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Equal Employment Opportunity Commission (EEOC) v. Wyoming

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CFR with view to Note
has been 11/6

Note

RESP
Received
(over)
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NOTE

DL invalidated portions
of Age Discrimination in
Employment Act.

PRELIMINARY MEMORANDUM

November 13 Conference
List 1, Sheet 1

No. 81-554 ADX

EEOC

Appeal from DWyo (Brimmer)

v.

ok Wyoming, et al.

Federal/Civil

Timely

SUMMARY: The SG argues that the Age Discrimination in Employment Act does not violate the Tenth Amendment by including state and local governments within its coverage.

FACTS and DECISIONS BELOW: Wyoming permits the involuntary retirement of Game and Fish Department employees at age 55 and requires their retirement at 65. The Age Discrimination in Employment Act (ADEA) forbids discrimination on the basis of age

CFR w/eye to a Note

DL

against employees between the ages of 40 and 70 by requiring them to retire involuntarily. In 1974, the ADEA was amended to include state and local government employers.

After receiving a complaint from a Wyoming state employee who was forced to retire at 55 and after unsuccessfully seeking conciliation, the EEOC filed suit in DWyo. The DC found that Congress had relied only upon the Commerce Clause when it enacted the ADEA. Then, the court cited National League of Cities v. Usery, 426 U.S. 833 (1976), and held that the 1974 ADEA amendments violated the Tenth Amendment. The court was particularly perturbed by the inconsistency of the federal government imposing mandatory retirement upon some of its workers and simultaneously forbidding the states to do the same thing. Because of this inconsistency and because of the importance of the state functions of law enforcement and recreation, the DC found that the federal interest in preventing discrimination against older state employees could not outweigh the state's interest in setting age limits for its these members of its work force.

CONTENTIONS: The SG argues that Congress did indeed rely upon the Fourteenth Amendment when it enacted the 1974 ADEA amendments, because the legislative history contains references to Title VII of the 1964 Civil Rights Act and the EEOC. Every other court that has faced the issue has decided that the 1974 amendments are appropriate legislation to enforce the Fourteenth Amendment. E.g., Arritt v. Grisell, 567 F.2d 1267, 1271 (CA4 1977). See cases cited at J.S. 10. Because the 1974 amendments

are an exercise of congressional power under §5 of the Fourteenth Amendment, they cannot be invalidated by the Tenth Amendment. See City of Rome v. United States, 446 U.S. 156 (1980).

Even if Congress acted under only the Commerce Clause, the 1974 amendments are valid. National League of Cities struck down a congressional attempt to regulate the wages of state employees. The instant prohibition upon arbitrary age-based discrimination, by contrast, does not involve a fundamental employment decision essential to the separate existence of the states. Wyoming remains free to retire older employees who are unable to perform their jobs, and Wyoming has not argued that the application of the 1974 amendments would have a serious adverse impact on its budget. In this case, the federal interest in abolishing arbitrary age discrimination thus outweighs the state's interest.

DISCUSSION: The DC holding that Congress did not act under §5 of the Fourteenth Amendment conflicts with the CA4 decision and the decisions of several DC's. In addition, this case obviously presents an important federal question, the constitutionality of the 1974 ADEA amendments. The Court should call for a response, but, in the end, the Court will almost certainly note.

Call for a response, looking to note.

Of course, there is no response.

October 28, 1981

Holleman

Opn in petn

GRANT
Schlueter

OK

February 19, 1982 Conference
List 5, Sheet 6

No. 81-554

EEOC

v.

WYOMING, et al.

Motion of Parties to Dispense
with Printing the Joint
Appendix

SUMMARY: The SG on behalf of the appellant (EEOC) moves to dispense with printing an appendix. This case (jurisdiction noted Jan. 11, 1982) addresses the question of whether enforcement of the Age Discrimination in Employment Act of 1967^{1/} against local and state government employers is violative of the Tenth Amendment. The SG states that the limited facts are adequately presented in the DC's opinion which is included in the jurisdictional statement. The appellee joins in the request.

DISCUSSION: In view of the fact that the necessary factual basis is presented in readily accessible papers already on file, it seems appropriate to grant this motion.

There is no response.

1/29/82
PJC

Schlueter

1/29 U.S.C. 621 et seq.

Grant. RF

Received 9/9/82

File

job 08/28/82

In 1974 Congress extended Age Discrimination Act to State & Local Governments. Did it have authority to do this either under Commerce Clause or § 5 of 14th Amend? ~~The~~ Wyo. state law authorized retirement game & fishing officers at 55 + ~~mandatory~~ mandatory at 65.

These are "law enforcement" officers. See DC's op. 6a

Jim's views:

1. Commerce Clause. This Act, involving employment practices of sovereign states, cannot be distinguished, for purposes of Commerce Clause analysis, from the FLSA before the Court in League of Cities, Inc. Leg. history indicates Congress acted under the Commerce Clause power, as it

To: Mr. Justice Powell had in enacting FLSA.

From: Jim Unless we over-rule League of Cities (Jim would prefer), it controls.

Re: EEOC v. Wyoming et al., No. 81-554

2. Section 5 of 14th Amend

Question Presented

Did Congress have the power to extend the Age Discrimination in Employment Act of 1967 (the ADEA) to include state and local governments within its coverage?

Background

A. The Federal Statute. Because this case may well turn on whether Congress enacted the ADEA pursuant to the commerce clause or to the fourteenth amendment, a brief examination of the history of the Act is in order.

Congress first considered enacting legislation to prohibit age discrimination during the legislative process that culminated in the enactment of title VII in 1964. While Congress did not include age discrimination in the prohibitions of title VII, the Civil Rights

See P14-18
Ent. P19-
on 55

→ Pennhurst (WHR's op.) requires some affirmative showing of Congressional intent to restrict state authority under § 5. None exists. Also doubtful § 5 applies at all.

2.
Act of 1964 directed the Secretary of Labor to make a study of age discrimination in employment and of the consequences of such discrimination on the economy and individuals affected. In 1967,[?] Congress enacted the ADEA, prohibiting employers from discriminating on the basis of age against employees between the ages of forty and seventy years by, among other things, requiring them to retire involuntarily. Section 2 of the ADEA declares: "Congress...finds... that...the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce." The ADEA adopted the enforcement powers, remedies, and procedures of the Fair Labor Standards Act (FLSA), 29 U.S.C. §626(b), a commerce clause act, but many of its prohibitions resemble those in title VII.

Yes Congress first considered extending the ADEA to state and local government employers in 1972 when it extended title VII to such employers. The amendments to title VII clearly had roots in section 5 of the fourteenth amendment. See H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 19 (1971). Shortly after Congress amended title VII, Senator Bentsen proposed amending a FLSA bill to extend the ADEA, specifically noting that "principles underlying the" title VII provisions are "directly applicable to the" ADEA. 118 Cong. Rec. 15895 (1972).

The FLSA bill was not passed, however, until 1974. The House report explicitly relied upon Congress' commerce power, the introduction alone mentioning effects on "commerce" nine times. Although this statement apparently refers to the FLSA provisions, there is no additional purpose preceding the amendments relating to

the ADEA. The House report stated that the "amendment [of ADEA] is a logical extension of the committee's decision to extend FLSA coverage to Federal, State and local government employers" and interpreted Maryland v. Wirtz, 392 U.S. 183 (1968) (upholding Congress' use of the commerce power to extend coverage of the FLSA to state-operated schools and hospitals) (overruled in National League of Cities v. Usery, 426 U.S. 833 (1976)), to mean that the FLSA's coverage is clearly within the power of Congress under the commerce clause. In addition, during floor debate in the House, Representative Dent specifically relied on Wirtz when asked whether it would be constitutional to bring government workers within ADEA. See 120 Cong. Rec. 7337 (1974).

The House report also, however, deplored "'age-ism'...as [being as] great an evil in our society as discrimination based on race...." There are frequent comparisons in the legislative history of the Act between discrimination based on age and discrimination based on race, sex, religion, and national origin. The 1972 House report on the title VII extension stated: "The Constitution has recognized that it is inimical to...democratic... government...to allow...discrimination in [the] bureaucratic systems which most directly affect the...citizens. The clear intention of the...Fourteenth Amendment[] is to prohibit all forms of discrimination."

(1) Conclusion. As petr concedes, Congress clearly relied upon the commerce clause to enact the 1974 amendments. The evidence indicating that Congress relied upon the fourteenth amendment is much more sparse: nowhere in the history of the ADEA or in that of

Congress
acted under
commerce
clause

Not
clear that
it relied
on 14th Amendment

the 1974 amendments is there an explicitly stated intent to act pursuant to the fourteenth amendment. Analogy to title VII is also largely unavailing. This Court has previously examined the provisions of both title VII and the ADEA and found that, while there are "important similarities between the two statutes," there exist [✓]"significant differences" as well. See Lorillard v. Pons, 434 U.S. 575, 584 (1978). More important, the fact that Congress eschewed proposals on several occasions to incorporate the age discrimination proscription into title VII indicates, if anything, an intent not to base the ADEA amendments on section 5 rather than any oversight. On the other hand, there are enough ambiguous passages in the legislative history, and similarities with title VII, to permit a court to infer, as many lower courts have done, that Congress relied at least in part on its section 5 powers. See H. Rep. No. 95-527, pt. 1, 95th Cong., 1st Sess. 5-6 (1977) (noting that National League of Cities did not apply to laws, such as the ADEA, preventing employment discrimination).

Yes | One thing is clear: Congress did not doubt that it had under Wirtz the power to enact the amendments, and if Congress had enacted them subsequent to National League of Cities, Congress might well have acted expressly pursuant to section 5. ^{14th Amend.} It also seems clear that many congressmen viewed age discrimination as a subject matter that could properly have been included in title VII.

(2) Federal law enforcement employees. The amendments in 1974 also extended ADEA coverage to the executive branch of the federal government. 29 U.S.C. §633(a). The same Congress, however, required law enforcement officers and firefighters at the federal

level, some 40,000 employees, to "be separated from service...[when they] become[] 55 years of age or complete[] 20 years of service if then over that age." 5 U.S.C. §8335 (b). The Senate Report indicated that Congress recognized "that these occupations should be composed...of young men and women physically capable of meeting the vigorous demands which are far more taxing physically than most in the Federal Service.... Older employees in these occupations should be encouraged to retire." S. Rep. No. 948, 93d Cong., 2d Sess. 1, reprinted in [1974] U.S. Code Cong. & Admin. News 3699 (1974). See also 5 U.S.C. §8335(a) (air traffic controllers retire at age 56); id., §8335(c) (employees of Panama Canal Commission and Alaska Railroad retire at 62).

you
B. The State Statute. Resp state's game wardens are law enforcement officers, and are authorized to make arrests and enforce criminal violations of state game and fish laws. Resp state requires the retirement of full-time law enforcement officers of the game department at age 55. According to amici curiae, twenty-eight states, and many cities, counties, and towns, mandate the retirement of law enforcement personnel prior to age seventy.

Discussion

I. Commerce Clause

In National League of Cities, the Court held that the 1974 amendments to the FLSA, which extended the minimum wage and maximum hour provisions to individuals employed by the states, were unconstitutional because they "directly supplant[ed] the...choices of the States'...officials...as to how they wish to structure pay scales in state employment." 426 U.S., at 848. The Court observed

co-exist to meet Nat. League of
that the amendments sought "to regulate directly the activities of ^{City} States as public employers," id. at 841, and "withdrew from the ^{standard} States the authority to make...fundamental employment decisions....," id., at 851. Finding that "[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 [and] what hours those persons will work," id. at 845, the Court concluded that "the challenged amendments operate[d] to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions," id. at 852.

As explained in Hodel v. Virginia Surface Mining & Reclamation Association, 452 U.S. 264, 287-288 (1981), there are three conditions for establishing that congressional commerce power legislation is invalid under the tenth amendment: (1) "there must be a showing that the challenged statute regulates the 'States as States'": (2) "the federal regulation must address matters that are indisputably 'attribute[s] of state sovereignty'"; and (3) "it must be apparent that the States' compliance with the federal law would directly impair their ability 'to structure integral operations in areas of traditional governmental functions.'"

A. Regulation of States as States. It is clear, and petr concedes, that the ADEA regulates "the States qua States."

B. Indisputable attributes of state sovereignty. The tenth amendment, according to petr, prohibits Congress from regulating only those fundamental employment decisions that are essential to the independent existence of the states, and the power of state

government to discriminate arbitrarily in employment on the basis of age is not a legitimate attribute of sovereignty. The ADEA does not interfere with the states' power to prescribe reasonable qualifications for those individuals to be employed to carry out state functions or to discharge those individuals found unfit for state employment. 29 U.S.C. §623(f)(1) (providing bona fide occupational qualification exemption).

Resps contend that National League of Cities stands at least for the proposition that the establishment of employment terms for state employees is indisputably an attribute of sovereignty. Although there is no exhaustive list of what is included in the term "attributes of sovereignty," the Court observed in United Transportation Union v. Long Island Railroad, 102 S.Ct. 1349, 1354 n.11 (1982) (quoting Layfayette v. Louisiana Power & Light Co., 435 U.S. 389, 422 (1978) (Burger, C.J., concurring)): "The National League of Cities opinion focused its delineation of the 'attributes of sovereignty'...on a determination as to whether the State's interest involved 'functions essential to separate and independent existence.'" Police forces and wildlife management are traditional state functions, see National League of Cities, 426 U.S., at 851 ("employer-employee relationships in...police protection...and parks and recreation"), and the duration of the term of employment is no less essential to "independent existence" and the structuring of the police service than is the compensation to be paid.

Resps concede that the ability to discriminate arbitrarily is not an attribute of state sovereignty, maintaining that the Constitution, see Massachusetts Board of Retirement v. Murgia, 427

U.S. 307, 314 (1976) (per curiam), without the ADEA, precludes that. Rather than being arbitrary, however, the setting of a reasonable term of employment based on age for state law enforcement officers is a rational classification that receives only minimal scrutiny under the equal protection clause. See id., at 315. Rationality is proved, in part, by the fact that resps' mandatory retirement requirement for law enforcement officers is very similar to the one for federal officers.

Resps also take issue with petr's argument that the BFOQ exemption sufficiently protects state sovereignty prerogative. Reliance on the exemption turns the determination whether an attribute of state sovereignty is involved into a battle of experts that eliminates the possibility of a coherent and consistent resolution of the issue. It would seem that the retirement of law enforcement officers at ages less than 70 should be either reasonable as a BFOQ or arbitrary as age discrimination, no matter where the case may be tried or which party is able to employ the most impressive experts. Thus, the issue here is not how this issue is decided, but who decides it.

Determination of the length of employment for state law enforcement officers seems to be as much an "attribute of sovereignty" as does determination of wages for state employees. It seems difficult to conclude that ADEA does not represent an attempt by Congress to "regulate directly the activities of States as public employers," National League of Cities, 426 U.S., at 841; "directly supplant[] the considered policy choices of the States' elected officials...as to how they wish to structure" a retirement program

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for their employees, id. at 848; and "directly penalize[] the States for choosing to hire governmental employees on terms different from those which Congress has sought to impose," id. at 849.

C. Direct Impairment of Traditional Functions. Petr concedes that wildlife management is a traditional government function.

It is unclear whether the actual effect of the congressional enactment determines whether the tenth amendment is a bar to the ADEA's application to the states. The Court in National League of Cities indicated that actual impact was not determinative: "We do not believe particularized assessments of actual impact are crucial to the resolution of the issue presented.... [T]he dispositive factor is that Congress has attempted to exercise its Commerce Clause authority to prescribe minimum wages and maximum hours to be paid by the States...." 426 U.S., at 851-852. In Hodel, the Court explained: "[T]he determinative factor in [National League of Cities] was the nature of the federal action, not the ultimate economic impact on the States." 452 U.S., at 292 n.33. On the other hand, it is difficult to discuss the "nature" of the federal action, and how it affects traditional state functions, without some discussion of actual effects. What the Court has probably meant is that the National League of Cities doctrine will preclude completely certain congressional action, i.e., the ADEA, that adversely impacts on certain state functions, i.e., law enforcement, regardless of its impact on other state activities.

Petr argues that the budgetary considerations noted in National League of Cities, where federal minimum wage requirements could have forced the restructuring of entire state government departments and

required the elimination of entire functions, see 426 U.S., at 846-852, are absent in this case. Petr argues that merely requiring a state to consider the facts relevant to promulgating a mandatory retirement age does not impair the state's ability "to structure integral operations" in any sense comparable to the impairment the Court concluded would follow from the financial consequences of enforcing the FLSA provisions at issue in National League of Cities.

yes / The impact on employment conditions here, however, is certainly similar to that in National League of Cities. Petr claims back wages for the game warden, and under 29 U.S.C. §626(b), these damages are "deemed to be unpaid minimum wages or unpaid overtime compensation" under the FLSA. Such damages, presumably, cannot be assessed against a state under National League of Cities.

yes { If there is any distinction between the "nature" of the federal action in this case and that in National League of Cities, it must be with actual impact. Some economic impact seems certain. In order to comply with the ADEA, the states must either (1) prove that age is a BFOQ or (2) forestall mandatory retirement of law enforcement personnel until age 70. From the states' perspective, each alternative requires unnecessary consumption of scarce resources.

yes The availability of the BFOQ exemption is of little solace to state and local governments faced with the costs of attorneys' fees, expenses of expert consultants and witnesses, and other litigative expenses. Litigation of a BFOQ defense for all law enforcement officers in a department, for each position, or for particular personnel actions also diverts valuable law enforcement personnel

from their normal duties. Moreover, a BFOQ exemption is extremely difficult to win even when there are resources to litigate.

Compliance also has costs: *Yes*

(1) Salaries generally increase with years of service. There usually are increased costs of life insurance benefits with age. Studies have shown that increases in age correlate positively with increases in the frequency as well as the duration of health insurance claims. Law enforcement personnel are often subject to statutes defining certain occupational diseases which, if contraction results in death or disability, entitle the employee to benefits. To the extent that the likelihood of developing ailments increases with age, the state would be forced to fund a higher number of disability pensions, often paid at full salary.

(2) State inability to structure retirement schemes could retard upward mobility in law enforcement positions, thereby reducing the states' ability to recruit talented men and women for those positions and thwarting to some degree affirmative action efforts.

(3) Resps contend that the ADEA will lead to the restructuring of its retirement pension system for state law enforcement officers. The resp state presently requires accelerated retirement contributions in order to provide law officers the same benefits level as it provides for other employees, but at an earlier age. Although it may be actuarially possible to balance the fund periodically and still give law officers the opportunity to retire at 55, such a system would at least require some restructuring of the benefits program and would probably require the resp state to contribute on a periodic basis.

(4) Because of the unpredictability of actual retirement dates, personnel administrators will no longer be able as easily to fill vacancies by scheduling of merit selection and training programs.

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| (5) Finally, there is a relationship between the natural degenerative process as a person ages and the person's ability to provide effective law enforcement services. To force state and local governments to comply with the ADEA may materially affect the quality and availability of protective services that are demanded by the public, and require the state to spend more for the same level of protective service.

may be
Despite these effects upon the states, the ADEA's actual impact on the overall state governments may be more limited than the effect of the FLSA provisions at issue in National League of Cities. On the other hand, the interference is more in degree than in kind. *Yes* Because salary and pension contributions are simply different parts of one employment benefit package, it is likely that an increase in one will decrease the other, thus forcing the states to allocate its resources in a manner dictated by Congress. It would seem that the states' ability to structure its employment conditions is significantly altered by the "nature" of the federal action at issue here.

D. Balancing. The Court has indicated that even the direct impairment of traditional state functions is sometimes permissible when the federal interest outweighs the state interest. See Hodel, 452 U.S., at 288 n.29. Under this analysis, petr argues that Congress' extension of the ADEA to state governments is an appropriate exercise of its authority under the commerce clause

because the national interest in protecting individuals from age discrimination far outweighs any legitimate interest that the states may have in requiring the retirement of productive employees. In 1965, a million man-years of productive time went unused because of unemployment of workers over 45, and the total cost to the national economy was somewhere in the area of four billion dollars (1951 prices). The 1974 extension is properly viewed as reflecting congressional recognition that the private sector cannot carry the entire responsibility for providing older workers in the nation's economy with productive employment opportunities. Resps, on the other hand, argue that no overriding federal interest is presented, demonstrated by the existence of a virtually identical retirement system imposed for federal law enforcement officers and firefighters by the 1974 Congress.

If there is any balancing between the national and state interests, it must necessarily be ad hoc, but the Court's discussion in National League of Cities would indicate that police protection and parks and recreation are state services that traditionally have been left to the states. The inconsistency of Congress on age discrimination also undercuts any overriding federal interest in preventing states from exercising their powers in similar fashion.

E. Summary. Petr is essentially making extremely fine distinctions between this case and National League of Cities, and unless National League of Cities is to be limited to the minimum wage and hour provisions of the FLSA, and nothing in that case so indicates, National League of Cities should control this case. On the other hand, after Hodel, the National League of Cities test is

so flexible that almost any result, while open to criticism, could be justified. If the Court is unwilling to hold the ADEA amendments unconstitutional, thought should be given to overruling National League of Cities. The case has generated a significant amount of this Court's business since 1976, and the Hodel reformulation leaves its application unpredictable and unprincipled. *Exactly*

II. Fourteenth Amendment

Congressional power under section 5 of the fourteenth amendment is not restricted by the tenth amendment, see Hodel, 452 U.S., at 287 n.28, and as a general rule, "[t]he question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." Woods v. Miller Co., 333 U.S. 138, 144 (1948). See Katzenbach v. Morgan, 384 U.S. 641, 646-647 n.5, (1966). Cf. Fullilove v. Klutznick, 448 U.S. 448, 502 (1980) (Powell, J., concurring) ("Congress is not expected to act as though it were duty bound to find facts and make conclusions of law.").

But "recitals" point to Commerce Clause

The difficulty is that, in Pennhurst State School v. Halderman, 451 U.S. 1 (1981), the Court stated its test for "determining when Congress intends to enforce [the] guarantees [of the fourteenth amendment]": "Because such legislation imposes congressional policy on a State involuntarily, and because it often intrudes on traditional state authority, we should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment." Id., at 16 (Rehnquist, J., joined by Burger, C.J., and Stewart, Blackmun, Powell & Stevens, JJ.). The Court noted that, in cases going to Congress' power to secure

guarantees under the fourteenth amendment, such as Morgan, Oregon v. Mitchell, 400 U.S. 112 (1970), and Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), Congress "expressly articulated its intent to legislate pursuant to §5." 426 U.S., at 14. Justice White's dissent, joined by Justices Brennan and Marshall, stated: "[I]t should not be lightly assumed that Congress acted pursuant to its power under §5 in passing the [Developmentally Disabled Assistance] Act. Here, there is no conclusive basis for determining that Congress acted pursuant to §5." 451 U.S., at 35-36 (emphasis added). That "conclusive basis" must be ascertained, according to the three, by examination of the statutory language, the structure of the act in question and its relationship to other acts as evidenced by cross-references stated in the act itself, and a combination of "all objective considerations" connected with the act. Id., at 36. The concurring Justices did not expressly disapprove of the majority's "clearly stated intent" test, but merely considered it along with other factors.

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Petr argues that the principle enunciated by the Court is certainly a guide to statutory construction, but is of doubtful application in a case, such as this one, where Congress clearly intended to impose its policy on the states. The Court in Pennhurst was resolving an issue of statutory construction, not, as here, a question of congressional authority to legislate. Moreover, in citing to Morgan and Oregon, the Court stated that these cases "involved statutes which simply prohibited certain kinds of state conduct." 451 U.S., at 16. Arguably, this case is one where the

Court has suggested that closer scrutiny of congressional motive is unnecessary.

Petr's interpretation of Pennhurst is appealing but doubtful. It is difficult to argue that Pennhurst did not address, "as here, a question of congressional authority to legislate." See id., at 15 ("In discerning congressional intent, we necessarily turn to the possible sources of Congress' power to legislate.") (emphasis added). Moreover, congressional intent to impose its policy on the states is not any clearer here than in the other sections of the FLSA of 1974 struck down in National League of Cities. Finally, although "[t]he case for inferring intent is at its weakest," id., at 16, with statutes creating an affirmative obligation, nowhere in Pennhurst did the Court suggest that it is unnecessary to find explicit intent where a statute merely prohibits conduct.

