The first dissenting opinion,

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67. 103 S. Ct. at 1062.

68. *Id.* at 1063.

69. *Id.* at 1070. The Chief Justice, with whom Justices Powell, Rehnquist, and O'Connor joined, stated:

> It is beyond dispute that the statute can give rise to increased employment costs caused by forced employment of older individuals. Since those employees tend to be at the upper end of the pay scale, the cost of their wages while they are still in the work force is greater. And since most pension plans calculate retirement benefits on the basis of maximum salary or number of years of service, pension costs are greater when an older employee retires. The employer is also forced to pay more for insuring the health of older employees because, as a group, they inevitably carry a higher-than-average risk of illnesses. [Citations omitted] Since they are — especially in law enforcement — also more prone to on-the-job injuries, it is reasonable to conclude that the employer's disability costs are increased.

Id.

70. 103 S. Ct. at 1061.

71. *Id.*

72. *Id.* at 1062.

73. *Id.*

74. *Id.*

per Justice Burger, found that the ADEA met the third prong of the *Hodel* test. The Chief Justice concluded that the Act would have a substantial financial impact on the states, since older workers are generally paid more due to job seniority,[75] and a policy impact, since promotions of qualified younger workers would be slowed because the older workers generally hold more responsible jobs.[76]

The Court thus found the application of the ADEA to the states a constitutional extension of the federal commerce power. As long as the state could justify the early retirement of one of its workers, no intrusion into its sovereignty would result; but if the state could not justify the early retirement of a worker, the intrusion into this area of its sovereignty would be allowable to satisfy a larger national goal.[77] The Chief Justice's dissent, however, denied that the retiring of unfit older workers on an individual basis was effective in actual practice because of the high standards for proving a "bona fide occupational qualification."[78]

E.E.O.C. v. Wyoming is significant because of the way it fits into the trends of cases bringing tenth amendment challenges to federal acts regulating the states, promulgated under the commerce power. Cases prior to 1976 bringing tenth amendment challenges to the commerce power were consistently resolved in favor of the commerce power. This trend continued in a fairly uniform direction until *National League of Cities v. Usery.*

In *National League of Cities,* for the first time in four decades, the Court held a congressional regulation of interstate commerce unconstitutional. Instead of following the previous line of cases, the Supreme Court abruptly overruled one of its cases, ruled the opposite way from its previous trend, and held that the tenth amendment restricted the application of a federal act promulgated under the commerce power to the states. *National League of Cities* could thus be viewed as arresting the growth of the commerce power, but its effect on later cases was unclear.

Even while it relies largely on *National League of Cities* in reaching its result, *E.E.O.C. v. Wyoming* holds similarly to the earlier line of cases in allowing the federal commerce power to prevail over a state sovereignty challenge. As did *Hodel* and other succeeding cases, *E.E.O.C. v. Wyoming* serves to limit and narrow the result of *National*

75. *Id.* at 1070.
76. *Id.* at 1071.
77. *See id.* at 1062.
78. *Id.* at 1071.

League of Cities. E.E.O.C. v. Wyoming indicates to courts looking at tenth amendment challenges to the Commerce Clause in the future that the pendulum has not necessarily swung back to upholding the challenges.

E.E.O.C. v. Wyoming is significant in its own right in that more than half the states, plus many local governments, have mandatory retirement laws that conflict with the Age Discrimination in Employment Act.[79] An Arkansas law provides for the mandatory retirement of police officers at age sixty-five.[80] If challenged under the ADEA, the Arkansas law would almost certainly be struck down. The practical impact might be limited, however, since the physical fitness required to be a police officer might be grounds for retiring many individual officers as a "bona fide occupational qualification." However, as was brought out in the dissent in *E.E.O.C. v. Wyoming,* it is often very difficult to prove that age is a "bona fide occupational qualification." The character of our work force may very well change to include a much larger component of older workers because of this decision.

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79. *Id.* at 1069 n.2.
80. ARK. STAT. ANN. § 42-455 (1977).