Assuming that the Court is bound by the Pennhurst "nonimplication" rule, petr alternatively argues that, although the legislative history of the ADEA is not extensive, what evidence there is supports the conclusion that Congress understood that the 1974 extension was supported by both the commerce clause and section 5. Even the less demanding "conclusive basis" test, however, is not easily met in the face of the ADEA's commerce-related definitions; Congress' declaration of age discrimination creating a burden on commerce; the interrelationship between the ADEA and the FLSA; Congress' rejection of the proposal to incorporate the 1974 ADEA amendments into title VII of the Civil Rights Act; and the absence of any congressional statement to the effect that its fourteenth amendment power was being used in enacting the ADEA.

Assuming that Congress did act pursuant to section 5, it "may only 'enforce' the provisions of the amendments and may do so only by 'appropriate legislation.'" Oregon, 400 U.S., at 128 (Black, J.). In Morgan, 384 U.S., at 651, the Court held that, under section 5, legislation is "appropriate legislation" to enforce the provisions of the fourteenth amendment if it is (1) a measure to enforce rights protected by the fourteenth amendment; (2) "plainly adapted to that end"; and (3) consistent with "the letter and the spirit of the constitution."

(1) Substantive Rights. Petr argues that the ADEA enforces rights granted by the fourteenth amendment by protecting individuals against adverse employment decisions based upon an arbitrary classification. Like arbitrary classifications based on race, sex, or religion, classifications based on age impermissibly disadvantage individuals by substituting stereotyped class-based assumptions for determinations based on individual merit. Nevertheless, it is difficult to equate age discrimination with race or sex discrimination. Race and sex discrimination results in employment because of feelings about a person entirely unrelated to his abilities to do a job. Age, however, is at some point inherently related to ability. *Of course*

In Murgia, the Court held that a state statute mandating retirement of a state police officer at 50 years rationally furthered the state's purpose of assuring the physical fitness of its state police officers and "clearly meets the requirements of the Equal Protection Clause." 427 U.S., at 314. The Court reviewed the statute under its rationality test. It is difficult to see why

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resps' statutes would not similarly withstand challenge on equal protection grounds. See also Vance v. Bradley, 440 U.S. 93 (1979) (holding that a requirement of retirement of Foreign Service personnel at age 60 was not violative of fifth amendment equal protection); Oregon, supra (finding that Congress did not have the power to reduce the voting age for state elections from 21 to 18).

Indeed, petr does not argue that the equal protection clause prohibits resps' mandatory retirement age. Rather, petr contends that a mandatory retirement statute that does not rationally further any legitimate state purpose violates the equal protection clause even under the relaxed standard, see Logan v. Zimmerman Brush Co., 102 S.Ct. 1148, 1162 (1982) (Powell, J., concurring in the judgment), and the ADEA simply requires a closer fit between the state's goals and the means used to reach them. Such an argument, however, must implicitly assume that Congress can consider any discrimination a proper subject for congressional action under section 5. That interpretation broadens considerably the powers of Congress, see Oregon, 400 U.S., at 126-127 (Black, J.) ("Nor was the Enforcement Clause of the Fourteenth Amendment intended to permit Congress to prohibit every discrimination between groups of people.), and makes any tenth amendment limitation on the commerce clause superfluous, id., at 128 ("Congress may not by legislation repeal other provisions of the Constitution [and] the power granted to Congress was not intended to strip the States of their power to govern themselves.").

(2) "Adapted to that end." It is thus clear that ADEA does not prohibit only those employer practices that would be found

irrational in a constitutional sense. It is arguable that, to the extent that ADEA reaches conduct that may not be unconstitutional, it is nevertheless "appropriate" legislation because it was adopted to minimize the risk of unconstitutional discrimination by: (1) shifting to the public employer the burden of justifying its mandatory retirement rule and by requiring a higher standard of justification than would be necessary to sustain the rule under the fourteenth amendment; (2) eliminating some defenses that would be used as a subterfuge for stereotyped judgments regarding older workers; and (3) prohibiting mandatory retirement, thus reducing the risk that older workers would suffer arbitrary hiring discrimination when forced into the job market.

Resps argue that, rather than reducing the risk of unconstitutional discrimination or remedying past discrimination, Congress has redefined the appropriate tests for equal protection analyses, and that the ADEA does not "plainly enforce" the provisions of the fourteenth amendment. It is difficult to conclude otherwise. See Morgan, 384 U.S., at 668 (Harlan, J., dissenting). On the other hand, if Congress can "enforce" the right here, it has probably "adapted means to that end."

(3) "Consistent with the Spirit and Letter." Morgan stated that "§5 grants Congress no power to restrict, abrogate, or dilute these guarantees." 384 U.S., at 651 n.10 (Black, J.). The ADEA, by limiting the protected class to employees who are between the ages of 40 and 70 years, in effect permits the states to discriminate against employees who are younger than 40 or older than 70. Resps

argue that the ADEA itself violates equal protection by creating a class based solely on age.

Clearly, the ADEA classification itself does not violate the Constitution. Nevertheless, petr's argument is unsettling in that it asks the Court to allow Congress to give "substance" to section 1 rights and then to defer to Congress' arbitrary line-drawing. In any case, the fact that Congress created a class of protected individuals is an implicit recognition that, while arbitrary age discrimination may be evil, discrimination based upon age is not the same as discrimination based upon race or sex. It is also difficult to contend that ADEA is remedying a critical national problem or that there is any supervening national interest justifying application of the federal regulation in place of states' laws when the federal government is unwilling to follow its own dictates.

Summary

1. This case and National League of Cities are too similar to distinguish in a principled manner. National League of Cities should either control or be overruled. I recommend overruling. *No*

2. Pennhurst apparently requires some affirmative showing by Congress that it relied on its fourteenth amendment powers before this Court will infer that Congress acted pursuant to section 5. That basis is not present. In any case, it is not at all clear that the ADEA is "appropriate legislation" pursuant to section 5. I recommend avoiding the difficult fourteenth amendment issue if at all possible. *(But see Jim's memo of 9/30)*

81-554 EEOC v. Wyoming

The SG's Basic Argument (Commerce Power):

The SG's brief states:

"The power of state government to discriminate arbitrarily in employment on the basis of age is not a legitimate attribute of sovereignty, comparable to the power of the state to make fundamental employment decisions concerning minimum wages and hours".

Putting it differently, the SG says "arbitrary discrimination is not an attribute of state sovereignty" *** It does not interfere with the state's power to prescribe reasonable qualifications . . . or to discharge individuals found unfit" (p. 10).

Respondent's Answers:

The Act does interfere with the same state sovereignty functions in the same way that the FELA Act did: it affects numerous decisions with respect to employment, and arguably may be an even greater intrusion on the state's authority. For example:

1. Increased costs. Salaries generally increased with years of service. Fringe benefits also continue to increase (e.g., cost of group life, health and accident insurance). More persons would be retired because of disability, often at full salary.

2. Retirement plans. Structuring retirement plans will be more difficult as well as expensive.

3. Handicaps recruiting of talented young people. Upward mobility to positions of leadership and higher salaries will be affected.

4. Natural degenerative process. As persons age, there is some natural degeneration physically and sometimes mentally. Identifying this to the point of justifying termination of employment will be impossible in most situations.

5. Bona fide occupational qualification. The SG says the Act will not interfere with the "state's power to proscribe reasonable qualifications" or "to discharge those individuals found unfit". The SG cites the provision that an employer (the state) need not comply "where age is a bona fide occupational qualification (BFOQ)". But this usually requires litigation.

6. Litigation. Experience under Title VII demonstrates that resulting litigation has been a burden. The threat of it has to be considered with respect to every employment decision: hiring, promoting, and firing. Litigation is expensive, and also distracts key personnel from normal duties.

* * *

In sum, the states make a rather strong case for arguing that there is no distinction on principle between the effect on state sovereignty of the Age and

Discrimination Act and FELA. I am inclined to agree (for Commerce Clause analysis) that National League of Cities either must be followed here or overruled. It has been undercut to some extent by some by the language in Hodel, but this does not justify overruling it.

The SG also argues that §5 of the Fourteenth Amendment empowers Congress to impose this burden on the states. But the legislative history lends no support to Congressional reliance on that Amendment. And in Pennhurst State School v. Halderman (WHR), the opinion suggests that we do not assume or imply Congressional reliance on this Amendment. 451 U.S., at 16.

L.F.P., Jr.

MEMORANDUM

TO: Jim Browning

DATE: Sept. 22, 1982

FROM: Lewis F. Powell, Jr.

81-554 EEOC v. Wyoming

Thank you for your most helpful bench memo.

In taking a second look at the briefs, I am impressed by the fact that the parties debate whether the Age Discrimination Act "directly impairs [the ability of states] to structure integral operations in areas of traditional functions" (see Hodel).

In your memorandum you mention, perceptively, that there is a substantial difference between the unfettered right to require mandatory retirement at age 65 (for example), and the necessity to make individual judgments with respect to every employee over 65 whom the state wishes to retire. Apart from other negatives, each of these decisions is made in the shadow of possible litigation. In view of the threat of litigation, demonstrated to be a reality in thousands of cases since Title VII was enacted, a state government in particular usually would choose to retain a marginally incompetent employee rather than separate him or her before age 70.

It would be interesting - if the information is readily available - to know how many suits have been brought against states under the Age Discrimination Act. Would Lexis provide this information? At best, it would reflect

only cases of record that have gone to judgment - the tip of the iceberg.

I do not suggest that the number of suits would be more than another interesting item of information. In this connection, it may be that the annual report of the Administrative Office (full of statistics) would show the total number of Title VII cases filed in federal court in a fiscal year. We have the 1981 fiscal year report in my Chambers (I think Mark may have it).

L.F.P., Jr.

ss

The SG's Basic Argument (Commerce Power):

The SG's brief states:

"The power of state government to discriminate arbitrarily in employment on the basis of age is not a legitimate attribute of sovereignty, comparable to the power of the state to make fundamental employment decisions concerning minimum wages and hours".

Putting it differently, the SG says "arbitrary discrimination is not an attribute of state sovereignty" ***

It does not interfere with the state's power to prescribe reasonable qualifications . . . or to discharge individuals found unfit" (p. 10).

But it does.

Reqs the Q - not all retirement of game wardens at 55 are "arbitrary"

Respondent's Answers:

The Act does interfere with the same state sovereignty functions in the same way that the FELA Act did: it affects numerous decisions with respect to employment, and arguably may be an even greater intrusion on the state's authority. For example:

1. Increased costs. Salaries generally increased with years of service. Fringe benefits also continue to increase (e.g., cost of group life, health and accident insurance). More persons would be retired because of disability, often at full salary.

2. ✓ Retirement plans. Structuring retirement plans will be more difficult as well as expensive.

3. ✓ Handicaps recruiting of talented young people. Upward mobility to positions of leadership and higher salaries will be affected.

4. ✓ Natural degenerative process. As persons age, there is some natural degeneration physically and sometimes mentally. Identifying this to the point of justifying termination of employment will be impossible in most situations.

5. Bona fide occupational qualification. The SG says the Act will not interfere with the "state's power to proscribe reasonable qualifications" or "to discharge those individuals found unfit". The SG cites the provision that an employer (the state) need not comply "where age is a bona fide occupational qualification (BFOQ)". But this usually requires litigation.

6. Litigation. Experience under Title VII demonstrates that resulting litigation has been a burden. The threat of it has to be considered with respect to every employment decision: hiring, promoting, and firing. Litigation is expensive, and also distracts key personnel from normal duties.

* * *

In sum, the states make a rather strong case for arguing that there is no distinction on principle between the effect on state sovereignty of the Age and

Discrimination Act and FEHA. I am inclined to agree (for Commerce Clause analysis) that National League of Cities either must be followed here or overruled. It has been undercut to some extent by some by the language in Hodel, but this does not justify overruling it.

The SG also argues that §5 of the Fourteenth Amendment empowers Congress to impose this burden on the states. But the legislative history lends no support to Congressional reliance on that Amendment. And in Pennhurst State School v. Halderman (WHR), the opinion suggests that we do not assume or imply Congressional reliance on this Amendment. 451 U.S., at 16.

L.F.P., Jr.

SS

*See Jim's excellent discussion
of 55 case: p 14-18 his B/memo.*

separate the controller is not effective, without the consent of the controller, until the last day of the month in which the 60-day notice expires.

(b) A law enforcement officer or a firefighter who is otherwise eligible for immediate retirement under section 8336(c) of this title shall be separated from the service on the last day of the month in which he becomes 55 years of age or completes 20 years of service if then over that age. The head of the agency, when in his judgment the public interest so requires, may exempt such an employee from automatic separation under this subsection until that employee becomes 60 years of age. The employing office shall notify the employee in writing of the date of separation at least 60 days in advance thereof. Action to separate the employee is not effective, without the consent of the employee, until the last day of the month in which the 60-day notice expires.

(c) An employee of the Alaska Railroad in Alaska and an employee who is a citizen of the United States employed on the Isthmus of Panama by the Panama Canal Company or the Canal Zone Government, who becomes 62 years of age and completes 15 years of service in Alaska or on the Isthmus of Panama shall be automatically separated from the service. The separation is effective on the last day of the month in which the employee becomes age 62 or completes 15 years of service in Alaska or on the Isthmus of Panama if then over that age. The employing office shall notify the employee in writing of the date of separation at least 60 days in advance thereof. Action to separate the employee is not effective, without the consent of the employee, until the last day of the month in which the 60-day notice expires.

(d) The President, by Executive order, may exempt an employee from automatic separation under this section when he determines the public interest so requires.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 571; Pub.L. 92-297, § 4, May 16, 1972, 86 Stat. 144; Pub.L. 93-350, § 4, July 12, 1974, 88 Stat. 356; Pub.L. 95-256, § 5(c), Apr. 6, 1978, 92 Stat. 191.

Historical and Revision Notes

Derivation:	United States Code	Revised Statutes and Statutes at Large
	5 U.S.C. 2255	July 31, 1956, ch. 804, § 401 "Sec 5", 70 Stat. 748.
		Feb. 7, 1964, Pub.L. 88-267, § 1 (less (a)-(c)), 78 Stat. 9.

Explanatory Notes

Standard changes are made to conform with the definitions applicable and style of this title as outlines in the preface to the report.

Codification. Pub.L. 96-70, Title III, § 3302(e)(3), Sept. 27, 1979, 93 Stat. 496, di-

recting that "Panama Canal Commission" be substituted for "Panama Canal Company or the Canal Zone Government" in subsec. (e) of this section has not been executed in view of the 1978 repeal of subsec. (e) of this section by Pub.L. 95-

256.

job 09/29/82

1500 Complaints

File

To: Mr. Justice Powell

From: Jim

Re: EEOC v. Wyoming, No. 81-554

A. You requested information on how many suits have been brought against states under the ADEA. In FY 80, the EEOC's Trial Division filed 47 ADEA suits and intervened in two others. There were 14,040 charges of age discrimination filed with the EEOC. Of those 14,040 charges filed, 1500 were filed against state/local governments; 21 against state employment agencies; 241 against elementary/secondary public schools; and 282 against public colleges/universities.

B. You also wanted to know how many ADEA cases against state governments have been decided, and the total number of title VII cases filed in federal court in a fiscal year. For this information, the librarians will have to contact services outside the Court. I will await further instructions on how far you would like to pursue this search given that the EEOC is a party.

SUPPLEMENTAL MEMORANDUM

To: Mr. Justice Powell

Noted 9/30

From: Jim

Re: EEOC v. Wyoming, No. 81-554

The SG has submitted a reply memorandum for the EEOC. He argues that, despite some language in Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981), Congress is not constitutionally required to generate legislative history to enact valid legislation. The legislative history of an enactment is not itself the subject of judicial review in the sense that courts seek to ascertain the adequacy of Congress' knowledge about constitutional law. The teaching of Pennhurst is that, when Congress exercises its spending power, it is crucial to ascertain whether Congress intended to impose an unconditional rule of conduct pursuant to its regulatory powers or whether it merely intended to require those who elect to participate in the federal program to conform their conduct to the conditions imposed upon recipients of federal funds. Pennhurst requires an explicit congressional statement of reliance on the fourteenth amendment only when it is asserted that a funding provision is also a regulatory provision. ?

Although this ^{is} a possible means of distinguishing Pennhurst from the present case, I am not sure the broad language in Pennhurst gives much indication that the Court meant to limit its "explicit

reliance" requirement. In any case, I agree fully with the SG's fundamental position that the purpose of judicial review under our constitutional system is not to enable the courts to take issue with the constitutional theories specified by the political branches in exercising their powers, but to ascertain whether the coordinate branches of the government have acted within their constitutional powers. If the Court finds Congress' extension of the ADEA to state employees an unconstitutional use of its commerce powers, it should decide whether Congress could enact the legislation under the fourteenth amendment.

\ In view of Pennington
I'm not sure we should
do more than say
on basis of record
we can assume
Congress intended
to make this type
of use of § 5.

Murgia (police at age 50) &
Vance v Bradley (gov. review officer at 60)
are relevant but not controlling.

Lee (56)

~~The~~ Case here on motion to dismiss.
No evidence.

Responding to 9 PS, Lee agreed that Congress could enact a law requiring all game warden to retire at age 55. (This answer rebuts any analogy to sex & race discrimination).

Saltzberg (Deputy AG Wynn)

What Wynn has done is not unconstitutional. Murgia settles this. The Q is whether Congress has acted ~~was~~ beyond its powers.

50
This Act is more intrusive than FLSA. ~~There~~ Here Congress is ~~totally~~ depriving States of right to choose its employees. This affects quality of State service - ~~as~~ as well as a State's pocket-book.

Fed Gov compels retirement for its law enforcement officers.

10/7

81-554 EEOC v Wynn

I. Common Law

1. League of Cities controls

2. At least equally intrusive

FEBA only costs
money, plus the federal
intrusion

ADEA, in addition
interfere directly with
who the States may
employ.

Thus affects efficiency
of State operations.

Older less efficient

More sick time

Recruitment of young

Increased costs

II § 5 not applicable

Pennhurst

The Chief Justice Cliff inLeague of Cities controlsJustice Brennan Reverse

Only issue in Q presented whether Congress violated 10th Amend. It did not.

Age is not necessarily a BFOQ ??

Reverse on Commerce Clause issue. This is very different from League of Cities

If we reach § 5 issue, Morgan v Katzbach controls. § 5 clearly controls.

Justice White Rev.

Agrees basically with W.J.B. - certainly on Commerce Clause.

Either by State or Congress, legislation could make a BFOQ finding on a group basis (but can this Court say this?)

Need not reach § 5.

Justice Marshall

Rev

Agree with W & B

Justice Blackmun

Rev.

~~I~~ Agree with W & B on both
grounds - Commerce clause + § 5.

Justice Powell

Aff in

See my notes.

I'm not prepared to overrule ~~But~~ ^{League} Citizens ₁.

Justice Rehnquist *Aff'm*

Agree generally with L.F.P

Justice Stevens

Rev.

*Disagree with wisdom of legislation.
But is within Commerce Power
Wouldn't agree § 5 applies*

Justice O'Connor

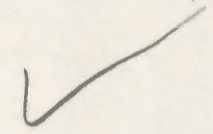
Aff'm

*meets Nat. Cities standard.
Agrees with L.F.P.*

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

October 12, 1982

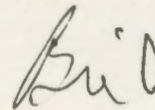


RE: No. 81-554 EEOC v. Wyoming, et al.

Dear Chief:

I'll try my hand at an opinion for the Court in this
case.

Sincerely,

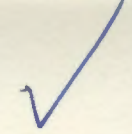


The Chief Justice

Copies to the Conference



Supreme Court of the United States
Washington, D. C. 20543



CHAMBERS OF
THE CHIEF JUSTICE

October 16, 1982

Re: 81-554 - EEOC v. Wyoming, et al.

MEMORANDUM TO: Justice Powell
Justice Rehnquist
Justice O'Connor

I will put my hand to a dissent in this case.

Regards,

December 17, 1982

81-554 EEOC v. WYOMING

Dear Bill:

I will await the dissent.

Sincerely,

Justice Brennan

Copies to the Conference

LFP/vde

December 20, 1982

81-554 EEOC v. Wyoming

Dear Chief:

I have written separately that I agree. But two or three relatively minor points occurred to me in reading your memorandum.

The short paragraph on page 5, written in terms of "turf", can be put in more lawyer-like terms. You might say something along the following lines:

"If Congress were free to regulate state sovereignty in this area at all, at least it should not demand more restrictive regulation of state employment policies than Congress itself imposes upon federal employment."

As you suggest (p. 7, 8), the SG's reliance on the B.F.O.Q. provision is wholly unpersuasive. I would emphasize, somewhat more than you have, the fact that B.F.O.Q. claims often - if not usually - result in law suits. These are expensive and also divert state officials from their normal duties.

On p. 11 (third line of first full paragraph), your memorandum said you would "have little doubt" as to the applicability of Bradley and Murgia. This is a rather weak statement. I would say that "the precedential force of these decisions would require that we sustain the Wyoming Act".

The second paragraph commencing on page 11 talks about City of Rome and several other cases that seem to me to be essentially irrelevant. I do agree that Oregon v. Mitchell is used to make a good point.

I am glad you will file a vigorous dissent. In my view, our colleagues' decision in this case leaves very little of the principle of federalism upon which our government was founded.

Sincerely,

The Chief Justice

LFP/sfs

December 20, 1982

81-554 EEOC v. Wyoming

Dear Chief:

I agree with the substance of your memorandum and will await the dissenting opinion.

Sincerely,

The Chief Justice

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

December 20, 1982

No. 81-554 EEOC v. Wyoming

Dear Bill,

I will await the dissent in this case.

Sincerely,

Sandra

Justice Brennan

Copies to the Conference

✓

So well?

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

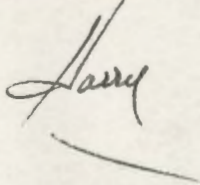
December 21, 1982

Re: No. 81-554 - EEOC v. Wyoming

Dear Bill:

Please join me.

Sincerely,

A handwritten signature in cursive script, appearing to read "Harry", with a long horizontal flourish extending to the right.

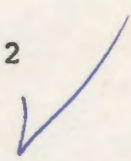
Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 21, 1982

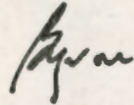


Re: 81-554 - EEOC v. Wyoming

Dear Bill,

Please join me in your first draft with
the addition you propose today.

Sincerely yours,



Justice Brennan

Copies to the Conference

cpm

lfp/ss 02/01/83

TO: Mike Sturley

FROM: LFP, JR.

SUBJECT: 81-554 EEOC v. Wyoming

Thank you for affording me an opportunity to take a look at your preliminary draft. I may well have misled you by my emphasis on the Virginia-Kentucky Resolution and similar expressions. I did think that there was more contemporary evidence of the states concern with federalism at the time of ratification of the Constitution.

I suppose the absence of this (if, in fact, you found nothing in the debates of the Constitutional Convention) is explained by the general understanding that a federal system was being created. No one doubted this. Therefore, there was no reason to state in the preamble of the Constitution that its "purpose" was to create a federal system or to reserve undelegated powers to the states.

Thus, a sounder way to rebut Justice Stevens is to make this clear, and then to pursue fairly briefly two lines of argument.

First, demonstrate the fallacy of JPS's view that the need for freedom of trade was "the central problem that gave rise to the Constitution itself", and that the commerce clause was enacted "to confer a power on the national government adequate to discharge its central mission". I have elaborated on what you wrote in a separate draft that I will give you. You can improve what I have written, and perhaps provide some limited documentation. *re: place of comm. cl.*

Secondly, we should retain a separate Part dealing with federalism and its historic place in our system. It is far more central historically than the Commerce Clause ever was. You should be able to document this. *place of Fed'ism*

Perhaps this Part could commence with a summary of what you have said very well in Part II of your preliminary draft, putting some of your material in notes. The quote from the Massachusetts Legislature, for example, can be omitted or summarized in a note.

I prefer to emphasize primarily what this Court has said about our federal system, and the Court's repeated recognition that the states are "sovereign" with respect to many functions. I do not want to debate League of Cities, but its opinion cites Maryland v. Wurz, 392 U.S.

at 196 - with a reference to a state's "sovereign political entity". There must be a number of other court decisions that also refer to federalism and the sovereign authority of the states. As recently as Justice Marshall's decision in Hodel - in which he accepted League of Cities - he acknowledged that federal regulation must be weighed in light of "indisputedly 'attributes of state sovereignty'". 452 U.S. 264, 287.

John's opinion recognizes no limit whatever to the power of Congress, under the commerce clause, to override state sovereignty. He neither mentions federalism nor state sovereignty, and refers to League of Cities as "pure judicial fiat". We might refer to this in a footnote, and add that under his view it is not easy to think of any governmental function at the state or local level - other than the criminal laws - that could not be preempted.

I have a couple of observations. If you have not taken a look at the federalist papers with the view to finding a good quote on federalism, I suggest that you do so. I am confident that the papers emphasized defense against foreign aggressors. It was, I think, a more important concern of the founders than commerce.

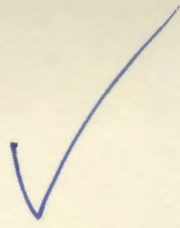
I also want to make clear that I do not denigrate the importance of the commerce clause. Nor do I support, and never have, the early doctrines as to the right of states to interpose their wills or to secede. Yet, as you document, these were convictions strongly held during the lifetimes of most of the great leaders who formed our national government.

LFP, Jr.



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR



February 17, 1983

No. 81-554 EEOC v. Wyoming

Dear Lewis,

Please join me in your dissent.

Sincerely,

Justice Powell

Copies to the Conference

MEMORANDUM

TO: Mike DATE: Feb. 23, 1983
FROM: Lewis F. Powell, Jr.

81-554 EEOC v. Wyoming

The changes made by Justice Stevens prompt me to suggest that we make somewhat clearer the point that this case concerns a power of the states that until quite recently was viewed as "sovereign". This is implicit in our opinion, but I think it should be made explicit - along the lines of footnote 13.

We have not made clearly the distinction between commerce as it was perceived well into this century (freedom of trade among the states) and the clearly sovereign activities of the states.

No power is more sovereign than the right of a state to select and determine the terms and conditions of employment of the people who constitute the state government. Most of these people have nothing to do with trade among the states in the normal acceptance of these terms.

Justice Stevens relies on Gibbons v. Ogden. The short answer is that Chief Justice Marshall was not addressing the sovereign power of states. Nor, indeed, did he say that the Commerce Clause was the central provision of the Constitution. He did construe it broadly, but as applied only to trade among the states.

I am not suggesting any major revision of the structure of our opinion. I do want you to try some of your artful drafting to make, briefly and clearer than at present, the point that this case does not involve commerce in any traditional sense, and that the statements relied upon by Justice Stevens - in the notes he has added - are irrelevant for two reasons: (i) they do not support the view that the Commerce Clause was the centerpiece of the Constitution, and (ii) they do not address at all the point that until mid-20th Century no one - certainly not the Founders - would have suggested that "commerce" or "trade among the states" embraced the sovereign function of a state's employment policies.

L.F.P., Jr.

ss

lfp/ss 02/23/83

MEMORANDUM

TO: Mike DATE: Feb. 23, 1983
FROM: Lewis F. Powell, Jr.

81-554 EEOC v. Wyoming

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L.F.P., Jr.

ss

Full

To: JUSTICE POWELL
From: Michael
Re: No. 81-554, EEOC v. Wyoming

Attached is a draft of a proposed new footnote 5. I suggest deleting present footnote 13 on page 11 and a sentence from present footnote 7 on page 8 (since their substance is incorporated in the attached draft), and adding this new footnote 5 on the middle of page 5 after "governments"--immediately before the beginning of part "A." I attach a copy of the opinion with these changes noted.

In the new footnote, I have not further stressed the point about the Commerce Clause not being the centerpiece of the Constitution for several reasons:

(i) Although JUSTICE STEVENS does not claim Chief Justice Marshall's direct support for this proposition, there are arguments that he could make if we pushed him to it. (He already cites Beveridge's Life of John Marshall.) Even in Gibbons v. Ogden, Marshall claimed that "[t]he power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government." 22 U.S., at 190. This statement is, of course, consistent with our view. But in context, Marshall seems to be giving more weight to that Clause than it really deserved.

(ii) JUSTICE STEVENS does claim direct support from Gibbons v. Ogden. Justice Johnson, in a separate opinion, discussed the reasons for the calling of the convention, and he essentially

advocated JUSTICE STEVENS's present view. 22 U.S., at 223-225. JUSTICE STEVENS cites a portion of this discussion in his opinion at 3 n.1. He also cites various other authorities at this point, including Gunther's Constitutional Law. It does not seem entirely fair to accuse him of not having Marshall's support. In any event, our strongest answer is that this all relates to the Annapolis Convention, not the Philadelphia Convention. And we already make this point in footnote 2.

(iii) Finally, I think this is already the strongest part of our opinion without the need for further response. Among the law clerks with whom I have discussed the two opinions (almost all of whom agree with JUSTICE STEVENS's "bottom line"), no one is willing to support his extreme view of the importance of the Commerce Clause. In my view, we have already won this point pretty convincingly. If we attack JUSTICE STEVENS any harder on it, we only run the risk that we will convince him. He may back off from his position slightly, tone down his claims, and cost us the straw man that we rebut. The material JUSTICE REHNQUIST gave us is not terribly helpful. It is a recognition of state sovereignty, but we could include literally hundreds of such recognitions. (Notice how many we include from last Term alone.) The context is not very good, however, since Chief Justice Marshall would deny that state sovereignty is a limitation on federal sovereignty. He apparently sees the two as operating in different spheres. The commerce powers are in the federal sphere.

STATE SOVEREIGNTY AND THE CONSTITUTION—A SUMMARY VIEW†

William P. Murphy*

Under Article II of the Articles of Confederation each state retained its sovereignty and independence, and every power, jurisdiction, and right which was not expressly delegated to the United States. This precluded the existence of any implied powers. The powers which were expressly delegated to Congress were limited, but even as to these, there was no power of enforcement. The central government, with rare exceptions, operated not on individuals but through the states, and its authority was effective only so far as, and no farther than, the states were willing to accept it. The states remained free to ignore the central government with impunity, which they did, in spite of their pledged word in Article XIII that they would abide by the determination of Congress on all matters delegated to it. Under the Articles, there existed in America a compact of sovereign states with a mutual agent. And history records that it was a failure.

Throughout the colonies there were men of prominence who were determined, for reasons sufficient to themselves, to eradicate this system. Being individuals of surpassing political skill and ability, and aided by the course of events under the Articles, they brought about the calling of the Constitutional Convention of 1787 and dominated its membership. The fundamental purpose of the Convention was to change the system. The Founding Fathers decided at the outset that no mere federation would suffice. Instead, they created a national government which would operate directly on individuals, gave it vastly increased sweeping powers, and created a national executive and a national judiciary for their enforcement. Severe limitations were placed on the powers of the states, and the supremacy of the central government over the states was clearly and expressly set forth. With deliberate intent and great care, the Founders remedied the defects of the system under the Articles. And because it was recognized that the Constitution was fatal to the sovereignty of the states, they by-passed the state governments and went

†This article concludes a study which began with *State Sovereignty Prior to the Constitution*, 29 Miss. L.J. 115 (1958); continued with *State Sovereignty and the Founding Fathers*, 30 Miss. L.J. 135 (1959); 30 Miss. L.J. 261 (1959); and 31 Miss. L.J. 50 (1959); continued with *State Sovereignty and the Drafting of the Constitution*, 31 Miss. L.J. 203 (1960); 32 Miss. L.J. 1 (1960); 32 Miss. L.J. 155 (1961); and 32 Miss. L.J. 227 (1961); and continued with *State Sovereignty and the Ratification of the Constitution*, 33 Miss. L.J. 29 (1961); 33 Miss. L.J. 164 (1962); and 33 Miss. L.J. 294 (1962).

*Professor of Law, University of Mississippi.

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directly to the people for ratification of the great transition. There was no misunderstanding as to the effect that the Constitution would have upon state sovereignty, for in the campaign for ratification one of the principal bases of opposition to the Constitution was that it would destroy the sovereignty of the states.

Study of the contemporary sources reveals that among both the supporters and opponents of the Constitution, there was no doubt, disagreement or misunderstanding on the following particulars. Ratification of the Constitution was final and irrevocable, and no right of secession from the United States was contemplated. The power to determine constitutional meaning and applicability lay with the instrumentalities of the national government. In making such determinations there was no expectation that any strict construction in favor of state power would be followed. Although national powers were enumerated, state power was not expected to be a constitutional limitation on the scope or extent of any enumerated national power.

It is obvious, however, from even a cursory view of American constitutional history since 1789, that the ratification of the Constitution did not settle these matters permanently, or even for very long. As noted at the very beginning of this study, almost immediately after the adoption of the Constitution the argument was advanced that since the states were sovereign under the Articles they were still sovereign except to the extent that sovereignty had been expressly surrendered in the Constitution, and therefore national powers should be strictly and narrowly construed. It was argued then that the Tenth Amendment supported the strict construction approach, and the same argument is still being made today.

Later a more vigorous position was taken. The admission made during the ratification campaign that the Constitution was fatal to state sovereignty was now conveniently forgotten, and the discovery was made that it was an idle thing which had been done after all, that the system of government under the Constitution was still what it had been under the Articles of Confederation, namely, a compact of sovereign states. From this premise there flowed logically the doctrines of state interposition and nullification articulated by John C. Calhoun, the brilliant pre-Civil War high priest of state sovereignty. Finally, there came the most radical assertion of all. Since the Union was merely a compact of sovereign states, it followed that there was no such thing as a permanent and indivisible nation. Therefore, by the same process through which it ratified the Constitution and entered the Union in the first place, *i.e.*, an exercise of popular sovereignty, a state could likewise secede from the United States.

It may be stated flatly that none of these doctrines—strict construction of the Constitution, interposition or nullification, and secession—

can find support in the ratification of the Constitution out of context, or in the words of them. And yet the enormous impact upon the country over which men had placed that doctrines of state sovereignty vitality?

It is true that Madison's *Notes* on the ratification of state sovereignty and the refutation remain an explanation, however, for the reason that state sovereignty was a series of, the drafters were aware of the union. Madison and Jefferson became operative in putting forth a compromise considering the extreme complete turnabout.

But any explanation of the fact that men formed and policies advanced their own part of the study of the Confederation and were defeated in the Union. Similarly, the only way they accepted ratification as inevitable in the Constitution was a legal. They engaged national power and which would produce a new government.

In their political theories found the circumstance to which the nation. This was to feel closer to the national government by local constitu-

can find support from the contemporary sources on the drafting and ratification of the Constitution. Beyond a few scattered passages taken out of context, the evidence of 1787-1788 is overwhelming against each of them. And yet it is undeniable that these doctrines have had an enormous impact upon American history. They have been burning issues over which men have argued, fought and died. How could it happen that doctrines so demonstrably untenable could have attained such vitality?

It is true that Elliot's *Debates* were not published until 1836 and Madison's *Notes* not until 1840. From this it might be suggested that state sovereignty doctrines were able to thrive because their documentary refutation remained undisclosed for fifty years after ratification. This explanation, however, is both superficial and erroneous. It is erroneous for the reason that the philosophical and political advocates of the state sovereignty doctrines were participants in, or at least contemporaries of, the drafting and ratification of the Constitution and were fully aware of the understanding at the time. One need go no further than Madison and Jefferson who, less than ten years after the Constitution became operative, authored the Virginia and Kentucky Resolutions setting forth a compact theory of the Constitution. In Madison's case, considering the extent of his nationalism in 1787, this is one of the most complete turnabouts in history.

But any explanation is superficial which fails to take into account the fact that men of affairs almost invariably espouse those philosophies, forms and policies of government which they feel will best protect and advance their own economic and social interests. As we saw in the first part of the study, this was true in the drafting of both the Articles of Confederation and the Constitution. The conservative nationalists who were defeated in 1776 did not accept the result as being irremediable. Similarly, the opponents of strong central government in 1787, while they accepted ratification of the Constitution as final, did not accept as inevitable in practice the fulfillment of that national power of which the Constitution was the promise. What they did was completely natural. They engaged in political action to restrain and limit the use of national power and they advanced interpretations of the Constitution which would protect the power of the states against national aggrandizement.

In their political struggle the advocates of the state sovereignty doctrines found their principal sources of strength and support in the circumstance to which Madison and Hamilton had repeatedly called attention. This was the political fact that the people as a general rule would feel closer to their state and local governments and more remote from the national government. Since members of Congress were to be elected by local constituencies, it was maintained that the men elected to these

offices would carry with them into national office a tendency or predisposition to favor state over national power. And survival in office would frequently demand giving precedence to parochial and provincial over national and general interests.

Time has demonstrated the acuteness of Madison's and Hamilton's perception. Throughout our history, far more often than not, Congress has been very sensitive to the existence of state interests and to areas and subjects of state power. Such political considerations have frequently resulted in the non-use of national powers. This has been true even to the point of reducing some of these powers to a dormant state. Congress's power to control the manner of election of Representatives and Senators has never been utilized to any great extent, and even the modest exercise of this power being proposed today is bitterly opposed as an invasion of states' rights. To give another example, Congress's powers under the full faith and credit clause remain to this day virtually untapped.

In their Constitutional struggle the defenders of state sovereignty were immensely aided by the very characteristic of the Constitution against which they had vigorously protested in the ratification campaign; namely, its generality and ambiguity. It was recognized by all hands in 1787-88 that the Constitution's generalities opened the way to indefinite augmentation of national power through latitudinal construction. Indeed, the main defense of the Constitution's generality was that it would permit whatever national action the future exigencies of an unknown future might demand. But, by definition, ambiguity means the capability of supporting more than one meaning or interpretation. If the Constitution could support an interpretation which favored national power, it could also support a construction that favored state power. And so began the perennial debate between "liberal" and "strict" construction through which contests between national and state power have been waged ever since, with each side claiming that its interpretation of the Constitution is the "true" one.

The advocates of the state sovereignty doctrines soon found another ally in their struggle, and again it was through one of the features of the Constitution against which they had levied severe strictures. This ally was the federal judiciary, and especially the United States Supreme Court. The establishment of judicial review—the power to interpret the Constitution with finality and to invalidate acts contrary to that interpretation—provided the advocates of state sovereignty with the device through which their views could be given legal efficacy. Although judicial review was established by a relatively nationalist minded Marshall Court, it was put to far different uses in the century following Marshall's death.

It is true that the Supreme Court never yielded to state sovereignty

doctrines in their admission. But the Court accepted the doctrine of national power and as "dual sovereignty" mere existence of state scope of national power operated and those not sufficient reason for powers. State autonomy construction. And in contrary construction, it and the importance

The facility with of the Constitution economic philosophy history, to declare the leap frog."¹ America to mid-twentieth century observation. The list Court could be para states' rights.

And yet there is taken, so far as constitutional the Constitution and it were abandoned extinct, despite the various interposition respect strict construction ap the final and lethal that the tenth amendment relationship and hence

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¹JENSEN, THE ARTICLES

doctrines in their advanced forms—nullification, interposition, and secession. But the Court did, on many occasions and as recently as 1936, accept the doctrine of strict construction of the Constitution against national power and in favor of state power. What came to be known as "dual sovereignty" was, in essence, no more than a holding that the mere existence of state power was in and of itself a limitation on the scope of national power. The doctrine that national powers were enumerated and those not enumerated were reserved to the states served as a sufficient reason for giving a narrow interpretation to the enumerated powers. State autonomy was elevated to state sovereignty by judicial construction. And if there were also decisions which applied the contrary construction, it only served to underscore the power of the Court and the importance of having a majority on the side one preferred.

The facility with which men could find in the amorphous language of the Constitution approval and sanction of their own political and economic philosophies prompted John Adams, at an early date in our history, to declare that "I have always called our Constitution a game at leap frog."¹ American constitutional history from John Adams's day to mid-twentieth century America amply demonstrates the truth of his observation. The listing of great nationalist decisions by the Supreme Court could be paralleled by a similar catalogue of decisions favoring states' rights.

And yet there is reason to believe that the last leap may have been taken, so far as constitutional law is concerned. The compact theory of the Constitution and the state sovereignty doctrines which flowed from it were abandoned after the Civil War and may today be considered extinct, despite the recent abortive attempts to revive them in the various interposition resolutions adopted by Southern legislatures. And the strict construction approach to the Constitution may well have received the final and lethal blow in the Supreme Court's recognition in 1941 that the tenth amendment is merely a truism which is declaratory of a relationship and hence is not a substantive limitation on national power.

Modern society increasingly makes exercise of national power an imperative, and the allegiance of the people to the national government increases commensurately with their expectations and demands. Strict construction thus loses the support of public opinion. It is inconceivable to imagine ever again Supreme Court decisions comparable to those of 1935 and 1936. Even the polemics of Southern Senators in the field of civil rights lack real conviction that national power is inadequate to the purpose. In the future, the distribution of power between nation and state will continue to be a political and a legislative question, as it always has been. But it is doubtful if ever again it will be a constitutional and a judicial question as it has been in the past. The future

¹JENSEN, *THE ARTICLES OF CONFEDERATION* 245 (1940).

debates over the respective roles and functions of nation and states will increasingly turn on questions of policy rather than power.

This study has been an inquiry into the dialectics of original intent on the question of the relationship and the distribution of power between the national government and the states under the Constitution. The contemporary understanding of the men who drafted the Constitution and the men who supported and opposed its ratification has been set forth in the preceding parts of the study. To the author the validity of the conclusions reached is clear beyond doubt. In one sense, of course, any inquiry into original intent is futile, for it is true that, in the final analysis, the actions of men, including their interpretations of the Constitution, are determined more by the demands and desiderata of the present than by the understanding of the past. It is also true that the intent and understanding of 1787-88 was almost immediately challenged, and has subsequently been denied, confused, submerged and even lost at times throughout our history. And arguably this has been a good thing for the country.

The fact that original intent lacks the power to control later action does not, however, render inquiries into original intent irrelevant. Throughout our history, justification has always been sought for conflicting constitutional interpretations in terms of original intent. Men prefer to defend their positions not only on grounds of the expediency of the moment but also in terms of historic legitimacy. So long as there is constitutional debate, it seems inevitable that original intent will be a part of the rhetoric. Knowledge on the subject is therefore necessary for forensic purposes.

The author feels, however, that there is a larger and more fundamental value to be derived from this study. It is trite to observe that the national government today exercises greater and more pervasive powers than ever before in our history. Of course, there never has been and never can be a permanently fixed number of public functions or subjects of power with clearly established and mutually exclusive lists of what is national and what is state or local. In a complex and interdependent industrial society, it is a commonplace that what was local yesterday today has assumed dimensions and effects which transcend state boundary lines. Much of the increased activity of the national government in this century has resulted from the fact that modern society generates problems which are beyond the capacity of individual states to control. The trend seems likely to accelerate rather than to abate.

While most Americans accept the necessity of an increased centralization of authority in order to cope with the problems of today's world, there are also feelings of misgiving and disquietude. Although events and circumstances make increased national activity imperative, many persons are apprehensive that we are departing from the original grand

design of the national power lacks historic feelings, and for but also a comfort

Speaking in that "The greatments was that the minute objections. The objection general power throughout so g objects. As far view be improper the general gov the maintenanc the general gov out the coopera less free as men small ones."²¹ T being abolished respective sover we seem finally Madison.

Remember Plan of which of the Constitu Convention ha independence o sovereignty, and lic would be as middle ground national author can be subordi

There has stitution was " to be adapted t has not been a

²¹ FARRAND, T

³¹ LETTERS AN

⁴ McCulloch v

design of the Constitution, that although the increased exercise of national power can be justified on grounds of expediency, it nevertheless lacks historic legitimacy. The author has frequently entertained such feelings, and for that reason this study has been not only an education but also a comfort and a consolation.

Speaking in the Constitutional Convention, James Madison stated that "The great objection made against an abolition of the state governments was that the general government could not extend its care to all the minute objects which fall under the cognizance of the local jurisdictions. The objection as stated lay not against the probable abuse of the general power but against the imperfect use that could be made of it throughout so great an extent of country, and over so great a variety of objects. As far as its operation would be practicable it could not in this view be improper; as far as it could be impracticable, the convenience of the general government itself would concur with that of the people in the maintenance of subordinate governments. Were it practicable for the general government to extend its care to every requisite object without the cooperation of the state governments the people would not be less free as members of one great republic than as members of thirteen small ones."² The states have never since 1787 been in any danger of being abolished. The historic contest has been waged over questions of respective sovereignty and power of nation and state. After 170 years, we seem finally to have settled on the approach originally advanced by Madison.

Remembering that the Constitution was grounded on the Virginia Plan of which James Madison was the author, the words of the "father of the Constitution" in his letter to Washington on the eve of the Convention have modern relevance. "Conceiving that an individual independence of the States is utterly irreconcilable with their aggregate sovereignty, and that a consolidation of the whole into one simple republic would be as inexpedient as it is unattainable, I have sought for some middle ground, which may at once support a due supremacy of the national authority, and not exclude the local authorities wherever they can be subordinately useful."³

There has been no departure from our ancient moorings. The Constitution was "intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs."⁴ The grand design has not been abandoned. It is continually being fulfilled.

²1 FARRAND, *THE RECORD OF THE FEDERAL CONVENTION* 356 (rev. ed. 1937).

³1 LETTERS AND OTHER WRITINGS OF JAMES MADISON 287 (1844 ed.).

⁴McCulloch v. Maryland, 17 U.S. (8 Wheat.) 316, 415 (1819).

THE C. J.	W. J. B.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.	J. P. S.	S. D. O'C.
	10/12/82							
1st draft memo 12/17/82	1st draft 12/17/82	Join WJB 12/21/82	Join WJB 1/4/83	Join WJB 12/21/82	await dissent 12/17/82	Join CJ 1/19/83	Join WJB 1/5/82	await dissent 12/20/82
1st draft dissent 1/17/83	2nd draft 1/7/83 3rd draft 1/21/83				agree with memo. await dissent 12/20/82		2nd draft con op 2/18/83	in accord with CJ's memo- await
					Join CJ 1/18/82		3rd draft 2/22/83 4th draft 2/24/83	dissent 1/10/83 1st draft con opinion 1/15/83
					will write dissent 1/24/83			Join CJ 1/18/83
					1st draft 2/17/83 2nd draft 2/24/83			Join LFP 2/17/83

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 4, 1983

Re: No. 81-554 - Equal Employment Opportunity
Commission v. Wyoming

Dear Bill:

Please join me.

Sincerely,

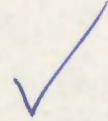
T.M.
T.M.

Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS



January 5, 1983

Re: 81-554 - EEOC v. Wyoming

Dear Bill:

Please join me.

Respectfully,

Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

January 10, 1983



No. 81-554 EEOC v. Wyoming

Dear Chief,

I am in general accord with your memorandum
in this case and will wait for your dissent.

Sincerely,

The Chief Justice

Copies to the Conference

January 18, 1983

81-554 EEOC v. Wyoming

Dear Chief:

I have sent you, under separate cover, a note joining in your fine dissenting opinion.

I am considering writing separately only to reply specifically to John Stevens. As I cannot get to this during this argument session, I will delay bringing down this case.

I have some ideas I would like to try out. They will relate solely to John's dissent and in no way cover the ground you have addressed so well.

Sincerely,

The Chief Justice

lfp/ss

January 18, 1983

81-554 EEOC v. Wyoming

Dear Chief:

Please add my name to your dissenting opinion.

Sincerely,

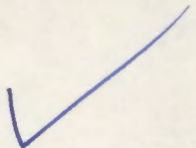
The Chief Justice

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST



January 19, 1983

Re: No. 81-554 EEOC v. Wyoming

Dear Chief:

Please join me in your dissenting opinion.

Sincerely,

The Chief Justice

cc: The Conference

lfp/ss 01/19/83

WYOMING SALLY-POW

MEMORANDUM

TO: Mike

DATE: Jan. 19, 1983

FROM: Lewis F. Powell, Jr.

81-554 EEOC v. Wyoming

This refers to our conversation concerning a separate dissenting opinion directed at John Stevens' view that the central purpose of the Constitution is evidenced by the Commerce Clause.

Of course, there were a combination of purposes. But all were to be attained within the framework of a federal system. Justice Stevens largely - if not entirely - ignores federalism. At least until the War Between the States, and de facto until well into this century, the Commerce Clause was overshadowed by the doctrine of federalism. If I recall Justice Stevens' opinion correctly (and I have not looked at it a second time), it presents an exceptionally inaccurate view of history - a view that should not go into the United States Reports without refutation.

As you know better than most, I have had no time to refresh my recollection. You will have to examine the appropriate authorities. I do suggest the following:

1. Scholarly histories and commentary on the founding of our country, commencing with the Articles of Confederation that in themselves evidenced the reluctance of the states to form a strong union. These sources will show that a number of states were unwilling to approve the Con-

stitution without the Bill of Rights, and that the Tenth Amendment was considered essential by several states. My recollection is that this included New York.

2. The debates of the Constitutional Convention - though voluminous - have relevant material. The secondary authorities on these debates may be an easier source.

3. I mentioned the Federalism Papers. My recollection of them is that, for the most part, they were advocating the advantages of a strong central government - though even as to this Hamilton and Madison did not share congruent views. Actually, and again I draw on my recollection, there was a primary concern about national security and the recognition that only by a united country could we remain strong enough to survive foreign aggression, and avoid internal tensions if not warfare.

4. The Kentucky-Virginia Resolutions, protesting the Alien and Sedition Acts in the late 1790s, explicitly argued that each of the states had a right to interpose its will against any action of the federal government, legislative, executive or judicial. It was widely understood at the time that Jefferson was one of the authors.

5. This Doctrine of Interposition was advocated by Massachusetts in the late 1820s, as I recall.

6. But the doctrine lost favor in most of the country except the South. The South's conviction that the Constitution had formed only a union of sovereign states was

a leading cause of secession. Calhoun of South Carolina was the most prominent spokesman.

7. A primary source on the doctrine of federalism is, of course, found in decisions of this Court. I do not suggest any comprehensive review of our decisions or extensive quotations.

* * *

My guess is that, apart from the usual problem of the preliminary research, the greatest difficulty in preparing an opinion is to keep it within reasonable bounds. I would like not to exceed the length of John Stevens' concurring opinion, but with more documentation.

I am not unaware of how pressed all law clerks are here at the Court. There will be less pressure during the four weeks of the February break than at any subsequent time. The cert memos command a finite part of your time. You have adjusted well to the "bobtail" type of bench memos, and these are entirely adequate now that I have confidence in you and your co-clerks. Indeed, in a real crunch a verbal briefing will suffice in some cases. It is necessary, however, for each of you to be familiar with the cases assigned to you.

Having said all of this, I do think responding to John Stevens is worth your scholarly effort and my time and attention. If I could have a draft in a couple of weeks, it would be most helpful.

L.F.P., Jr.

ss

P. S. 1. Take a look at Dumas Malone's six volume work on Jefferson, recently published. There may be some mention of the Kentucky-Virginia Resolutions and Jefferson's part.

P.S. 2. Justice Stevens gets off a rather heated attack on League of Cities. I would ignore this and not even mention that case. I am interested only in the broader question addressed in this memorandum.

lfp/ss 01/19/83

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81-554 EEOC v. Wyoming

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January 24, 1983

81-554 EEOC v. Wyoming

Dear Bill:

I find that I failed to send you a note advising of my intention to add a few words in dissent in this case.

My apologies for overlooking this.

Sincerely,

Justice Brennan

lfp/ss

cc: The Conference

mfs 01/25/83

To: JUSTICE POWELL
From: Michael
Re: EEOC v. Wyoming, No. 81-554

1798-99 Kentucky and Virginia Resolutions

drafted by Jefferson and Madison, respectively, to protest the Alien and Sedition Acts of 1798; method chosen because courts, dominated by Federalists, were willing to enforce Acts; all Northern states disapproved Resolutions; Second Kentucky and Virginia Resolutions drafted by Jefferson and Madison in response to disapproval of original Resolutions; stronger language, including "nullification" (Kentucky) and "interposition" (Virginia); Jefferson and Madison retreated from views of Resolutions when Acts were no longer an issue (after their party gained national power)

1807-14 New England Opposition to Embargo Law etc.

Massachusetts legislature denounced 1809 enforcement act as "unjust, oppressive, and unconstitutional, and not legally binding on the citizens of this state"; Connecticut refused to furnish militia, using interposition language; 1813 embargo law denounced by Mass. legislature using interposition language; Daniel Webster(!) used interposition language in Congress re: 1813 conscription bill & bill for enlistment of minors; 1814 Hartford Convention

1828-33 South Carolina Nullification

nullification doctrine developed by John C. Calhoun--see "South Carolina Exposition" (1828) setting out theory of interposition; state convention can nullify federal law within state pending possible overruling by federal constitutional amendment (3/4 vote necessary to overrule state!); Webster-Hayne Debate (1830) re: Calhoun doctrine; Nullification Ordinance (1832) adopted by South Carolina in opposition to congressional tariff legislation; Pres. Jackson faced S. Car. challenge squarely and won

1850-60 Northern Opposition to Fugitive Slave Act

best example found in Ableman v. Booth, 62 U.S. 506 (1858). Booth arrested for violating Act and held in federal custody; Wisconsin state court granted habeas relief, finding Act unconstitutional; Wisconsin Supreme Court affirmed; Wisconsin legislature supported result; eventually this Court reversed

mfs 01/27/83

To: JUSTICE POWELL
From: Michael
Re: EEOC v. Wyoming, No. 81-554

1798-99 Kentucky and Virginia Resolutions

drafted by Jefferson and Madison, respectively, to protest the Alien and Sedition Acts of 1798; method chosen because courts, dominated by Federalists, were willing to enforce Acts; all Northern states disapproved Resolutions; Second Kentucky and Virginia Resolutions drafted by Jefferson and Madison in response to disapproval of original Resolutions; stronger language, including "nullification" (Kentucky) and "interposition" (Virginia); Jefferson and Madison retreated from views of Resolutions when Acts were no longer an issue (after their party gained national power) Miller & Howell, *Interposition, Nullification and the Delicate Division of Power in the Federal System*, 5 J. Pub. L. 2, 13-14 (1956).

1807-14 New England Opposition to Embargo Law etc.

Massachusetts legislature denounced 1809 enforcement act as "unjust, oppressive, and unconstitutional, and not legally binding on the citizens of this state" Miller & Howell, *Interposition, Nullification and the Delicate Division of Power in the Federal System*, 5 J. Pub. L. 2, 14 (1956); Connecticut refused to furnish militia, using interposition language Ibid.; 1813 embargo law denounced by Mass. legislature using interposition language Id., at 15; Daniel Webster(!) used interposition language in Congress re: 1813 conscription bill & bill for enlistment of minors Ibid.; 1814 Hartford Convention Ibid.

1828-33 South Carolina Nullification

nullification doctrine developed by John C. Calhoun--see "South Carolina Exposition" (1828) setting out theory of interposition; state convention can nullify federal law within state pending possible overruling by federal constitutional amendment (3/4 vote necessary to overrule state!); Webster-Hayne Debate

(1830) re: Calhoun doctrine; Nullification Ordinance (1832) adopted by South Carolina in opposition to congressional tariff legislation; Pres. Jackson faced S. Car. challenge squarely and won Miller & Howell, Interposition, Nullification and the Delicate Division of Power in the Federal System, 5 J. Pub. L. 2, 9-12 (1956)

1850-60 Northern Opposition to Fugitive Slave Act

best example found in Ableman v. Booth, 62 U.S. 506 (1858). Booth arrested for violating Act and held in federal custody; Wisconsin state court granted habeas relief, finding Act unconstitutional; Wisconsin Supreme Court affirmed; Wisconsin legislature supported result; eventually this Court reversed Miller & Howell, Interposition, Nullification and the Delicate Division of Power in the Federal System, 5 J. Pub. L. 2, 16 (1956)

Alien Act of June ²⁵, 1798, c. 58,
~~1 Stat.~~ 570

Sedition Act of July 14, 1798,
c. 74, 1 Stat. 596

Embargo Act of Dec. 22, 1807, ^{c. 5,}
2 Stat. 451

Force Act of Jan. 9, 1809, ^{c. 5,}
2 Stat. 506

Embargo Act of Dec. ¹⁷, 1813, c. 1, 3 Stat. 88

lfp/ss 01/31/83

EEOCD SALLY-POW

81-554 EEOC v. Wyoming

Justice Powell, dissenting.

I join the Chief Justice's dissenting opinion, and write separately to record a personal dissent from Justice Stevens' revisionist view of the history of our country. He commences his separate concurring opinion with the startling observation that the Commerce Clause "was the Framers' response to the central problem that gave rise to the Constitution itself". Ante, at 1. (emphasis added). Again, at a subsequent point in his opinion Justice Stevens observed that "this Court has construed the Commerce Clause to reflect the intent of the Framers . . . to confer a power on the national government adequate to discharge its central mission". Ante, at 3 (emphasis added).¹ Justice Stevens further states that

¹The authority primarily relied on by Justice Stevens are quotations from Justice Rutledge who did indeed write in 1947 that the "proximate cause of our national existence" was not to assure the great "democratic freedoms"; rather it was "to secure freedom of trade" within the former colonies. W. Rutledge, A Declaration of Legal Faith, at 25-26, (1947), ante, at 1,2.

"National League of Cities not only was incorrectly decided, but also is inconsistent with the central purpose of the Constitution itself" Ante, at 5. (emphasis added)

I

Justice Stevens and I must have read different history books. No one would suggest that removing barriers to the free flow of trade was not one of the purposes of the Constitution. I do suggest that there were a number of other purposes of equal or greater importance in the contemplation of the statesmen who assembled in Philadelphia and as evidenced by the debates in the several states on the issue of ratification. No doubt there were differences of opinion as to the primacy of the various purposes. But one can be reasonably sure that few among the Founding Fathers thought that trade barriers were "the central problem", or that their elimination was the "central mission" of the Constitutional Convention.

If Justice Stevens had written that the intent of the Founders, in adopting the Commerce Clause nearly two centuries ago, is irrelevant to the world in which we

live today, I would not have disagreed. But his concurring opinion purports to rely on their intent. The Commerce Clause properly has been construed, and its reach gradually extended, by this Court to accommodate unanticipated changes that have occurred over the decades primarily in transportation and communication. I would not have thought until today, however, that anyone would suppose that the time and circumstances of a game warden's retirement in Wyoming were of the slightest consequences to commerce and trade. Surely, such a suggestion, seriously made at the time that this was within the central purpose of the Constitution, would have foreclosed its ratification.

I refer to the dissenting opinion of the Chief Justice for a response to the Court's opinion on the basis of constitutional doctrine. I write only -- and briefly in view of the scope of the subject -- to place the Commerce Clause properly in the perspective of history, and to suggest that even today federalism is not as utterly subservient to that Clause as Justice Stevens appears to believe.

II

The central purpose of the Constitution was, as the name implies, to constitute a government. The central provisions, therefore, are those relating to the establishment of the government. The system of checks and balances, for example, was far more central to the larger perspective than any single power conferred on Congress. But apart from the framework of government itself, the motivating purposes of the Framers were stated in the preamble to the Constitution:

" . . . to form a more perfect Union, establish Justice, ensure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty . .
."

Achievement of these purposes was not delegated solely to the Congress. But if one looks at the powers that were so delegated, the position of the Commerce Clause hardly suggests that it was "central" among the concerns of the patriots who formed our union. Section 8 begins with the power to tax and to pay debts. Then, consistent with the preamble is the power to "provide for the common defense and general welfare". Among the following enumerated powers, the Commerce Clause is only one among nearly a score. So much for what the language

and structure of the Constitution itself teaches about the intent of the Framers.

III

One would never know from my friend's and colleague's concurring opinion that the Constitution formed a federal system, composed of the central government and states that retained a significant measure of sovereign authority. This is clear from the the Constitution itself, the debates at the Convention and particularly from the discussions that attended the ratification debates in the colonies. It is impossible to believe that the Constitution would have been adopted, much less ratified, if it had been understood that the "central mission" of the national government was embodied in the Commerce Clause, a mission to be accomplished even at the expense of regulating the personnel practices of state and local government.

"pure judicial fiat" -
"central problem" - p 1
"proximate cause" - 2
"central mission" - 3, 6
"central purpose" - 5

*(but not even mentioned
in Preamble to Court)*

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-554

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, APPELLANT v. WYOMING, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF WYOMING

[January —, 1983]

JUSTICE STEVENS, concurring.

While I join the Court's opinion, a complete explanation of my appraisal of the case requires these additional comments about the larger perspective in which I view the underlying issues.

I

In final analysis, we are construing the scope of the power granted to Congress by the Commerce Clause of the Constitution. It is important to remember that this clause was the Framers' response to the central problem that gave rise to the Constitution itself. As I have previously noted, Justice Rutledge described the origins and purpose of the Commerce Clause in these words:

"If any liberties may be held more basic than others, they are the great and indispensable democratic freedoms secured by the First Amendment. But it was not to assure them that the Constitution was framed and adopted. Only later were they added, by popular demand. It was rather to secure freedom of trade, to break down the barriers to its free flow, that the Annapolis Convention was called, only to adjourn with a view to Philadelphia. Thus the generating source of the Con-

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: Justice Stevens

Circulated: JAN 13 '83

Recirculated:

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Fed Govt
was to
be granted
power to
regulate
the every
detail
of state
govt?*

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of "Commerce"
is a product
of this century & particularly
the past half century.*

*John's views:
In a word,
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The Commerce
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*What
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"As evils are wont to do, they dictated the character and scope of their own remedy. This lay specifically in the commerce clause. No prohibition of trade barriers as among the states could have been effective of its own force or by trade agreements. It had become apparent that such treaties were too difficult to negotiate and the process of securing them was too complex for this method to give the needed relief. Power adequate to make and enforce the prohibition was required. Hence, the necessity for creating an entirely new scheme of government.

"So by a stroke as bold as it proved successful, they founded a nation, although they had set out only to find a way to reduce trade restrictions. So also they solved the particular problem causative of their historic action, by introducing the commerce clause in the new structure of power." W. Rutledge, *A Declaration of Legal Faith*, at 25-26 (1947), quoted in *United States v. Staszuk*, 517 F. 2d 53, 58 (CA7) (en banc), cert. denied, 423 U. S. 837 (1975).

There have been occasions when the Court has given a miserly construction to the Commerce Clause.¹ But as the needs of a dynamic and constantly expanding national econ-

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to Court

not so

True

omy have changed, this Court has construed the Commerce Clause to reflect the intent of the Framers of the Constitution—to confer a power on the national government adequate to discharge its central mission. In this process the Court has repeatedly repudiated cases that had narrowly construed the clause.² The development of judicial doctrine has accommodated the transition from a purely local, to a regional, and ultimately to a national economy.³ Today, of course, the federal economy is merely a part of an international mechanism no single nation could possibly regulate.

In the statutes challenged in this case and in *National League of Cities v. Usery*, 426 U. S. 833 (1974), Congress exercised its power to regulate the American labor market.

to prohibit interstate transportation of goods produced with child labor); *Carter v. Carter Coal Co.*, 298 U. S. 238, 308–310 (1936) (commerce power does not extend to regulation of wages, hours, and working conditions of coal miners).

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what do
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There was a time when this Court would have denied that Congress had any such power,⁴ but that chapter in our judicial history has long been closed.⁵ Today, there should be universal agreement on the proposition that Congress has ample power to regulate the terms and conditions of employment throughout the economy. Because of the interdependence of the segments of the economy and the importance and magnitude of government employment, a comprehensive Congressional policy to regulate the labor market may require coverage of both public and private sectors to be effective.

Congress may not, of course, transcend specific limitations on its exercise of the commerce power that are imposed by other provisions of the Constitution. But there is no limitation in the text of the Constitution that is even arguably applicable to this case. The only basis for questioning the federal statute at issue here is the pure judicial fiat found in this Court's opinion in *National League of Cities v. Usery*. Neither the Tenth Amendment,⁶ nor any other provision of the Constitution, affords any support for that judicially constructed limitation on the scope of the federal power granted to Congress by the Commerce Clause. In my opinion, that decision must be placed in the same category as *E. C.*

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As Chief Justice Stone wrote in *United States v. Darby*, *supra*, at 124, "The amendment states but a truism that all is retained which has not been surrendered. . . . From the beginning and for many years the amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end."

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II

My conviction that Congress had ample power to enact this statute, as well as the statute at issue in *National League of Cities*, is unrelated to my views about the merits of either piece of legislation. As I intimated in my dissent in that case, I believe that federal regulation that enhances the minimum price of labor inevitably reduces the number of jobs available to people who are ready, willing, and able to engage in productive work—and thereby aggravates rather than ameliorates our unemployment problems. I also believe, contrary to the popular view, that the burdens imposed on the national economy by legislative prohibitions against mandatory retirement on account of age exceed the potential benefits. My personal views on such matters are, however, totally irrelevant to the judicial task I am obligated to perform. There is nothing novel about this point—it has been made repeatedly by more learned and more experienced judges.⁷ But it is important to emphasize this obvious limit on the proper exercise of judicial power, one that is some-

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Write to the C.F.

To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

L.F.D.

From: **The Chief Justice**

Circulated: **DEC 17 1982**

Recirculated: _____

MEMORANDUM TO THE CONFERENCE

RE: 81-554—EEOC v. WYOMING

When I have more time, I will shorten this treatment. The following will show you the thrust of my dissenting views.

The Court decides today that Congress may dictate to the states, and their political subdivisions, detailed standards governing the selection of state employees, including those charged with protecting people and homes from crimes and fires. Although the proposed opinion reads the Constitution to allow Congress to usurp this very fundamental state function, I have reexamined that document to see where it grants to the national government the power to impose such strictures on the states. Those strictures are not required by any holding of this Court, and the Congress has not placed similar limits on itself in the exercise of its own sovereign powers to choose those who provide services for the nation.

The statute in issue, the Age Discrimination in Employment Act, 29 U. S. C. (and Supp. III) 621 *et seq.*, was first enacted in 1967 to ban discriminatory treatment in private employment based on age. Pub. L. 90-202, 81 Stat. 602. In 1974, when the Fair Labor Standards Act was extended to apply to the states in their capacities as employers,¹ the Age Act was similarly extended. Pub. L. 93-259, 88 Stat. 74. This extension has the effect of invalidating statutes such as

¹ The extension of the FLSA to the states was declared unconstitutional in *National League of Cities v. Usery*, 426 U. S. 833 (1976).

- I take it that this is closer to your views.
- I find the first full TP on p. 15 somewhat odd. The second sentence could be read as saying that it requires more physical stamina to be an officer in ~~RI~~ Wyo. than in R.I. I would avoid such suggestion. JOB

the Wyoming State Highway Patrol and Game and Fish Warden Retirement Act, Wyo. Stat. §31-3-101 *et seq.*, which permits the involuntary retirement of Wyoming fish and game wardens who are at age 55 and imposes mandatory retirement at age 65.²

This case originated in a complaint filed with appellant, the Equal Employment Opportunity Commission, by Bill Crump, a Wyoming District Game Division supervisor who was mandatorily retired pursuant to §31-3-107. When informal settlement procedures initiated by the Commission failed, the Commission filed this action against the State, charging that the State's statute violated the Age Act. The action was dismissed by the District Court, which held that the Tenth Amendment barred application of the Age Act to the states under *National League of Cities v. Usery*, 426 U. S. 833 (1976). The Commission appealed directly here under 28 U. S. C. § 1252, urging us to reverse on the ground that congressional authority exists under both the Commerce Clause and § 5 of the Fourteenth Amendment.

I would affirm.

I

I begin by analysing the Commerce Clause rationale, for it was upon this power that Congress expressly relied when it originally enacted the Age Act in 1967, see 29 U. S. C. § 621, and when it extended its protections to state and local government employers, see H.R. Rep. No. 93-913, 93d Cong., 2d Sess.—(1974).

We have had several occasions in recent years to investigate the scope of congressional authority to legislate under the Commerce Clause, see, *e. g.*, *National League of Cities v. Usery*, *supra*; *Hodel v. Virginia Surface and Mining Reclamation Association, Inc.*, 452 U. S. 264 (1981); *United Transportation Union v. Long Island R.R.*, — U. S. —

² Wyoming's law is hardly unique. *Amici* cite to us statutes in 28 states, Brief for Alabama, et al. as *Amicus Curiae* 2a-5a, and 160 municipalities, Brief for the National Institute of Municipal Law Enforcement Officers as *Amicus Curiae* 1a-7a, that violate the Age Act.

(1982). The wisdom to be drawn from these cases is that Congress' authority under the Commerce Clause is restricted by the protections afforded the states by the Tenth Amendment. To decide whether a particular enactment has improperly intruded into Tenth Amendment rights, we have adopted a three-prong test:

"First, there must be a showing that the challenged regulation regulates the 'States as States.' [*National League of Cities, supra*], at 854. Second, the federal regulation must address matters that are indisputably 'attributes of state sovereignty.' *Id.*, at 845. And third, it must be apparent that the States' compliance with the federal law would directly impair their ability 'to structure integral operations in areas of traditional functions.' *Id.*, at 852." *Hodel*, at 287-288.

For statutes that meet each prong of this test, a final inquiry must be made to decide whether "the federal interest advanced [is] such that it justifies state submission." *Id.*, at 288 n. 29, citing *Fry v. United States*, 421 U. S. 542 (1975); *National League of Cities, supra*, at 856 (BLACKMUN, J., concurring).

We need not pause on the first prong of this test, for the legislation is indisputably aimed at regulating the states in their capacity as states, § 630(b). The Commission argues, however, that the legislation does not run counter to the other two prongs of the test. Turning then to prong two, whether the Age Act addresses matters that are 'attributes of state sovereignty,' we must first distinguish between the argument made by the Commission in its brief, and the position adopted at oral argument. In its brief, the Commission characterized Wyoming's interest as an interest in arbitrary discrimination. From this it argued that discriminating arbitrarily is not an 'attribute of state sovereignty,' Brief for Appellant 10 and 11. I agree: were Wyoming indeed claiming that the Constitution permits it to discriminate without reason, I too might uphold national legislation preventing such activity as against a Tenth Amendment claim. But that

is not the case here. Indeed, the Commission has now abandoned this line of reasoning, and in its place, acknowledges that in enacting mandatory retirement laws, Wyoming was perhaps—albeit mistakenly—seeking to assure the physical preparedness of those who enforce laws and put out fires. Tr. of Oral Arg. 5. Significantly, the Commission made no attempt at oral argument to claim that *this* goal is not an attribute of sovereignty, for had such a claim been made, obviously it would be rejected. Parks and recreation services were identified in *National League of Cities, supra*, at 851, as traditional state activities protected by the Tenth Amendment. But even more important, it is the essence of state power to choose—subject only to constitutional limits—who is part of the state government. Cf. *Oregon v. Mitchell*, 400 U. S. 112, 123 (1970) (Black, J.). If poachers destroy the fish and game reserves of Wyoming, it is not to the Congress that people are going to complain. Rather, it is the state and local authorities who will have to justify their actions in selecting wardens. Since it is the state that bears the responsibility for delivering the services, it is clearly an attribute of state sovereignty to choose who will perform these duties—subject only to constitutional limits.

Interestingly, the Congress, while mandating compliance in the states, has been meticulously careful to preserve its own freedom to select employees on any basis it chooses. Although the Age Act was expressly made to apply to the national government, 29 U. S. C. § 633a, exceptions were built into the enactment. Certain categories of employment—such as law enforcement officers—were *explicitly* excluded, and in addition, the statute provides that “[r]easonable exemptions to the provisions of this section may be established by the [Civil Service] Commission.”³ Nor is the Commission’s explanation for these exemptions reassuring. When asked at oral argument why all federal workers were not

³ This function was later transferred to the Equal Employment Opportunity Commission, see section 2 of the 1978 Reorganization Plan No. 1, 43 Fed. Reg. 19807, 92 Stat. 3781.

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given the benefit of the Age Act, the Solicitor General said the reason that was not done was that some of the enclaves, such people as CIA, air traffic controllers, law enforcement officers, fire fighters, were subject to the primary jurisdiction of other congressional committees and Congress did not want to impinge "on their turf" before giving them an opportunity to pass on the issue.⁴

My own view of our constitutional scheme is that Congress should think at least as carefully about impinging on the "turf" of the states as it does about impinging on the "turf" of its membership.

The third prong of the *National League of Cities* test is that the federal intrusion must impair the ability of the state to structure integral operations. Wyoming cites several ways in which the Age Act interferes with its ability to structure state services, and several *amici* briefs inform us of additional difficulties engendered by the Act. These break down into two groups; economic and non-economic hardships. It is beyond dispute that the statute can give rise to increased employment costs caused by forced employment of older individuals. Since these 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.⁵ The employer is

⁴See Tr. of Oral Arg. 8. The legislative history of the FLSA of 1974 bears out this assertion. During the debate in the House of Representatives, amendments were successfully introduced by Representatives Spellman and Hawkins to allow other committees the opportunity to review the statute before it was applied to employees of the agencies for which the committees were responsible, 123 Cong. Rec. 30555-30556.

⁵This problem is exacerbated by the special retirement schemes often used in connection with mandatory early retirement laws. In Wyoming, for example, state employees who are not subject to early retirement contribute less per month towards retirement than those in occupations where early retirement is required. So long as the early retirement laws are in effect, this system is actuarially sound because the employees who will spend

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 illness. See, *e. g.*, M.L. Pollock, L.R. Gettman, and B.U. Meyer, Analysis of Physical Fitness and Coronary Heart Disease Risk of Dallas Area Police Officers, 20 J. Occup. Med. 393 (1978); N.W. Shock, Cardiac Performance and Age, Cardiovascular Problems, 3-24 (1976); J.H. Hall and J.D. Zwemer, Prospective Medicine (1979). 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. See generally, D.W. Gregg and V.B. Lucas, Life and Health Insurance Handbook (3d ed. 1973); S.S. Huebner, K. Black, Jr., Life Insurance (10th ed. 1982).

Non-economic hardships are equally severe. Employers are prevented from hiring those physically best able to do the job. Since older workers occupy a disproportionate share of the upper-level and supervisory positions, a bar on mandatory retirement also impedes promotion opportunities. Lack of such opportunities tends to undermine younger employees' incentive to strive for excellence, and impedes the state from fulfilling affirmative action objectives.

The federal government can hardly claim that the objectives of decreasing costs and increasing promotional opportunities are impermissible: many of the same goals are cited repeatedly to justify the "enclaves" of federal exceptions to the Age Act. For example, mandatory retirement is still the rule in the Armed Services, 10 U. S. C. § 1251, and the Foreign Service, 22 U. S. C. § 4052, despite passage of the Age Act. The House Committee on Armed Services continues, apparently, to think it essential to have a mechanism for the removal of infirm officers from positions of command, H.R.

less years at work pay into the system more rapidly. Simple invalidation of the early retirement system would work an inequity by requiring these workers to contribute more towards retirement than other state employees. Brief for Appellee 12, n. 5. Of course, Wyoming could revamp its pension system to correct this problem. Forcing the State to do so is another example of the adverse impact wrought by the Age Act.

Rep. No. 96-1462, 96th Cong., 2d Sess. 8 (1980). Mandatory retirement was recommended after the Committee analysed the costs and concluded that it would cost more to keep an older employee on active service than it would cost to retire him, *id.*, at 28. Similarly, the House Committee on Post Office and Civil Service, while acknowledging the "unfairness of a mandatory retirement age," H.R. Rep. 96-992 Pt. 2, 96th Cong., 2d Sess. 30 (1980), concluded that it remains necessary in the Foreign Service "for the maintenance of predictable career patterns," *id.*, to prevent "unavailability for worldwide assignment," *id.*, and to "restore the 'flow' [*i. e.* promotional opportunities] to the system," *id.*, at 15.

The Commission answers the State's contentions by arguing that even under the Age Act, it is possible to effectuate some of the State's goals. According to appellant, adverse economic impact is mitigated by § 623(f)(2), which provides that an employer may "observe the terms of a bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter. . . ."

I reject the notion that this exception ameliorates the State's problem to any significant extent. The reality is that, for Wyoming to benefit from this exception, it will have to enact new laws and develop new regulations to reduce its insurance coverage on older employees. Drafting and enacting these new laws is a burden Congress has no power to impose on the states. Second, it is doubtful that Wyoming could, as a practical matter, lower the health and disability insurance coverage on employees who fall under mandatory retirement laws. It is these employees who are, for the most part, in the most physically hazardous occupations, and thus most need the protection. Stated another way, perhaps Crump would not want to keep his job if the State were unwilling to bear the economic risks of his injuries. Section 623(f)(2) is thus a shallow alternative to mandatory retirement.

Inspection of § 623(f)(1), the Commission's answer to non-economic hardships, fares no better. That section provides that mandatory early retirement is permissible "where age is

a bona fide occupational qualification [bfoq] reasonably necessary to the normal operation of the particular business. . . .” Although superficially, this section appears to offer the states a means for lessening the administrative burden of retiring unfit employees on a case by case basis by using age when it is an appropriate proxy for ability, the exception does not work in practice. In the absence of statutory guidelines, the courts that have faced the question have—in response to this appellant’s urgings—taken a hard line on what constitutes a bona fide occupational qualification. Typical seems to be the approach taken in *Arritt v. Grisell*, 567 F. 2d 1267, 1271 (CA4 1977), requiring the employer to prove:

“(1) that the bfoq which it invokes is reasonably necessary to the essence of its business . . . , and (2) that the employer has reasonable cause, i. e., a factual basis for believing that all or substantially all persons within the class . . . would be unable to perform safely and efficiently the duties involved, or that it is impossible or impractical to deal with persons over the age limit on an individualized basis.”

See also *Usery v. Tamiami Trail Tours, Inc.*, 531 F. 2d 224 (CA5 1976). Given the state of modern medicine, it is virtually impossible to prove that *all* persons within a class are unable to perform a particular job or that it is impossible to test employees on an individual basis, see, e. g., *Johnson v. Mayor of Baltimore*, 515 F.Supp. 1287, 1299 (D.Md. 1981), cert. denied, — U. S. — (1982) (age not bfoq for firefighters since medical tests are available to test on a case-by-case basis); *Adams v. James*, 526 F.Supp. 80, 87 (M.D. Ala. 1981) (evidence compiled for trial not usable to show age is a bfoq for police officers).

In the face of this track record, I find it impossible to say that § 623(f)(1) provides an adequate method for avoiding significant impairment to the state’s ability to structure its integral governmental operations.

Since I am satisfied that the Age Act runs afoul of all three prongs of the *National League of Cities* test, I turn to the

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balancing test alluded to in JUSTICE BLACKMUN'S concurring opinion in *National League of Cities*, and in *Hodel*. The Commission argues that the federal interest in preventing unnecessary demands on the social security system and other maintenance programs, in protecting employees from arbitrary discrimination, and in eliminating unnecessary burdens on the free flow of commerce "is more than sufficient in the face of a Wyoming's bald assertion of a prerogative to be arbitrary." Brief for Appellant, at 19.⁶

It is simply not accurate to state that Wyoming is really resting its challenge to the Age Act on a "sovereign" right to discriminate; as I read it, Wyoming is asserting a right to be "discriminating" in choosing its law enforcement personnel by taking age into account. Nor do I believe that these largely theoretical benefits to the federal government outweigh the very real danger that a fire may burn out of control because the firefighters are not physically able to cope; or that a criminal may escape because a law-enforcement officer's reflexes are too slow to react swiftly to apprehend an offender; or that an officer may be injured or killed for want of capacity to defend himself. I submit these factors may not be very real to Congress because it is not Congress' responsibility to prevent them. They are nonetheless quite real to the states. I would hold that Commerce Clause powers are wholly insufficient to bar the states from dealing with or preventing these dangers in a rational manner. Wyoming's solution is plainly a rational means.

II

Since it was ratified after the Tenth Amendment, the Fourteenth Amendment is not subject to all the constraints discussed earlier in connection with the Commerce Clause. Indeed, it is well established that Congress may, under the powers bestowed by § 5, enact legislation affecting the states, *Ex Parte Virginia*, 100 U. S. 339, 345 (1880); *Fitzpatrick v.*

⁶This blandly ignores Congress' assertions of authority to avoid the very strictures it imposes on the states.

Bitzer, 427 U. S. 445 (1976). But this does not mean that Congress has been given a "blank check" to intrude into details of states' governments at will. The Tenth Amendment was not, after all repealed when the Fourteenth Amendment was ratified: it was merely limited. The question then becomes whether the Fourteenth Amendment operates to transfer from the states to the federal government the essentially local governmental function of deciding who will protect citizens from law breakers.

The outer reaches of congressional power under the civil war amendments have always been uncertain. One factor is, however, clear: Congress may act only where a violation lurks. The flaw in the Commission's analysis is that in this instance, no one—not the Court, not the Congress⁷—has determined that mandatory retirement plans violate any rights protected by these amendments. We cannot say that the Judiciary made this determination, for we have considered the constitutionality of mandatory retirement schemes twice, in *Massachusetts Board of Retirement v. Murgia*, 427 U. S. 307 (1976), for state police, and *Vance v. Bradley*, 440 U. S. 93 (1979), for Foreign Service officers; we rejected both equal protection challenges. In both instances, we arrived at our conclusion by examining, *arguendo*, the retirement schemes under the rational-basis standard. It was not necessary that we be convinced that equal protection guarantees extend to classes defined by age because governmental employment is not a fundamental right and those who are mandatorily retired are not a suspect class.

In *Murgia*, we found that early retirement of policemen was justified by the states' objective of "protect[ing] the public by assuring physical preparedness of its uniformed police," *id.*, at 314; in *Bradley*, we held that early retirement of foreign service personnel was justified by Congress' perception

⁷The ability of Congress to define independently protected classes is a controversial issue, and I do not mean to propose a resolution here. Rather, I think that the Age Act is unconstitutional even if it is assumed that Congress has this power.

of a need to assure "opportunities for promotion would be available," "the high quality of those occupying positions critical to the conduct of our foreign relation," and in order to "minimize[] the risk of less than superior performance by reason of poor health or loss of vitality," 440 U. S., at 101 and 103-104. Congress was simply using a rational means for solving a practical governmental problem within its constitutional jurisdiction.

Were we asked to review the constitutionality of the Wyoming State Highway Patrol and Game and Fish Warden Retirement Act, ~~I have little doubt we would reach a result~~ consistent with *Bradley* and *Murgia*. Like Congress dealing with military personnel, FBI agents and foreign service officers, the State of Wyoming has an interest in the physical ability of its highway patrol, game, and fish wardens. It is within Wyoming's authority to motivate personnel to high performance by assuring opportunities for advancement; Wyoming reasonably considers safety conditions on its highways and game preserves critical to the well-being of its citizenry. In short, it cannot be said that in applying the Age Act to the states Congress has acted to enforce equal protection guarantees as they have been defined by this Court.

Nor can appellant claim that Congress has used the powers we recognized in *City of Rome v. United States*, 446 U. S. 156, 176-177 (1980); *Oregon v. Mitchell*, *supra*; *Jones v. Alfred H. Mayer Co.*, 392 U. S. 409, 437-444 (1968); *South Carolina v. Katzenbach*, 383 U. S. 301 (1966); *Katzenbach v. Morgan*, 384 U. S. 641 (1966), to enact legislation that prohibits conduct not in itself unconstitutional because it considered the prohibition necessary to guard against encroachment of guaranteed rights or to rectify past discrimination. There has been no finding, as there was in *South Carolina v. Katzenbach*, *supra*, at 309, that the abrogated state law infringed on rights identified by this Court.⁸ Nor did Con-

⁸ At oral argument, the Solicitor General argued that in applying the rational-basis test in *Murgia* and *Bradley*, the Court *sub silentio* agreed that age discrimination is protected by the Equal Protection Clause, and

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gress use, as it did in *Katzenbach v. Morgan*, *supra*, at 656, its "specially informed legislative competence" to decide that the state law it invalidated was too intrusive on federal rights to be an appropriate means to achieve the ends sought by the state. Instead, the Age Act can be sustained only if we assume first, that Congress can define rights wholly independently of our case law, and second, that Congress has done so here. I agree with neither proposition.

Allowing Congress to protect constitutional rights statutorily that it has independently defined fundamentally alters our scheme of government. Although the *South Carolina v. Katzenbach* line of cases may be read to allow Congress a degree of flexibility in deciding what the Fourteenth Amendment safeguards, I have always read *Oregon v. Mitchell* as finally imposing a limitation on the extent to which Congress may substitute its own judgment for that of the states and assume this Court's "role of final arbiter," *Mitchell*, at 205 (Harlan, J., dissenting). *Mitchell*, after all, involved legislation in the area of suffrage, where Congress had special competence and special reasons to limit the powers of the states. It is significant, however, that while we there sustained the portions of the Voting Rights Act of 1970 lowering the minimum age of voters from 21 to 18 in federal elections,

that all Congress has done is alter the burden needed to prove compliance with its guarantees. Tr. of Oral Arg. 17-18. I do not read these decisions to support this notion. *Murgia* and *Bradley* presented us with no occasion to determine the scope of the equal protection guarantee because we found the legislation challenged there sustainable even if we assumed the class was protected. Moreover, there are good arguments for finding that a class defined in temporal terms is not protected. Since all citizens (if they are lucky and live that long) become old, the majoritarian process is adequate to protect their interest.

This is not to say definitively that age discrimination is not protected by the Fourteenth Amendment because this case does not squarely raise that issue. Rather, I am pointing out that since this Court has not decided the question, the Government cannot support this enactment on the ground that Congress was attempting to establish further safeguards for a class we have found to be constitutionally protected.

barring literacy tests in state and federal elections, and forbidding states from disqualifying voters in presidential elections for failure to meet state residency requirements, a majority of the *Mitchell* Court did not agree to allow Congress to alter voting requirements in *state* elections. We struck that portion of the Voting Rights Act because we thought it a "plain fact of history" that Congress lacked this power, see *id.*, at 125 and 294 (Black and Stewart, JJ.); *id.*, at 154-215 (Harlan, J.); and because we thought that the Fourteenth Amendment was not a license to "overstep the letter or spirit of any constitutional restriction," *id.*, at 287 (Stewart, J.).

Good point

For me, this same reasoning leads inevitably to the conclusion that Congress lacked power to apply the Age Act to the states. There is no hint in the body of the Constitution ratified in 1789 or in the relevant amendments that every classification based on age is outlawed. Yet there is much in the Constitution and the relevant amendments to indicate that states retain sovereign powers not expressly surrendered, and these surely include the power to choose the employees they feel are best able to serve and protect their citizens.⁹

And even were we to assume for purposes of argument that Congress could redefine the Fourteenth Amendment, I would still reject the power of Congress to impose the Age Act on the states because there is no evidence that Congress intended to redefine it. Surely Congress would not, in the same year that the Age Act was extended to the states, have passed mandatory retirement legislation of its own, Pub. L. 93-350, 88 Stat. 356, codified at 5 U. S. C. § 8335, for law en-

⁹ It has been suggested that where a congressional resolution of a policy question hinges on legislative facts, the Court should defer to Congress's judgment because Congress is in a better position than the Court to find the relevant facts. Cox, *The Role of Congress in Constitutional Determinations*, 40 U. Cinn. L. Rev. 187, 229-230 (1971). While this theory may have some importance in matters of federal concern, it has no place in deciding between two legislative judgments because Congress is simply not as well equipped as local legislators to make decisions involving purely local legislative facts.

forcement officers and firefighters, if it thought that the legislation would violate its own newly declared constitutional guarantee.

I cannot view this inconsistency as a mere instance of underinclusiveness, as appellant urges. An underinclusive statute is one that fails to tackle a problem in its entirety and leaves a portion of an identified evil untouched for later resolution. *Williamson v. Lee Optical Co.*, 348 U. S. 483, 489 (1955). Enacting new inconsistent laws is a far cry from suffering with a situation pending development of a solution. Eight years have elapsed since the Age Act was extended to the states, yet early retirement is still required of federal air traffic controllers, 5 U. S. C. § 8335(a), federal law enforcement officers, § 8335(b), federal firefighters, *id.*, employees of the Panama Canal Comm'n and the Alaska Railroad, § 8335(c), members of the Foreign Service, 22 U. S. C. § 4052, and members of the Armed Services, 10 U. S. C. § 1251. Even were I to change my views and uphold equal protection statutes based on congressional identification of a new class of protected "entitlees," I would not do so in this case, when Congress itself ignores the rights of employees who are similarly situated to those it sees as meriting protection from the states.

III

I believe I have demonstrated that neither the Constitution nor any of its amendments have transferred from the states to the federal government the essentially local function of establishing standards for choosing state employees. The Framers did not give Congress the power to decide local employment standards; they wisely realized that Congress as a body lacked the means to analyse the factors that bear on this decision, such as occupational risks, climate, geography, and demography. Since it is local conditions that determine how a job should be performed, and who should perform it, the authority and responsibility for making employment decisions must be in the hands of local governments, subject only to those restrictions unmistakably contemplated by the Four-

teenth Amendment. Intrusion by Congress can lead only to ill informed decisionmaking.

And even if Congress had infinite fact-finding means at its disposal, conditions in various parts of the country are too diverse to be susceptible to a uniformly applicable solution. Wyoming is a state with large sparsely populated areas, where law enforcement often requires substantial physical stamina; the same conditions are not always encountered by law enforcement officers in Rhode Island, which has far less land area. Problems confronting law enforcement officers in Alaska or Maine may be unlike those encountered in Hawaii and Florida. Barring states from making employment decisions tailored to meet specific local needs undermines the flexibility that has long allowed industrial states to live under the same flag as rural states, and small, densely populated states to coexist with large, sparsely populated ones.

Justice Brandeis' classic conception of the states as laboratories, *New State Ice Co. v. Liebmann*, 285 U. S. 262, 311 (1932) (Brandeis, J., dissenting), is turned on its head when national rather than state governments assert the authority to make decisions on age standards. Without the knowledge to experiment wisely, a national experiment will surely fail. But if, in the Brandeis spirit, a state that is cognizant of its local needs wishes to experiment by having some of its employees denied retirement until age 70 or 75, it should be encouraged to do so; if, on the other hand, a state wishes to experiment with some retirements at age 55 or 60, that should also be permissible. This flexibility for experimentation not only permits each state to find the best solutions to its own problems, it is the means by which each state may profit from the activities of all the rest. I see nothing in the Constitution that permits Congress to force the states into a Procrustean national mold. That is the antithesis of what the authors of the Constitution contemplated for our federal system.

Please
not!

To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

L.F.P.

From: **The Chief Justice**

JAN 17 1983

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-554

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, APPELLANT v. WYOMING, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

[January —, 1983]

CHIEF JUSTICE BURGER, dissenting.

The Court decides today that Congress may dictate to the states, and their political subdivisions, detailed standards governing the selection of state employees, including those charged with protecting people and homes from crimes and fires. Although the opinion reads the Constitution to allow Congress to usurp this fundamental state function, I have re-examined that document and I fail to see where it grants to the national government the power to impose such strictures on the states either expressly or by implication. Those strictures are not required by any holding of this Court, and it is not wholly without significance that Congress has not placed similar limits on itself in the exercise of its own sovereign powers. Accordingly, I would hold the Age Discrimination in Employment Act (Age Act) unconstitutional as applied to the states, and affirm the judgment of the District Court.

I

I begin by analysing the Commerce Clause rationale, for it was upon this power that Congress expressly relied when it originally enacted the Age Act in 1967, see 29 U. S. C. § 621, and when it extended its protections to state and local government employers, see H.R. Rep. No. 93-913, 93d Cong., 2d Sess.—(1974).¹

¹The Age Act was extended to the states along with the Fair Labor Standards Act. Pub. L. 93-259, 88 Stat. 74. Extension of the FLSA was declared unconstitutional in *National League of Cities v. Usery*, 426 U. S.

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Join

I may
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to J.P.S.

We have had several occasions in recent years to investigate the scope of congressional authority to legislate under the Commerce Clause, see, *e. g.*, *National League of Cities v. Usery*, 426 U. S. 833 (1976); *Hodel v. Virginia Surface and Mining Reclamation Association, Inc.*, 452 U. S. 264 (1981); *United Transportation Union v. Long Island R.R.*, — U. S. — (1982). The wisdom to be drawn from these cases is that Congress' authority under the Commerce Clause is restricted by the protections afforded the states by the Tenth Amendment. To decide whether a particular enactment has improperly intruded into Tenth Amendment rights, we have adopted a three-prong test:

"First, there must be a showing that the challenged regulation regulates the 'States as States.' [*National League of Cities, supra*], at 854. Second, the federal regulation must address matters that are indisputably 'attributes of state sovereignty.' *Id.*, at 845. And third, it must be apparent that the States' compliance with the federal law would directly impair their ability 'to structure integral operations in areas of traditional functions.' *Id.*, at 852." *Hodel*, at 287-288.

For statutes that meet each prong of this test, a final inquiry must be made to decide whether "the federal interest advanced [is] such that it justifies state submission." *Id.*, at 288 n. 29, citing *Fry v. United States*, 421 U. S. 542 (1975); *National League of Cities, supra*, at 856 (BLACKMUN, J., concurring).

We need not pause on the first prong of this test, for the legislation is indisputably aimed at regulating the states in their capacity as states, § 630(b). The Commission argues, however, that the legislation does not run counter to the other two prongs of the test. Turning then to prong two, whether the Age Act addresses matters that are 'attributes

of state sovereignty,' we may assume that in enacting the Wyoming State Highway Patrol and Game and Fish Warden Retirement Act, Wyo. Stat. §31-3-101 *et seq.*, Wyoming sought to assure the physical preparedness of its game wardens and others who enforce its laws. Tr. of Oral Arg. 5. This goal is surely an attribute of sovereignty, for parks and recreation services were identified in *National League of Cities*, *supra*, at 851, as traditional state activities protected by the Tenth Amendment. Even more important, it is the essence of state power to choose—subject only to *constitutional* limits—who is to be part of the state government. Cf. *Oregon v. Mitchell*, 400 U. S. 112, 123 (1970) (Black, J.). If poachers destroy the fish and game reserves of Wyoming, it is not to the Congress that people are going to complain, but to state and local authorities who will have to justify their actions in selecting wardens. Since it is the state that bears the responsibility for delivering the services, it is clearly an attribute of state sovereignty to choose who will perform these duties.

To decide whether a challenged activity is an attribute of sovereignty, it is instructive to inquire whether other government entities have attempted to enact similar legislation. A finding that other governmental units have passed mandatory retirement laws, although not conclusive, is persuasive evidence that such laws are traditional methods for insuring an efficient workforce for certain governmental functions. My research indicates that more than one-half the states have retirement laws that, like the Wyoming State Highway Patrol and Game and Fish Warden Retirement Act, violate the Age Act.² More important, Congress, while mandating

² See, e. g., Ala. Code § 36-27-16(a)(1)(e) (Supp. 1982) (police; age 60); Ark. Stat. Ann. § 455 (1977) (police; 65); Cal. GOV Code Ann. § 20980 (West 1980) (highway patrol; 60); Del. Code Ann., Tit. 11, § 8323 (1974) (police; 55); Idaho Code § 50-1514(a) (Supp. 1981) (police; 65); Ill. Rev. Stat., ch. 24, ¶ 10-2.1-17 (Supp. 1982) (police and firemen; 65); Ind. Code

compliance in the states, carefully preserved its own freedom to select employees on any basis it chooses. Although the Age Act was expressly made to apply to the national government, 29 U. S. C. § 633a, exceptions were built into the enactment. Certain categories of employment—such as law enforcement officers—were *explicitly* excluded, and in addition, the statute provides that “[r]easonable exemptions to the provisions of this section may be established by the [Civil Service] Commission.”³ I conclude that defining the qualifications of employees is an essential of sovereignty.

§ 36-8-3.5-20 (1981) (police and firemen; 65); Iowa Code § 97B.46(3) (Supp. 1982) (peace officers and firefighters; 65); Kan. Stat. Ann. § 74-4975(b) (1980) (patrolmen; 60); La. Rev. Stat. Ann. § 691 (West 1982) (law enforcement personnel and firefighters; 65); Md. Ann. Code, Art. 88B, § 53(1)(C) (1979) (police; 60); Mass. Gen. Laws Ann. ch. 32, § 69(d) (West 1966) & § 83A(d) (Supp. 1982) (police; 65); Mich. Comp. Laws § 38.556(c) (1982) (police and firemen; 65); Minn. Stat. § 423.075(1) (West 1982) (police and firemen; 65); Miss. Code Ann. § 25-13-11 (Supp. 1982) (highway patrol; 55) & § 21-29-245 (Supp. 1982) (police and firemen; 60); Mo. Rev. Stat. § 104.010 & § 104.080 (Supp. 1982) (highway patrol; 60); Mont. Code Ann. § 19-6-504 (1981) (highway patrol; 60) & § 19-9-301 (1981) (police; 65); Neb. Rev. Stat. § 81-2025(2) (1981) (patrolmen; 60); N.Y. Retire. & Soc. Sec. Law § 381-6(e) (police; 65); N.D. Cent. Code § 39-03.1-18 (1980) (highway patrol; 60); Ohio Rev. Code Ann. § 5505.16 (Supp. 1981) (highway patrol; 55); Okla. Stat., Tit. 47, § 2-305A (Supp. 1982) (police; 60); Ore. Rev. Stat. § 237.129(1) (1981) (police and firemen; 60); Pa. Stat. Ann., Tit. 71, § 65(d) (Purdon Supp. 1981) (police; 60); R.I. Gen. Laws § 45-21.2-5 (1980) (police and firemen; 65); S.C. Code § 9-1-1535 (Supp. 1982) (conservation officers; 65); Tenn. Code Ann. § 8-36-205(1) (1980) (police; 60 or 65); Tex. Rev. Civ. Stat. Ann., Art. 6423g-1, § 11(d) (Vernon Supp. 1982) (police; 65); Vt. Stat. Ann., Tit. 3, § 459(a)(2) (Supp. 1982) (police; 55); Wash. Rev. Code § 43.43.250(1) (1981) (state patrol; 60); W.Va. Code § 8-22-25(d) (Supp. 1982) (police and firemen; 65); Wyo. Stat. § 15-5-307(a) (Supp. 1982) (police; 60). See also Brief for the National Institute of Municipal Law Enforcement Officers as *Amicus Curiae* 1a-7a, citing 160 municipalities that have laws violating the Age Act.

³This function was later transferred to the Equal Employment Opportunity Commission, see section 2 of the 1978 Reorganization Plan No. 1, 43 Fed. Reg. 19807, 92 Stat. 3781.

The third prong of the *National League of Cities* test is that the federal intrusion must impair the ability of the state to structure integral operations. Wyoming cites several ways in which the Age Act interferes with its ability to structure state services, and several *amici* inform us of additional difficulties, some economic, some not, that are engendered by the Act.

It is beyond dispute that the statute can give rise to increased employment costs caused by forced employment of older individuals. Since these 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.⁴ 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 illness. See, e. g., M.L. Pollock, L.R. Gettman, and B.U. Meyer, Analysis of Physical Fitness and Coronary Heart Disease Risk of Dallas Area Police Officers, 20 J. Occup. Med. 393 (1978); N.W. Shock, Cardiac Performance and Age, Cardiovascular Problems, 3-24 (1976); J.H. Hall and J.D. Zwemer, Prospective Medicine (1979). Since they are—especially in law enforcement—also more prone to

⁴This problem is exacerbated by the special retirement schemes often used in connection with mandatory early retirement laws. In Wyoming, for example, state employees who are not subject to early retirement contribute less per month towards retirement than those in occupations where early retirement is required. So long as the early retirement laws are in effect, this system is actuarially sound because the employees who will spend less years at work pay into the system more rapidly. Simple invalidation of the early retirement system would work an inequity by requiring these workers to contribute more towards retirement than other state employees. Brief for Appellee 12, n. 5. Of course, Wyoming could revamp its pension system to correct this problem. Forcing the State to do so is another example of the adverse impact wrought by the Age Act.

on-the-job injuries, it is reasonable to conclude that the employer's disability costs are increased. See generally, D.W. Gregg and V.B. Lucas, *Life and Health Insurance Handbook* (3d ed. 1973); S.S. Huebner, K. Black, Jr., *Life Insurance* (10th ed. 1982).

Non-economic hardships are equally severe. Employers are prevented from hiring those physically best able to do the job. Since older workers occupy a disproportionate share of the upper-level and supervisory positions, a bar on mandatory retirement also impedes promotion opportunities. Lack of such opportunities tends to undermine younger employees' incentive to strive for excellence, and impedes the state from fulfilling affirmative action objectives.

The Federal Government can hardly claim that the objectives of decreasing costs and increasing promotional opportunities are impermissible: many of the same goals are cited repeatedly to justify the "enclaves" of federal exceptions to the Age Act. For example, mandatory retirement is still the rule in the Armed Services, 10 U. S. C. § 1251, and the Foreign Service, 22 U. S. C. § 4052, despite passage of the Age Act. The House Committee on Armed Services continues, apparently, to think it essential to have a mechanism to assure that officers from positions of command are vigorous and free from infirmities generally associated with age. H.R. Rep. No. 96-1462, 96th Cong., 2d Sess. 8 (1980). Similarly, the House Committee on Post Office and Civil Service, while acknowledging the "unfairness of a mandatory retirement age," H.R. Rep. 96-992 Pt. 2, 96th Cong., 2d Sess. 30 (1980), concluded that it remains necessary in the Foreign Service "for the maintenance of predictable career patterns," *id.*, to prevent "unavailability for worldwide assignment," *id.*, and to "restore the 'flow' [*i. e.* promotional opportunities] to the system," *id.*, at 15. See also 5 U. S. C. § 335. It is difficult to grasp just how Congress reconciles that view with its legislation forcing the states to comply with rigid standards.

The Commission answers the State's contentions by arguing that even under the Age Act, it is possible to effectuate some of the State's goals. According to appellant, adverse economic impact is mitigated by § 623(f)(2), which provides that an employer may "observe the terms of a bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter. . . ."

I reject the notion that this exception ameliorates the State's problem to any significant extent. The reality is that, for Wyoming to benefit from this exception, it will have to enact new laws and develop new regulations to reduce its insurance coverage on older employees. Drafting and enacting these new laws is a burden Congress has no power to impose on the states. Second, it is doubtful that Wyoming could, as a practical matter, lower the health and disability insurance coverage on employees who fall under mandatory retirement laws. It is these employees who are, for the most part, in the most physically hazardous occupations, and thus most need protection. Stated another way, perhaps Crump would not want to keep his job if the State were unwilling to bear the economic risks of his injuries. Section 623(f)(2) is thus a shallow alternative to mandatory retirement.

Section 623(f)(1), the Commission's answer to the problem of protecting the state's ability to deliver its services effectively, provides no solution either. That section provides that mandatory early retirement is permissible "where age is a bona fide occupational qualification [BFOQ] reasonably necessary to the normal operation of the particular business. . . ." Although superficially, this section appears to offer the states a means for lessening the administrative burden of retiring unfit employees on a case by case basis, the exception does not work in practice. In the absence of statu-

tory guidelines, the courts that have faced the question have—in response to this appellant's urgings—established a high standard of what constitutes a bona fide occupational qualification. Typical seems to be the approach taken in *Arritt v. Grisell*, 567 F. 2d 1267, 1271 (CA4 1977), requiring the employer to prove:

“(1) that the bfoq which it invokes is reasonably necessary to the essence of its business . . . , and (2) that the employer has reasonable cause, i. e., a factual basis for believing that all or substantially all persons within the class . . . would be unable to perform safely and efficiently the duties involved, or that it is impossible or impractical to deal with persons over the age limit on an individualized basis.”

See also *Usery v. Tamiami Trail Tours, Inc.*, 531 F. 2d 224 (CA5 1976). Given the state of modern medicine, it is virtually impossible to prove that *all* persons within a class are unable to perform a particular job or that it is impossible to test employees on an individual basis, see, e. g., *Johnson v. Mayor of Baltimore*, 515 F.Supp. 1287, 1299 (D.Md. 1981), cert. denied, — U. S. — (1982).

In the face of this track record, I find it impossible to say that § 623(f)(1) provides an adequate method for avoiding significant impairment to the state's ability to structure its integral governmental operations.⁵

Since I am satisfied that the Age Act runs afoul of the three prongs of the *National League of Cities* test, I turn to the balancing test alluded to in JUSTICE BLACKMUN's concurring opinion in *National League of Cities*, and in *Hodel*. The Commission argues that the federal interest in preventing

⁵ In addition, states that choose to invoke the BFOQ exception expose themselves to lawsuits requiring them to defend their choices. Defense of lawsuits is a costly and time-consuming endeavor that is, in itself, a burden impermissible for Congress to impose on the states.

yes

unnecessary demands on the social security system and other maintenance programs, in protecting employees from arbitrary discrimination, and in eliminating unnecessary burdens on the free flow of commerce "is more than sufficient in the face of a Wyoming's bald assertion of a prerogative to be arbitrary." Brief for Appellant, at 19.

It is simply not accurate to state that Wyoming is resting its challenge to the Age Act on a "sovereign" right to discriminate; as I read it, Wyoming is asserting a right to set standards to meet local needs. Nor do I believe that these largely theoretical benefits to the Federal Government outweigh the very real danger that a fire may burn out of control because the firefighters are not physically able to cope; or that a criminal may escape because a law-enforcement officer's reflexes are too slow to react swiftly enough to apprehend an offender; or that an officer may be injured or killed for want of capacity to defend himself. These factors may not be real to Congress but it is not Congress' responsibility to prevent them; they are nonetheless real to the states. I would hold that Commerce Clause powers are wholly insufficient to bar the states from dealing with or preventing these dangers in a rational manner. Wyoming's solution is plainly a rational means.

II

Since it was ratified after the Tenth Amendment, the Fourteenth Amendment is not subject to the constraints discussed earlier in connection with the Commerce Clause. Indeed, it is well established that Congress may, under the powers bestowed by § 5, enact legislation affecting the states, *Ex Parte Virginia*, 100 U. S. 339, 345 (1880); *Fitzpatrick v. Bitzer*, 427 U. S. 445 (1976). But this does not mean that Congress has been given a "blank check" to intrude into details of states' governments at will. The Tenth Amendment was not, after all repealed when the Fourteenth Amendment

was ratified: it was merely limited. The question then becomes whether the Fourteenth Amendment operates to transfer from the states to the Federal Government the essentially local governmental function of deciding who will protect citizens from law breakers.

The outer reaches of congressional power under the civil war amendments have always been uncertain. One factor is, however, clear: Congress may act only where a violation lurks. The flaw in the Commission's analysis is that in this instance, no one—not the Court, not the Congress⁶—has determined that mandatory retirement plans violate any rights protected by these amendments. We cannot say that the Judiciary made this determination, for we have considered the constitutionality of mandatory retirement schemes twice, in *Massachusetts Board of Retirement v. Murgia*, 427 U. S. 307 (1976), for state police, and *Vance v. Bradley*, 440 U. S. 93 (1979), for Foreign Service officers; we rejected both equal protection challenges. In both instances, we arrived at our conclusion by examining, *arguendo*, the retirement schemes under the rational-basis standard. It was not necessary that we be convinced that equal protection guarantees extend to classes defined by age because governmental employment is not a fundamental right and those who are mandatorily retired are not a suspect class.

In *Murgia*, we found that early retirement of policemen was justified by the states' objective of "protect[ing] the public by assuring physical preparedness of its uniformed police," *id.*, at 314; in *Bradley*, we held that early retirement of foreign service personnel was justified by Congress' perception of a need to assure "opportunities for promotion would be available," "the high quality of those occupying positions critical to the conduct of our foreign relation," and in order to

*no
violation
of rights*

⁶The ability of Congress to define independently protected classes is an issue that I do not mean to resolve here. Rather, I think that the Age Act is unconstitutional even if it is assumed that Congress has this power.

“minimize[] the risk of less than superior performance by reason of poor health or loss of vitality,” 440 U. S., at 101 and 103-104. Congress was simply using a rational means for solving a practical governmental problem within its constitutional jurisdiction.

Were we asked to review the constitutionality of the Wyoming State Highway Patrol and Game and Fish Warden Retirement Act, we would reach a result consistent with *Bradley* and *Murgia*. Like Congress dealing with military personnel, FBI agents and foreign service officers, the State of Wyoming has an interest in the physical ability of its highway patrol, game, and fish wardens. It is within Wyoming’s authority to motivate personnel to high performance by assuring opportunities for advancement; Wyoming reasonably considers safety conditions on its highways and game preserves critical to the well-being of its citizenry. In short, it cannot be said that in applying the Age Act to the states Congress has acted to enforce equal protection guarantees as they have been defined by this Court.

Nor can appellant claim that Congress has used the powers we recognized in *City of Rome v. United States*, 446 U. S. 156, 176-177 (1980); *Oregon v. Mitchell*, *supra*; *Jones v. Alfred H. Mayer Co.*, 392 U. S. 409, 437-444 (1968); *South Carolina v. Katzenbach*, 383 U. S. 301 (1966); *Katzenbach v. Morgan*, 384 U. S. 641 (1966), to enact legislation that prohibits conduct not in itself unconstitutional because it considered the prohibition necessary to guard against encroachment of guaranteed rights or to rectify past discrimination. There has been no finding, as there was in *South Carolina v. Katzenbach*, *supra*, at 309, that the abrogated state law infringed on rights identified by this Court.⁷ Nor did Con-

⁷At oral argument, the Solicitor General argued that in applying the rational-basis test in *Murgia* and *Bradley*, the Court *sub silentio* agreed that age discrimination is protected by the Equal Protection Clause, and that Congress has merely altered the burden needed to prove compliance

gress use, as it did in *Katzenbach v. Morgan*, *supra*, at 656, its “specially informed legislative competence” to decide that the state law it invalidated was too intrusive on federal rights to be an appropriate means to achieve the ends sought by the state. Instead, the Age Act can be sustained only if we assume first, that Congress can define rights wholly independently of our case law, and second, that Congress has done so here. I agree with neither proposition.

Allowing Congress to protect constitutional rights statutorily that it has independently defined fundamentally alters our scheme of government. Although the *South Carolina v. Katzenbach* line of cases may be read to allow Congress a degree of flexibility in deciding what the Fourteenth Amendment safeguards, I have always read *Oregon v. Mitchell* as finally imposing a limitation on the extent to which Congress may substitute its own judgment for that of the states and assume this Court’s “role of final arbiter,” *Mitchell*, at 205 (Harlan, J., dissenting). *Mitchell*, after all, involved legislation in the area of suffrage, where Congress had special competence and special reasons to limit the powers of the states. It is significant, however, that while we there sustained the portions of the Voting Rights Act of 1970 lowering the minimum age of voters from 21 to 18 in federal elections, barring literacy tests in state and federal elections, and forbidding states from disqualifying voters in presidential elec-

with its guarantees. Tr. of Oral Arg. 17–18. I do not read these decisions to support this notion. *Murgia* and *Bradley* presented us with no occasion to determine the scope of the equal protection guarantee because we found the legislation challenged there sustainable even if we assumed the class was protected.

This is not to say definitively that age discrimination is not protected by the Fourteenth Amendment because this case does not squarely raise that issue. Rather, I am pointing out that since this Court has not decided the question, the Government cannot support this enactment on the ground that Congress was attempting to establish further safeguards for a class we have found to be constitutionally protected.

tions for failure to meet state residency requirements, a majority of the *Mitchell* Court did not agree to allow Congress to alter voting requirements in *state* elections. We struck that portion of the Voting Rights Act because we thought it a "plain fact of history" that Congress lacked this power, see *id.*, at 125 and 294 (Black and Stewart, JJ.); *id.*, at 154-215 (Harlan, J.); and because we thought that the Fourteenth Amendment was not a license to "overstep the letter or spirit of any constitutional restriction," *id.*, at 287 (Stewart, J.).

For me, this same reasoning leads inevitably to the conclusion that Congress lacked power to apply the Age Act to the states. There is no hint in the body of the Constitution ratified in 1789 or in the relevant amendments that every classification based on age is outlawed. Yet there is much in the Constitution and the relevant amendments to indicate that states retain sovereign powers not expressly surrendered, and these surely include the power to choose the employees they feel are best able to serve and protect their citizens.⁸

And even were we to assume, *arguendo*, that Congress could redefine the Fourteenth Amendment, I would still reject the power of Congress to impose the Age Act on the states when Congress, in the same year that the Age Act was extended to the states, passed mandatory retirement legislation of its own, Pub. L. 93-350, 88 Stat. 356, codified at 5 U. S. C. § 8335, for law enforcement officers and firefighters. Eight years have elapsed since the Age Act was extended to the states, yet early retirement is still required of federal air

⁸ It has been suggested that where a congressional resolution of a policy question hinges on legislative facts, the Court should defer to Congress's judgment because Congress is in a better position than the Court to find the relevant facts. Cox, *The Role of Congress in Constitutional Determinations*, 40 U. Cinn. L. Rev. 187, 229-230 (1971). While this theory may have some importance in matters of strictly federal concern, it has no place in deciding between the legislative judgments of Congress and that of the Wyoming Legislature. Congress is simply not as well equipped as state legislators to make decisions involving purely local needs.

traffic controllers, 5 U. S. C. § 8335(a), federal law enforcement officers, § 8335(b), federal firefighters, *id.*, employees of the Panama Canal Commission and the Alaska Railroad, § 8335(c), members of the Foreign Service, 22 U. S. C. § 4052, and members of the Armed Services, 10 U. S. C. § 1251.

III

I believe I have demonstrated that neither the Constitution nor any of its amendments have transferred from the states to the federal government the essentially local function of establishing standards for choosing state employees. The Framers did not give Congress the power to decide local employment standards because they wisely realized that as a body, Congress lacked the means to analyse the factors that bear on this decision, such as the diversity of occupational risks, climate, geography, and demography. Since local conditions generally determine how a job should be performed, and who should perform it, the authority and responsibility for making employment decisions must be in the hands of local governments, subject only to those restrictions unmistakably contemplated by the Fourteenth Amendment. Intrusion by Congress into this area can lead only to ill informed decisionmaking.

And even if Congress had infinite fact-finding means at its disposal, conditions in various parts of the country are too diverse to be susceptible to a uniformly applicable solution. Wyoming is a state with large sparsely populated areas, where law enforcement often requires substantial physical stamina; the same conditions are not always encountered by law enforcement officers in Rhode Island, which has far less land area, no mountains, and no wilderness. Problems confronting law enforcement officers in Alaska or Maine may be unlike those encountered in Hawaii and Florida. Barring states from making employment decisions tailored to meet specific local needs undermines the flexibility that has long

allowed industrial states to live under the same flag as rural states, and small, densely populated states to coexist with large, sparsely populated ones.

The reserved powers of the states and Justice Brandeis' classic conception of the states as laboratories, *New State Ice Co. v. Liebmann*, 285 U. S. 262, 311 (1932) (Brandeis, J., dissenting), are turned on their heads when national rather than state governments assert the authority to make decisions on the age standard of state law enforcement officers. Flexibility for experimentation not only permits each state to find the best solutions to its own problems, it is the means by which each state may profit from the experiences and activities of all the rest. Nothing in the Constitution permits Congress to force the states into a Procrustean national mold that takes no account of local needs and conditions. That is the antithesis of what the authors of the Constitution contemplated for our federal system.

To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell ✓
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **The Chief Justice**
JAN 17 1983

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SUPREME COURT OF THE UNITED STATES

No. 81-554

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, APPELLANT v. WYOMING, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF WYOMING

[January —, 1983]

CHIEF JUSTICE BURGER, dissenting.

The Court decides today that Congress may dictate to the states, and their political subdivisions, detailed standards governing the selection of state employees, including those charged with protecting people and homes from crimes and fires. Although the opinion reads the Constitution to allow Congress to usurp this fundamental state function, I have re-examined that document and I fail to see where it grants to the national government the power to impose such strictures on the states either expressly or by implication. Those strictures are not required by any holding of this Court, and it is not wholly without significance that Congress has not placed similar limits on itself in the exercise of its own sovereign powers. Accordingly, I would hold the Age Discrimination in Employment Act (Age Act) unconstitutional as applied to the states, and affirm the judgment of the District Court.

I

I begin by analysing the Commerce Clause rationale, for it was upon this power that Congress expressly relied when it originally enacted the Age Act in 1967, see 29 U. S. C. § 621, and when it extended its protections to state and local government employers, see H.R. Rep. No. 93-913, 93d Cong., 2d Sess.—(1974).¹

¹The Age Act was extended to the states along with the Fair Labor Standards Act. Pub. L. 93-259, 88 Stat. 74. Extension of the FLSA was declared unconstitutional in *National League of Cities v. Usery*, 426 U. S.

40m
— I think this is a
well-done dissent 40B

We have had several occasions in recent years to investigate the scope of congressional authority to legislate under the Commerce Clause, see, *e. g.*, *National League of Cities v. Usery*, 426 U. S. 833 (1976); *Hodel v. Virginia Surface and Mining Reclamation Association, Inc.*, 452 U. S. 264 (1981); *United Transportation Union v. Long Island R.R.*, — U. S. — (1982). The wisdom to be drawn from these cases is that Congress' authority under the Commerce Clause is restricted by the protections afforded the states by the Tenth Amendment. To decide whether a particular enactment has improperly intruded into Tenth Amendment rights, we have adopted a three-prong test:

"First, there must be a showing that the challenged regulation regulates the 'States as States.' [*National League of Cities, supra*], at 854. Second, the federal regulation must address matters that are indisputably 'attributes of state sovereignty.' *Id.*, at 845. And third, it must be apparent that the States' compliance with the federal law would directly impair their ability 'to structure integral operations in areas of traditional functions.' *Id.*, at 852." *Hodel*, at 287-288.

For statutes that meet each prong of this test, a final inquiry must be made to decide whether "the federal interest advanced [is] such that it justifies state submission." *Id.*, at 288 n. 29, citing *Fry v. United States*, 421 U. S. 542 (1975); *National League of Cities, supra*, at 856 (BLACKMUN, J., concurring).

We need not pause on the first prong of this test, for the legislation is indisputably aimed at regulating the states in their capacity as states, § 630(b). The Commission argues, however, that the legislation does not run counter to the other two prongs of the test. Turning then to prong two, whether the Age Act addresses matters that are 'attributes

of state sovereignty,' we may assume that in enacting the Wyoming State Highway Patrol and Game and Fish Warden Retirement Act, Wyo. Stat. § 31-3-101 *et seq.*, Wyoming sought to assure the physical preparedness of its game wardens and others who enforce its laws. Tr. of Oral Arg. 5. This goal is surely an attribute of sovereignty, for parks and recreation services were identified in *National League of Cities, supra*, at 851, as traditional state activities protected by the Tenth Amendment. Even more important, it is the essence of state power to choose—subject only to *constitutional* limits—who is to be part of the state government. Cf. *Oregon v. Mitchell*, 400 U. S. 112, 123 (1970) (Black, J.). If poachers destroy the fish and game reserves of Wyoming, it is not to the Congress that people are going to complain, but to state and local authorities who will have to justify their actions in selecting wardens. Since it is the state that bears the responsibility for delivering the services, it is clearly an attribute of state sovereignty to choose who will perform these duties.

To decide whether a challenged activity is an attribute of sovereignty, it is instructive to inquire whether other government entities have attempted to enact similar legislation. A finding that other governmental units have passed mandatory retirement laws, although not conclusive, is persuasive evidence that such laws are traditional methods for insuring an efficient workforce for certain governmental functions. My research indicates that more than one-half the states have retirement laws that, like the Wyoming State Highway Patrol and Game and Fish Warden Retirement Act, violate the Age Act.² More important, Congress, while mandating

²See, e. g., Ala. Code § 36-27-16(a)(1)(e) (Supp. 1982) (police; age 60); Ark. Stat. Ann. § 455 (1977) (police; 65); Cal. GOV Code Ann. § 20980 (West 1980) (highway patrol; 60); Del. Code Ann., Tit. 11, § 8323 (1974) (police; 55); Idaho Code § 50-1514(a) (Supp. 1981) (police; 65); Ill. Rev. Stat., ch. 24, ¶ 10-2.1-17 (Supp. 1982) (police and firemen; 65); Ind. Code

compliance in the states, carefully preserved its own freedom to select employees on any basis it chooses. Although the Age Act was expressly made to apply to the national government, 29 U. S. C. § 633a, exceptions were built into the enactment. Certain categories of employment—such as law enforcement officers—were *explicitly* excluded, and in addition, the statute provides that “[r]easonable exemptions to the provisions of this section may be established by the [Civil Service] Commission.”³ I conclude that defining the qualifications of employees is an essential of sovereignty.

§ 36-8-3.5-20 (1981) (police and firemen; 65); Iowa Code § 97B.46(3) (Supp. 1982) (peace officers and firefighters; 65); Kan. Stat. Ann. § 74-4975(b) (1980) (patrolmen; 60); La. Rev. Stat. Ann. § 691 (West 1982) (law enforcement personnel and firefighters; 65); Md. Ann. Code, Art. 88B, § 53(1)(C) (1979) (police; 60); Mass. Gen. Laws Ann. ch. 32, § 69(d) (West 1966) & § 83A(d) (Supp. 1982) (police; 65); Mich. Comp. Laws § 38.556(c) (1982) (police and firemen; 65); Minn. Stat. § 423.075(1) (West 1982) (police and firemen; 65); Miss. Code Ann. § 25-13-11 (Supp. 1982) (highway patrol; 55) & § 21-29-245 (Supp. 1982) (police and firemen; 60); Mo. Rev. Stat. § 104.010 & § 104.080 (Supp. 1982) (highway patrol; 60); Mont. Code Ann. § 19-6-504 (1981) (highway patrol; 60) & § 19-9-801 (1981) (police; 65); Neb. Rev. Stat. § 81-2025(2) (1981) (patrolmen; 60); N.Y. Retire. & Soc. Sec. Law § 381-6(e) (police; 65); N.D. Cent. Code § 39-03.1-18 (1980) (highway patrol; 60); Ohio Rev. Code Ann. § 5505.16 (Supp. 1981) (highway patrol; 55); Okla. Stat., Tit. 47, § 2-305A (Supp. 1982) (police; 60); Ore. Rev. Stat. § 237.129(1) (1981) (police and firemen; 60); Pa. Stat. Ann., Tit. 71, § 65(d) (Purdon Supp. 1981) (police; 60); R.I. Gen. Laws § 45-21.2-5 (1980) (police and firemen; 65); S.C. Code § 9-1-1535 (Supp. 1982) (conservation officers; 65); Tenn. Code Ann. § 8-36-205(1) (1980) (police; 60 or 65); Tex. Rev. Civ. Stat. Ann., Art. 6423g-1, § 11(d) (Vernon Supp. 1982) (police; 65); Vt. Stat. Ann., Tit. 3, § 459(a)(2) (Supp. 1982) (police; 55); Wash. Rev. Code § 43.43.250(1) (1981) (state patrol; 60); W.Va. Code § 8-22-25(d) (Supp. 1982) (police and firemen; 65); Wyo. Stat. § 15-5-307(a) (Supp. 1982) (police; 60). See also Brief for the National Institute of Municipal Law Enforcement Officers as *Amicus Curiae* 1a-7a, citing 160 municipalities that have laws violating the Age Act.

³This function was later transferred to the Equal Employment Opportunity Commission, see section 2 of the 1978 Reorganization Plan No. 1, 43 Fed. Reg. 19807, 92 Stat. 3781.

The third prong of the *National League of Cities* test is that the federal intrusion must impair the ability of the state to structure integral operations. Wyoming cites several ways in which the Age Act interferes with its ability to structure state services, and several *amici* inform us of additional difficulties, some economic, some not, that are engendered by the Act.

It is beyond dispute that the statute can give rise to increased employment costs caused by forced employment of older individuals. Since these 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.⁴ 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 illness. See, *e. g.*, M.L. Pollock, L.R. Gettman, and B.U. Meyer, Analysis of Physical Fitness and Coronary Heart Disease Risk of Dallas Area Police Officers, 20 J. Occup. Med. 393 (1978); N.W. Shock, Cardiac Performance and Age, Cardiovascular Problems, 3-24 (1976); J.H. Hall and J.D. Zwemer, Prospective Medicine (1979). Since they are—especially in law enforcement—also more prone to

⁴This problem is exacerbated by the special retirement schemes often used in connection with mandatory early retirement laws. In Wyoming, for example, state employees who are not subject to early retirement contribute less per month towards retirement than those in occupations where early retirement is required. So long as the early retirement laws are in effect, this system is actuarially sound because the employees who will spend less years at work pay into the system more rapidly. Simple invalidation of the early retirement system would work an inequity by requiring these workers to contribute more towards retirement than other state employees. Brief for Appellee 12, n. 5. Of course, Wyoming could revamp its pension system to correct this problem. Forcing the State to do so is another example of the adverse impact wrought by the Age Act.

on-the-job injuries, it is reasonable to conclude that the employer's disability costs are increased. See generally, D.W. Gregg and V.B. Lucas, *Life and Health Insurance Handbook* (3d ed. 1973); S.S. Huebner, K. Black, Jr., *Life Insurance* (10th ed. 1982).

Non-economic hardships are equally severe. Employers are prevented from hiring those physically best able to do the job. Since older workers occupy a disproportionate share of the upper-level and supervisory positions, a bar on mandatory retirement also impedes promotion opportunities. Lack of such opportunities tends to undermine younger employees' incentive to strive for excellence, and impedes the state from fulfilling affirmative action objectives.

The Federal Government can hardly claim that the objectives of decreasing costs and increasing promotional opportunities are impermissible: many of the same goals are cited repeatedly to justify the "enclaves" of federal exceptions to the Age Act. For example, mandatory retirement is still the rule in the Armed Services, 10 U. S. C. § 1251, and the Foreign Service, 22 U. S. C. § 4052, despite passage of the Age Act. The House Committee on Armed Services continues, apparently, to think it essential to have a mechanism to assure that officers from positions of command are vigorous and free from infirmities generally associated with age. H.R. Rep. No. 96-1462, 96th Cong., 2d Sess. 8 (1980). Similarly, the House Committee on Post Office and Civil Service, while acknowledging the "unfairness of a mandatory retirement age," H.R. Rep. 96-992 Pt. 2, 96th Cong., 2d Sess. 30 (1980), concluded that it remains necessary in the Foreign Service "for the maintenance of predictable career patterns," *id.*, to prevent "unavailability for worldwide assignment," *id.*, and to "restore the 'flow' [*i. e.* promotional opportunities] to the system," *id.*, at 15. See also 5 U. S. C. § 335. It is difficult to grasp just how Congress reconciles that view with its legislation forcing the states to comply with rigid standards.

The Commission answers the State's contentions by arguing that even under the Age Act, it is possible to effectuate some of the State's goals. According to appellant, adverse economic impact is mitigated by § 623(f)(2), which provides that an employer may "observe the terms of a bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter. . . ."

I reject the notion that this exception ameliorates the State's problem to any significant extent. The reality is that, for Wyoming to benefit from this exception, it will have to enact new laws and develop new regulations to reduce its insurance coverage on older employees. Drafting and enacting these new laws is a burden Congress has no power to impose on the states. Second, it is doubtful that Wyoming could, as a practical matter, lower the health and disability insurance coverage on employees who fall under mandatory retirement laws. It is these employees who are, for the most part, in the most physically hazardous occupations, and thus most need protection. Stated another way, perhaps Crump would not want to keep his job if the State were unwilling to bear the economic risks of his injuries. Section 623(f)(2) is thus a shallow alternative to mandatory retirement.

Section 623(f)(1), the Commission's answer to the problem of protecting the state's ability to deliver its services effectively, provides no solution either. That section provides that mandatory early retirement is permissible "where age is a bona fide occupational qualification [BFOQ] reasonably necessary to the normal operation of the particular business. . . ." Although superficially, this section appears to offer the states a means for lessening the administrative burden of retiring unfit employees on a case by case basis, the exception does not work in practice. In the absence of statu-

tory guidelines, the courts that have faced the question have—in response to this appellant's urgings—established a high standard of what constitutes a bona fide occupational qualification. Typical seems to be the approach taken in *Arritt v. Grisell*, 567 F. 2d 1267, 1271 (CA4 1977), requiring the employer to prove:

“(1) that the bfoq which it invokes is reasonably necessary to the essence of its business . . . , and (2) that the employer has reasonable cause, i. e., a factual basis for believing that all or substantially all persons within the class . . . would be unable to perform safely and efficiently the duties involved, or that it is impossible or impractical to deal with persons over the age limit on an individualized basis.”

See also *Usery v. Tamiami Trail Tours, Inc.*, 531 F. 2d 224 (CA5 1976). Given the state of modern medicine, it is virtually impossible to prove that *all* persons within a class are unable to perform a particular job or that it is impossible to test employees on an individual basis, see, e. g., *Johnson v. Mayor of Baltimore*, 515 F.Supp. 1287, 1299 (D.Md. 1981), cert. denied, — U. S. — (1982).

In the face of this track record, I find it impossible to say that § 623(f)(1) provides an adequate method for avoiding significant impairment to the state's ability to structure its integral governmental operations.⁵

Since I am satisfied that the Age Act runs afoul of the three prongs of the *National League of Cities* test, I turn to the balancing test alluded to in JUSTICE BLACKMUN's concurring opinion in *National League of Cities*, and in *Hodel*. The Commission argues that the federal interest in preventing

⁵ In addition, states that choose to invoke the BFOQ exception expose themselves to lawsuits requiring them to defend their choices. Defense of lawsuits is a costly and time-consuming endeavor that is, in itself, a burden impermissible for Congress to impose on the states.

unnecessary demands on the social security system and other maintenance programs, in protecting employees from arbitrary discrimination, and in eliminating unnecessary burdens on the free flow of commerce "is more than sufficient in the face of a Wyoming's bald assertion of a prerogative to be arbitrary." Brief for Appellant, at 19.

It is simply not accurate to state that Wyoming is resting its challenge to the Age Act on a "sovereign" right to discriminate; as I read it, Wyoming is asserting a right to set standards to meet local needs. Nor do I believe that these largely theoretical benefits to the Federal Government outweigh the very real danger that a fire may burn out of control because the firefighters are not physically able to cope; or that a criminal may escape because a law-enforcement officer's reflexes are too slow to react swiftly enough to apprehend an offender; or that an officer may be injured or killed for want of capacity to defend himself. These factors may not be real to Congress but it is not Congress' responsibility to prevent them; they are nonetheless real to the states. I would hold that Commerce Clause powers are wholly insufficient to bar the states from dealing with or preventing these dangers in a rational manner. Wyoming's solution is plainly a rational means.

II

Since it was ratified after the Tenth Amendment, the Fourteenth Amendment is not subject to the constraints discussed earlier in connection with the Commerce Clause. Indeed, it is well established that Congress may, under the powers bestowed by § 5, enact legislation affecting the states, *Ex Parte Virginia*, 100 U. S. 339, 345 (1880); *Fitzpatrick v. Bitzer*, 427 U. S. 445 (1976). But this does not mean that Congress has been given a "blank check" to intrude into details of states' governments at will. The Tenth Amendment was not, after all repealed when the Fourteenth Amendment

was ratified: it was merely limited. The question then becomes whether the Fourteenth Amendment operates to transfer from the states to the Federal Government the essentially local governmental function of deciding who will protect citizens from law breakers.

The outer reaches of congressional power under the civil war amendments have always been uncertain. One factor is, however, clear: Congress may act only where a violation lurks. The flaw in the Commission's analysis is that in this instance, no one—not the Court, not the Congress⁶—has determined that mandatory retirement plans violate any rights protected by these amendments. We cannot say that the Judiciary made this determination, for we have considered the constitutionality of mandatory retirement schemes twice, in *Massachusetts Board of Retirement v. Murgia*, 427 U. S. 307 (1976), for state police, and *Vance v. Bradley*, 440 U. S. 93 (1979), for Foreign Service officers; we rejected both equal protection challenges. In both instances, we arrived at our conclusion by examining, *arguendo*, the retirement schemes under the rational-basis standard. It was not necessary that we be convinced that equal protection guarantees extend to classes defined by age because governmental employment is not a fundamental right and those who are mandatorily retired are not a suspect class.

In *Murgia*, we found that early retirement of policemen was justified by the states' objective of "protect[ing] the public by assuring physical preparedness of its uniformed police," *id.*, at 314; in *Bradley*, we held that early retirement of foreign service personnel was justified by Congress' perception of a need to assure "opportunities for promotion would be available," "the high quality of those occupying positions critical to the conduct of our foreign relation," and in order to

⁶The ability of Congress to define independently protected classes is an issue that I do not mean to resolve here. Rather, I think that the Age Act is unconstitutional even if it is assumed that Congress has this power.

“minimize[] the risk of less than superior performance by reason of poor health or loss of vitality,” 440 U. S., at 101 and 103-104. Congress was simply using a rational means for solving a practical governmental problem within its constitutional jurisdiction.

Were we asked to review the constitutionality of the Wyoming State Highway Patrol and Game and Fish Warden Retirement Act, we would reach a result consistent with *Bradley* and *Murgia*. Like Congress dealing with military personnel, FBI agents and foreign service officers, the State of Wyoming has an interest in the physical ability of its highway patrol, game, and fish wardens. It is within Wyoming's authority to motivate personnel to high performance by assuring opportunities for advancement; Wyoming reasonably considers safety conditions on its highways and game preserves critical to the well-being of its citizenry. In short, it cannot be said that in applying the Age Act to the states Congress has acted to enforce equal protection guarantees as they have been defined by this Court.

Nor can appellant claim that Congress has used the powers we recognized in *City of Rome v. United States*, 446 U. S. 156, 176-177 (1980); *Oregon v. Mitchell*, *supra*; *Jones v. Alfred H. Mayer Co.*, 392 U. S. 409, 437-444 (1968); *South Carolina v. Katzenbach*, 383 U. S. 301 (1966); *Katzenbach v. Morgan*, 384 U. S. 641 (1966), to enact legislation that prohibits conduct not in itself unconstitutional because it considered the prohibition necessary to guard against encroachment of guaranteed rights or to rectify past discrimination. There has been no finding, as there was in *South Carolina v. Katzenbach*, *supra*, at 309, that the abrogated state law infringed on rights identified by this Court.⁷ Nor did Con-

⁷ At oral argument, the Solicitor General argued that in applying the rational-basis test in *Murgia* and *Bradley*, the Court *sub silentio* agreed that age discrimination is protected by the Equal Protection Clause, and that Congress has merely altered the burden needed to prove compliance

gress use, as it did in *Katzenbach v. Morgan*, *supra*, at 656, its “specially informed legislative competence” to decide that the state law it invalidated was too intrusive on federal rights to be an appropriate means to achieve the ends sought by the state. Instead, the Age Act can be sustained only if we assume first, that Congress can define rights wholly independently of our case law, and second, that Congress has done so here. I agree with neither proposition.

Allowing Congress to protect constitutional rights statutorily that it has independently defined fundamentally alters our scheme of government. Although the *South Carolina v. Katzenbach* line of cases may be read to allow Congress a degree of flexibility in deciding what the Fourteenth Amendment safeguards, I have always read *Oregon v. Mitchell* as finally imposing a limitation on the extent to which Congress may substitute its own judgment for that of the states and assume this Court’s “role of final arbiter,” *Mitchell*, at 205 (Harlan, J., dissenting). *Mitchell*, after all, involved legislation in the area of suffrage, where Congress had special competence and special reasons to limit the powers of the states. It is significant, however, that while we there sustained the portions of the Voting Rights Act of 1970 lowering the minimum age of voters from 21 to 18 in federal elections, barring literacy tests in state and federal elections, and forbidding states from disqualifying voters in presidential elec-

with its guarantees. Tr. of Oral Arg. 17-18. I do not read these decisions to support this notion. *Murgia* and *Bradley* presented us with no occasion to determine the scope of the equal protection guarantee because we found the legislation challenged there sustainable even if we assumed the class was protected.

This is not to say definitively that age discrimination is not protected by the Fourteenth Amendment because this case does not squarely raise that issue. Rather, I am pointing out that since this Court has not decided the question, the Government cannot support this enactment on the ground that Congress was attempting to establish further safeguards for a class we have found to be constitutionally protected.

tions for failure to meet state residency requirements, a majority of the *Mitchell* Court did not agree to allow Congress to alter voting requirements in *state* elections. We struck that portion of the Voting Rights Act because we thought it a "plain fact of history" that Congress lacked this power, see *id.*, at 125 and 294 (Black and Stewart, JJ.); *id.*, at 154-215 (Harlan, J.); and because we thought that the Fourteenth Amendment was not a license to "overstep the letter or spirit of any constitutional restriction," *id.*, at 287 (Stewart, J.).

For me, this same reasoning leads inevitably to the conclusion that Congress lacked power to apply the Age Act to the states. There is no hint in the body of the Constitution ratified in 1789 or in the relevant amendments that every classification based on age is outlawed. Yet there is much in the Constitution and the relevant amendments to indicate that states retain sovereign powers not expressly surrendered, and these surely include the power to choose the employees they feel are best able to serve and protect their citizens.⁸

And even were we to assume, *arguendo*, that Congress could redefine the Fourteenth Amendment, I would still reject the power of Congress to impose the Age Act on the states when Congress, in the same year that the Age Act was extended to the states, passed mandatory retirement legislation of its own, Pub. L. 93-350, 88 Stat. 356, codified at 5 U. S. C. § 8335, for law enforcement officers and firefighters. Eight years have elapsed since the Age Act was extended to the states, yet early retirement is still required of federal air

⁸ It has been suggested that where a congressional resolution of a policy question hinges on legislative facts, the Court should defer to Congress's judgment because Congress is in a better position than the Court to find the relevant facts. Cox, *The Role of Congress in Constitutional Determinations*, 40 U. Cinn. L. Rev. 187, 229-230 (1971). While this theory may have some importance in matters of strictly federal concern, it has no place in deciding between the legislative judgments of Congress and that of the Wyoming Legislature. Congress is simply not as well equipped as state legislators to make decisions involving purely local needs.

traffic controllers, 5 U. S. C. § 8335(a), federal law enforcement officers, § 8335(b), federal firefighters, *id.*, employees of the Panama Canal Commission and the Alaska Railroad, § 8335(c), members of the Foreign Service, 22 U. S. C. § 4052, and members of the Armed Services, 10 U. S. C. § 1251.

III

I believe I have demonstrated that neither the Constitution nor any of its amendments have transferred from the states to the federal government the essentially local function of establishing standards for choosing state employees. The Framers did not give Congress the power to decide local employment standards because they wisely realized that as a body, Congress lacked the means to analyse the factors that bear on this decision, such as the diversity of occupational risks, climate, geography, and demography. Since local conditions generally determine how a job should be performed, and who should perform it, the authority and responsibility for making employment decisions must be in the hands of local governments, subject only to those restrictions unmistakably contemplated by the Fourteenth Amendment. Intrusion by Congress into this area can lead only to ill informed decisionmaking.

And even if Congress had infinite fact-finding means at its disposal, conditions in various parts of the country are too diverse to be susceptible to a uniformly applicable solution. Wyoming is a state with large sparsely populated areas, where law enforcement often requires substantial physical stamina; the same conditions are not always encountered by law enforcement officers in Rhode Island, which has far less land area, no mountains, and no wilderness. Problems confronting law enforcement officers in Alaska or Maine may be unlike those encountered in Hawaii and Florida. Barring states from making employment decisions tailored to meet specific local needs undermines the flexibility that has long

allowed industrial states to live under the same flag as rural states, and small, densely populated states to coexist with large, sparsely populated ones.

The reserved powers of the states and Justice Brandeis' classic conception of the states as laboratories, *New State Ice Co. v. Liebmann*, 285 U. S. 262, 311 (1932) (Brandeis, J., dissenting), are turned on their heads when national rather than state governments assert the authority to make decisions on the age standard of state law enforcement officers. Flexibility for experimentation not only permits each state to find the best solutions to its own problems, it is the means by which each state may profit from the experiences and activities of all the rest. Nothing in the Constitution permits Congress to force the states into a Procrustean national mold that takes no account of local needs and conditions. That is the antithesis of what the authors of the Constitution contemplated for our federal system.

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SUPREME COURT OF THE UNITED STATES

No. 81-554

EQUAL EMPLOYMENT OPPORTUNITY COMMIS-
SION, APPELLANT *v.* WYOMING, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF WYOMING

[February —, 1983]

JUSTICE POWELL, dissenting.

I join THE CHIEF JUSTICE's dissenting opinion, but write separately to record a personal dissent from JUSTICE STEVENS' revisionist view of our Nation's history.

I

JUSTICE STEVENS begins his concurring opinion with the startling observation that the Commerce Clause "was the Framers' response to the *central problem* that gave rise to the Constitution itself." *Ante*, at 1 (emphasis added). At a subsequent point in his opinion, he observes that "this Court has construed the Commerce Clause to reflect the *intent of the Framers . . .* to confer a power on the national government adequate to discharge its *central mission*." *Ante*, at 3 (emphasis added).¹ JUSTICE STEVENS further states that "*National League of Cities* not only was incorrectly decided, but also is inconsistent with the *central purpose* of the Constitution itself. . . ." *Ante*, at 5 (emphasis added).

¹ The authority on which JUSTICE STEVENS primarily relies is an extrajudicial lecture delivered by Justice Rutledge in 1946. *Ante*, at 1-2. Justice Rutledge declared that the "proximate cause of our national existence" was not to assure the great "democratic freedoms"; rather it was "to secure freedom of trade" within the former colonies. W. Rutledge, *A Declaration of Legal Faith* 25 (1947).

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No one would deny that removing trade barriers between the States was *one* of the Constitution's purposes. I suggest, however, that there were other purposes of equal or greater importance motivating the statesmen who assembled in Philadelphia and the delegates who debated the issue in the state ratification conventions. No doubt there were differences of opinion as to the principal shortcomings of the Articles of Confederation. But one can be reasonably sure that few of the Founding Fathers thought that trade barriers among the States were "the central problem," or that their elimination was the "central mission" of the Constitutional Convention. Creating a national government within a federal system was far more central than any eighteenth-century concern for interstate commerce.

It is true, of course, that this Court properly has construed the Commerce Clause, and extended its reach, to accommodate the changes that have occurred in our country since the Constitution was ratified. If JUSTICE STEVENS had written that the Founders' intent in adopting the Commerce Clause nearly two centuries ago is of little relevance to the world in which we live today, I would not have disagreed. But his concurring opinion purports to rely on their ~~contemporary~~ intent. *Ante* at 3. I therefore write—briefly in view of the scope of the subject—to place the Commerce Clause in proper historical perspective, and further to suggest that even today federalism is not, as JUSTICE STEVENS appears to believe, utterly subservient to that Clause.

II

The Constitution's central purpose was, as the name implies, to constitute a government. The most important provisions, therefore, are those in the first three Articles relating to the establishment of that government. The system of checks and balances, for example, is far more central to the larger perspective than any single power conferred on any branch. Indeed, the Virginia Plan, the initial proposal from

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which the entire Convention began its work, focuses on the framework of government without even mentioning the power to regulate commerce.²

Founders

Apart from the framework of government itself, the ~~Founders~~ stated their motivating purposes in the Preamble to the Constitution:

"to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty. . . ."

These purposes differ little from the concerns motivating the States in the Articles of Confederation: "their common defence, the security of their liberties, and their mutual and general welfare." Art. III. Although the "general Welfare" recognized by the Constitution could embrace the free flow of trade among States (despite the fact that the same

see ante, at 1,

² Whatever may have sparked the Annapolis Convention, it is clear that the focus of attention at the Constitutional Convention in Philadelphia was the formation of a new government. Madison's report of the proceedings begins, "Monday May 14th 1787 was the day fixed for the meeting of the deputies in Convention for revising the federal system of Government." 1 M. Farrand, *The Records of the Federal Convention of 1787*, p. 3 (rev. ed. 1937) (footnote omitted). After dealing with several preliminary matters, see *id.*, at 1-17, the "main business," *id.*, at 18 (J. Madison), opened on May 29 with Edmund Randolph's speech proposing the Virginia Plan. Almost all of the Plan's resolutions dealt with the appropriate structure for the new government. Only the sixth resolution dealt with legislative powers at all. And far from stressing any power to regulate interstate commerce, it simply declared, in relevant part,

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"that the National Legislature ought to be empowered to enjoy the Legislative Rights vested in Congress by the Confederation & moreover to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation. . . ." ~~Edmund Randolph~~ at 21.

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While this language was, no doubt, broad enough to include the power to regulate interstate commerce, there was certainly no emphasis on that particular power.

Id.,

language in the Articles of Confederation did not), it is clear that security "against foreign invasion [and] against dissensions between members of the Union" was of at least equal importance. See Speech by Edmund Randolph (May 29, 1787), reprinted in 1 M. Farrand, *The Records of the Federal Convention of 1787*, p. 18 (rev. ed. 1937) (J. Madison).³

The power to achieve the purposes was not delegated solely to Congress. If, however, one looks at the powers that were so delegated, the position of the Commerce Clause hardly suggests that it was "central" among the concerns of the patriots who formed our Union. The enumeration of powers in Article I, section 8 begins with the "Power To lay and collect Taxes."⁴ This is followed by the power "to pay the Debts" of the United States. Then, consistent with the Preamble, comes the power to "provide for the common Defence and general Welfare." See note 3, *supra*. The perceived need for a national legislature with the power to tax, and to maintain an army and navy for the common defense, loomed far larger in the Founders' thinking than the need to eliminate trade barriers. Among the remaining enumerated powers, the power to regulate interstate commerce is only one among roughly a score. It is given no place of particular prominence. So much for what the Constitution's language and structure teach about the Framers' intent.

³ No one in the ratification debate doubted that the power to defend the country was essential, and must be given to the central government. See *The Federalist* No. 41, pp. 269-276 (J. Cooke ed. 1961) (J. Madison). Even under the Articles of Confederation, it was considered necessary to give Congress "the sole and exclusive right and power of determining on peace and war." Art. IX. All of the evidence indicates that this most basic purpose of government was far more important to the Founders than the regulation of interstate commerce.

⁴ A major weakness of the system created by the Articles of Confederation was the central government's inability to collect taxes directly. See 1 Farrand, *supra* n. 2, at 284 (remarks of Alexander Hamilton). Remedying this defect was thus one of the most important purposes of the Constitutional Convention. See R. Paul, *Taxation in the United States* 4-5 (1954); *The Federalist* No. 30 (A. Hamilton).

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III

One would never know from the concurring opinion that the Constitution formed a federal system, comprising a national government with delegated powers and state governments that retained a significant measure of sovereign authority. This is clear from the Constitution itself, from the debates surrounding its adoption and ratification, from the early history of our constitutional development, and from the decisions of this Court. It is impossible to believe that the Constitution would have been adopted, much less ratified, if it had been understood that the Commerce Clause embodied the national government's "central mission," a mission to be accomplished even at the expense of regulating the personnel practices of state and local governments.

A

The Bill of Rights imposes express limitations on national powers. The Tenth Amendment, in particular, explicitly recognizes the retained power of the States: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." This limitation was, of course, implicit in the Constitution as originally ratified. Even those who opposed the adoption of a Bill of Rights did not dispute the propriety of such a limitation. Rather, they argued that it was unnecessary, for the Constitution delegated certain powers to the central government, and those not delegated were necessarily retained by the States or the people.⁵ Fur-

⁵ Alexander Hamilton, for example, made this argument in *The Federalist* No. 84, pp. 578-579 (J. Cooke ed. 1961). See also *United States v. Darby*, 312 U. S. 100, 124 (1941) (Tenth Amendment "declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment"); *United States v. Sprague*, 282 U. S. 716, 733 (1931) ("The Tenth Amendment was intended to confirm the understanding of the people at the time the Constitution was adopted, that powers not granted to the United States were reserved to the States or to the people. It added nothing to the instrument as origi-

thermore, the inherent federal nature of the system is clear from the structure of the national government itself. Members of Congress and presidential electors are chosen by States. Representation in the Senate is apportioned by States, regardless of population. The Full Faith and Credit Clause gives particular recognition to the States' "public Acts, Records, and judicial Proceedings." Article IV, section 4 requires a republican form of government in each State. The initial ratification of the Constitution was accomplished on a state-by-state basis, and subsequent amendments require approval by three fourths of the States.

It was also clear from the contemporary debates that the Founding Fathers intended the Constitution to establish a federal system. As James Madison, "the Father of the Constitution," explained to the people of New York:

"The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce The powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State." The Federalist No. 45, p. 313 (J. Cooke ed. 1961).

② There can be no doubt that Madison's contemporaries shared this view. See, *e. g.*, Letter of Roger Sherman & Oliver Ellsworth to the Governor of Connecticut (Sept. 26, 1787), reprinted in 3 Farrand, *supra*, at 99 (description of proposed Constitution) (The "powers [vested in Congress] extend only to matters respecting the common interests of the union, and

nally ratified. . . .").

are specially defined, so that the particular states retain their sovereignty in all other matters.").

During the earliest years of our constitutional development, principles of federalism were not only well recognized, they formed the basis for virtually every State in the Union to assert its rights as a State against the Federal Government. In 1798, for example, Thomas Jefferson drafted the Kentucky Resolutions,⁶ which were passed by the Kentucky legislature to protest the unpopular Alien and Sedition Acts, Act of June 18, 1798, c. 54, 1 Stat. 566; Act of June 25, 1798, c. 58, 1 Stat. 570; Act of July 6, 1798, c. 66, 1 Stat. 577; Act of July 14, 1798, c. 74, 1 Stat. 596. At the same time, Madison drafted similar Virginia Resolutions, which were adopted by the Virginia General Assembly. See 4 J. Elliot, *Debates on the Federal Constitution* 528-529 (2d ed. 1863). In both cases it was clear that the powers reserved to the States were treated as a substantive limitation on Congress's authority. It was asserted that these powers enabled a State to interpose its will against any action by the Federal Government. Thirty years later, Jefferson and Madison's views were expanded by John C. Calhoun in his nullification doctrine—the extreme view that eventually led to the War Between the States.⁷ See 6 *The Works of John C. Calhoun* 1-57 (R.

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⁶ In the first resolution, Jefferson explained

"[t]hat the several states composing the United States of America are not united on the principle of unlimited submission to their general government; but that, by compact, under the style and title of a Constitution for the United States, and of amendments thereto, they constituted a general government for special purposes, delegated to that government certain definite powers, reserving, each state to itself, the residuary mass of right to their own self-government; and that whensoever the general government assumes undelegated powers, its acts are unauthoritative, void, and of no force." Kentucky Resolution of 1798, *reprinted in* 4 J. Elliot, *Debates on the Federal Constitution* 540 (2d ed. 1863).

⁷ In referring to this early and interesting history, I do not suggest that either the doctrine of interposition or that of nullification was constitution-

Cralle ed. 1859) (original draft of South Carolina Exposition of 1828).

The view that the reserved powers of the States limited the delegated powers of the ~~United States~~ Government was ~~limitedly~~ confined to the South. The New England States, for example, vehemently opposed the Embargo Act of Dec. 22, 1807, c. 5, 2 Stat. 451, and they turned to their rights as States in defense. In 1809, the Governor of Connecticut, with the support of the legislature, refused to comply with the Act of Jan. 9, 1809, c. 5, 2 Stat. 506, which Congress passed to enforce the embargo.⁸ In Massachusetts the story was similar: The legislature denounced the enforcement Act as "unjust, oppressive, and unconstitutional, and not legally binding on the citizens of this state." Resolution of the Massachusetts Legislature (Feb. 15, 1809), *reprinted in H.*

ally sound. In any event, they were laid to rest in one of history's bloodiest fratricides, ending at Appomattox in 1865. The views of these great figures in our history are, however, directly pertinent to the question whether there was ever any *intention* that the Commerce Clause would empower the Federal Government to intrude expansively upon the sovereign powers reserved to the States.

⁸The Governor explained to a special session of the state legislature that

"[w]henver our national legislature is led to overleap the prescribed bounds of their [sic] constitutional powers, on the State legislatures, in great emergencies, devolve the arduous task—it is their right—it becomes their duty, to interpose their protecting shield between the right and liberty of the people, and the assumed power of the General Government." *U.C.*

Speech of Governor Trumbull (Feb. 20, 1809), *reprinted in H. Ames, State Documents on Federal Relations*, 40 (1900).
The Assembly promptly passed resolutions supporting the Governor's position and concluding that the embargo legislation was "incompatible with the constitution of the United States, and encroach[ed] upon the immunities of [the] State." Resolution of the ~~Massachusetts~~ General Assembly ~~passed~~ *Feb. 1809, reprinted in Ames, supra, at* ~~41~~. In view of its duty to support the Constitution, the legislature declined "to assist, or concur in giving effect to the aforesaid unconstitutional act, passed, to enforce the Embargo." *Ibid.*

And no power is more "sovereign" than the right of a government to determine the terms and conditions of employment of the officers and employees who constitute the government.

Ames, *State Documents on Federal Relations, 1789-1801*, 21 (1907). When Congress enacted the Embargo Act of Dec. 17, 1813, c. 1, 3 Stat. 88, the Massachusetts legislature declared it "a manifest . . . abuse of power" that infringed the "sovereignty reserved to the States"⁹ and justified the legislature in "interpos[ing] its power" to protect its citizens from "oppression," Resolution of the Massachusetts Legislature (Feb. 8, 1814), reprinted in Ames, *supra*, at 72. Even Daniel Webster, famous for his defense of the National Government, recognized that principles of federalism limit Congress's power.¹⁰

B

principles

Few perceptions of history are clearer than the fact that state sovereignty has always been a basic assumption of American political theory. Although its contours have changed over two centuries, state sovereignty remains a fundamental component of our system that this Court has recognized time and time again. Even to refer to the highlights would go far beyond the scope of this dissent. I therefore mention only a few of the decisions from last Term alone in which the Court expressly noted that States retain significant sovereign powers.¹¹ In *Community Communications*

⁹ The legislature explained that the State's sovereignty was reserved, in part, to protect its citizens from excessive federal power. Resolution of the Massachusetts Legislature (Feb. 8, 1814), reprinted in Ames, *supra* n. 8, at 72.

¹⁰ During a debate in Congress on a conscription bill and a bill for the enlistment of minors, Webster declared that if these measures were enacted it would be "the solemn duty of the State Governments" to interpose their authority to prevent enforcement. In his view, this was "among the objects for which the State Governments exist." Speech on the Conscription Bill (Dec. 9, 1814), reprinted in 14 The Writings and Speeches of Daniel Webster 55, 68 (1903).

¹¹ See, e.g., *Rivera-Rodriguez v. Popular Democratic Party*, — U. S. —, — (1982) ("Puerto Rico, like a State, is an autonomous political entity, 'sovereign over matters not ruled by the Constitution.'" (quoting

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6 *Co. v. City of Boulder*, 455 U. S. 40 (1982), we considered the state action exemption from the antitrust laws. Since “under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority,” *id.*, at 49 (quoting *Parker v. Brown*, 317 U. S. 341, 351 (1943)), we had previously recognized an antitrust exemption for States acting “in the exercise of [their] sovereign powers,” *id.*, at 48. We held that this exemption does not extend to cities, but in so doing we repeatedly stressed the sovereign nature of States. See *id.*, at 48–54. In *United Transportation Union v. Long Island R. Co.*, 455 U. S. 678 (1982), we unanimously upheld the application of the Railway Labor Act to a state-owned railroad. We reached this conclusion, however, only by finding that operation of the railroad was not one of the State’s “constitutionally preserved sovereign function[s].” *Id.*, at 683. And in *Federal Energy Regulatory Comm’n v. Mississippi*, — U. S. — (1982), we considered whether parts of the Public Utility Regulatory Policies Act “constituted an invasion of state sovereignty in violation of the Tenth Amendment,” *id.*, at —. Although the Court upheld the statute, it was clear that state sovereignty was an essential element to be considered in reaching that conclusion. See *id.*, at —.

Calero-Toledo v. Pearson Yacht Leasing Co., 416 U. S. 663, 673 (1974); *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinée*, — U. S. —, —, n. 10 (1982) (States are “equal sovereigns in a federal system”) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U. S. 286, 292 (1980)); *Engle v. Isaac*, — U. S. —, — (1982) (discussing “the States’ sovereign power to punish offenders”); *Underwriters National Assurance Co. v. North Carolina Life & Accident & Health Ins. Guaranty Assn.*, 455 U. S. 691, 704 (1982) (recognizing “the structure of our Nation as a union of States, each possessing equal sovereign powers”); *Cabell v. Chavez-Salido*, 454 U. S. 432, 444–447 (1982) (relying on State’s “sovereign” police powers); *Fair Assessment in Real Estate Assn. v. McNary*, 454 U. S. 100, 108 (1981) (state courts are those “of a different, though paramount sovereignty”) (quoting *Matthews v. Rodgers*, 284 U. S. 521, 525 (1932)).

6

In sum, all of the evidence reminds us of the importance of the principles of federalism in our constitutional system. The Founding Fathers, and those who participated in the earliest phases of constitutional development, understood the States' reserved powers to be a limitation on Congress's power—including its power under the Commerce Clause. And the Court has recognized and accepted this fact for almost two hundred years.¹²

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JUSTICE STEVENS' concurring opinion recognizes no limitation on ~~Congress's~~ ability to override state sovereignty in exercising its powers under the Commerce Clause. His opinion does not mention either federalism or state sovereignty. Instead it declares that "[t]he *only* basis for questioning the federal statute at issue here is the pure judicial fiat found in this Court's opinion in *National League of Cities v. Usery*." *Ante*, at 4 (emphasis added). Under this view it is not easy to think of any state function that could not be preempted.

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¹² Of course I do not denigrate the importance of the Commerce Clause. It is essential to the functioning of our National Government. It is, however, only one provision of a Constitution that embodies strong principles of federalism.

13

New Footnote on EEOCR

FEB 16 1983

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

L.F.P.

From: Justice Powell

Circulated: _____

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-554

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, APPELLANT v. WYOMING, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

[February —, 1983]

JUSTICE POWELL, dissenting.

I join THE CHIEF JUSTICE's dissenting opinion, but write separately to record a personal dissent from JUSTICE STEVENS' revisionist view of our Nation's history.

I

JUSTICE STEVENS begins his concurring opinion with the startling observation that the Commerce Clause "was the Framers' response to the *central problem* that gave rise to the Constitution itself." *Ante*, at 1 (emphasis added). At a subsequent point in his opinion, he observes that "this Court has construed the Commerce Clause to reflect the *intent of the Framers . . . to confer a power on the national government adequate to discharge its central mission.*" *Ante*, at 3 (emphasis added).¹ JUSTICE STEVENS further states that "*National League of Cities* not only was incorrectly decided, but also is inconsistent with the *central purpose* of the Constitution itself. . . ." *Ante*, at 5 (emphasis added).

¹The authority on which JUSTICE STEVENS primarily relies is an extrajudicial lecture delivered by Justice Rutledge in 1946. *Ante*, at 1-2. Justice Rutledge declared that the "proximate cause of our national existence" was not the desire to assure the great "democratic freedoms"; rather it was the need "to secure freedom of trade" within the former colonies. W. Rutledge, A Declaration of Legal Faith 25 (1947).

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branch. Indeed, the Virginia Plan, the initial proposal from which the entire Convention began its work, focuses on the framework of the national government without even mentioning the power to regulate commerce.²

Apart from the framework of government itself, the Founders stated their motivating purposes in the Preamble to the Constitution:

“to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty. . . .”

These purposes differ little from the concerns motivating the States in the Articles of Confederation: “their common defence, the security of their liberties, and their mutual and general welfare.” Art. III. Although the “general Welfare” recognized by the Constitution could embrace the free flow of trade among States (despite the fact that the same

² Whatever may have sparked the Annapolis Convention, see *ante*, at 1, it is clear that the focus of attention at the Constitutional Convention in Philadelphia was the formation of a new government. Madison's report of the proceedings begins, “Monday May 14th 1787 was the day fixed for the meeting of the deputies in Convention for revising the federal system of Government.” 1 M. Farrand, *The Records of the Federal Convention of 1787*, p. 3 (rev. ed. 1937) (footnote omitted). After dealing with several preliminary matters, see *id.*, at 1-17, the “main business,” *id.*, at 18 (J. Madison), opened on May 29 with Edmund Randolph's speech proposing the Virginia Plan. Almost all of the Plan's resolutions dealt with the appropriate structure for the new government. Only the sixth resolution dealt with legislative powers at all. And far from stressing any power to regulate interstate commerce, it simply declared, in relevant part, “that the National Legislature ought to be empowered to enjoy the Legislative Rights vested in Congress by the Confederation & moreover to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation. . . .” *Id.*, at 21. While this language was, no doubt, broad enough to include the power to regulate interstate commerce, there was certainly no emphasis on that particular power.

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language in the Articles of Confederation did not), it is clear that security "against foreign invasion [and] against dissensions between members of the Union" was of at least equal importance. See Speech by Edmund Randolph (May 29, 1787), *reprinted in* 1 M. Farrand, *The Records of the Federal Convention of 1787*, p. 18 (rev. ed. 1937) (J. Madison).³

The power to achieve the purposes identified in the Preamble was not delegated solely to Congress. If, however, one looks at the powers that were so delegated, the position of the Commerce Clause hardly suggests that it was "central" among the concerns of the patriots who formed our Union. The enumeration of powers in Article I, section 8 begins with the "Power To lay and collect Taxes."⁴ This is followed by the power "to pay the Debts" of the United States. Then, consistent with the Preamble, comes the power to "provide for the common Defence and general Welfare." See note 3, *supra*. The perceived need for a national legislature with the power to tax, and to maintain an army and navy for the common defense, loomed far larger in the Founders' thinking than the need to eliminate barriers to the fledgling commerce among the States. Among the remaining enumerated powers, the power to regulate interstate commerce is only one among roughly a score. It is given no place of particular

³ No one in the ratification debate doubted that the power to defend the country was essential, and must be given to the central government. See *The Federalist* No. 41, pp. 269-276 (J. Cooke ed. 1961) (J. Madison). Even under the Articles of Confederation, it was considered necessary to give Congress "the sole and exclusive right and power of determining on peace and war." Art. IX. All of the evidence indicates that this most basic purpose of government was far more important to the Founders than the regulation of interstate commerce.

⁴ A major weakness of the system created by the Articles of Confederation was the central government's inability to collect taxes directly. See 1 Farrand, *supra* n. 2, at 284 (remarks of A. Hamilton). Remedying this defect was thus one of the most important purposes of the Constitutional Convention. See R. Paul, *Taxation in the United States* 4-5 (1954); *The Federalist* No. 30 (A. Hamilton).

prominence. So much for what the Constitution's language and structure teach about the Framers' intent.

III

One would never know from the concurring opinion that the Constitution formed a federal system, comprising a national government with delegated powers and state governments that retained a significant measure of sovereign authority. This is clear from the Constitution itself, from the debates surrounding its adoption and ratification, from the early history of our constitutional development, and from the decisions of this Court. It is impossible to believe that the Constitution would have been ~~adopted~~, much less ratified, if it had been understood that the Commerce Clause embodied the national government's "central mission," a mission to be accomplished even at the expense of regulating the personnel practices of state and local governments.

A

The Bill of Rights imposes express limitations on national powers. The Tenth Amendment, in particular, explicitly recognizes the retained power of the States: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." This limitation was, of course, implicit in the Constitution as originally ratified. Even those who opposed the adoption of a Bill of Rights did not dispute the propriety of such a limitation. Rather, they argued that it was unnecessary, for the Constitution delegated certain powers to the central government, and those not delegated were necessarily retained by the States or the people.⁵ Fur-

⁵ Alexander Hamilton, for example, made this argument in *The Federalist* No. 84, pp. 578-579 (J. Cooke ed. 1961). See also *United States v. Darby*, 312 U. S. 100, 124 (1941) (Tenth Amendment "declaratory of the relationship between the national and state governments as it had been es-

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thermore, the inherent federal nature of the system is clear from the structure of the national government itself. Members of Congress and presidential electors are chosen by States. Representation in the Senate is apportioned by States, regardless of population. The Full Faith and Credit Clause gives particular recognition to the States' "public Acts, Records, and judicial Proceedings." Article IV, section 4 requires a republican form of government in each State. The initial ratification of the Constitution was accomplished on a state-by-state basis, and subsequent amendments require approval by three fourths of the States.

It was also clear from the contemporary debates that the Founding Fathers intended the Constitution to establish a federal system. As James Madison, "the Father of the Constitution," explained to the people of New York:

"The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce The powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State." The Federalist No. 45, p. 313 (J. Cooke ed. 1961).

There can be no doubt that Madison's contemporaries shared this view. See, *e. g.*, Letter of Roger Sherman & Oliver

established by the Constitution before the amendment"); *United States v. Sprague*, 282 U. S. 716, 733 (1931) ("The Tenth Amendment was intended to confirm the understanding of the people at the time the Constitution was adopted, that powers not granted to the United States were reserved to the States or to the people. It added nothing to the instrument as originally ratified. . . .").

Ellsworth to the Governor of Connecticut (Sept. 26, 1787), *reprinted in* 3 Farrand, *supra*, at 99 (description of proposed Constitution) (The "powers [vested in Congress] extend only to matters respecting the common interests of the union, and are specially defined, so that the particular states retain their sovereignty in all other matters.").

During the earliest years of our constitutional development, principles of federalism were not only well recognized, they formed the basis for virtually every State in the Union to assert its rights as a State against the Federal Government. In 1798, for example, Thomas Jefferson drafted the Kentucky Resolutions,⁶ which were passed by the Kentucky legislature to protest the unpopular Alien and Sedition Acts, Act of June 18, 1798, c. 54, 1 Stat. 566; Act of June 25, 1798, c. 58, 1 Stat. 570; Act of July 6, 1798, c. 66, 1 Stat. 577; Act of July 14, 1798, c. 74, 1 Stat. 596. At the same time, Madison drafted similar Virginia Resolutions, which were adopted by the Virginia General Assembly. See 4 J. Elliot, *Debates on the Federal Constitution* 528-529 (2d ed. 1863). In both cases it was clear that the powers reserved to the States were treated as a substantive limitation on the authority of Congress. It was asserted that these powers enabled a State to interpose its will against *any* action by the National Government. Thirty years later, Jefferson and Madison's views were expanded by John C. Calhoun in his nullification

⁶ In the first resolution, Jefferson explained

"[t]hat the several states composing the United States of America are not united on the principle of unlimited submission to their general government; but that, by compact, under the style and title of a Constitution for the United States, and of amendments thereto, they constituted a general government for special purposes, delegated to that government certain definite powers, reserving, each state to itself, the residuary mass of right to their own self-government; and that whensoever the general government assumes undelegated powers, its acts are unauthoritative, void, and of no force." Kentucky Resolution of 1798, *reprinted in* 4 J. Elliot, *Debates on the Federal Constitution* 540 (2d ed. 1863).

doctrine—the extreme view that eventually led to the War Between the States.⁷ See 6 The Works of John C. Calhoun 1-57 (R. Cralle ed. 1859) (original draft of South Carolina Exposition of 1828).

The view that the reserved powers of the States limited the delegated powers of the National Government was not confined to the South. The New England States, for example, vehemently opposed the Embargo Act of Dec. 22, 1807, c. 5, 2 Stat. 451, and they turned to their rights as States in defense. In 1809, the Governor of Connecticut, with the support of the legislature, refused to comply with the Act of Jan. 9, 1809, c. 5, 2 Stat. 506, which Congress passed to enforce the embargo.⁸ In Massachusetts the story was simi-

⁷ In referring to this early and interesting history, I do not suggest that either the doctrine of interposition or that of nullification was constitutionally sound. In any event, they were laid to rest in one of history's bloodiest fratricides, ending at Appomattox in 1865. The views of these great figures in our history are, however, directly pertinent to the question whether there was ever any *intention* that the Commerce Clause would empower the Federal Government to intrude expansively upon the sovereign powers reserved to the States. And no power is more "sovereign" than the right of a government to determine the terms and conditions of employment of the officers and employees who constitute the government.

⁸ The Governor explained to a special session of the state legislature that "[w]henver our national legislature is led to overleap the prescribed bounds of their [*sic*] constitutional powers, on the State Legislatures, in great emergencies, devolves the arduous task—it is their right—it becomes their duty, to interpose their protecting shield between the right and liberty of the people, and the assumed power of the General Government." Speech of Governor Jonathan Trumbull (Feb. 23, 1809), *reprinted in* H. Ames, *State Documents on Federal Relations* 40 (1906). The Assembly promptly passed resolutions supporting the Governor's position and concluding that the embargo legislation was "incompatible with the constitution of the United States, and encroach[ed] upon the immunities of [the] State." Resolutions of the General Assembly (Feb. 23, 1809), *reprinted in* Ames, *supra*, at 41. In view of its duty to support the Constitution, the legislature declined "to assist, or concur in giving effect to the aforesaid unconstitutional act, passed, to enforce the Embargo." *Ibid.*

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¹¹ See, e. g., *Rivera-Rodriguez v. Popular Democratic Party*, — U. S. —, — (1982) (“Puerto Rico, like a State, is an autonomous political entity, ‘sovereign over matters not ruled by the Constitution.’”) (quoting *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U. S. 663, 673 (1974)); *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinée*, — U. S. —, —, n. 10 (1982) (States are “‘coequal sovereigns in a federal system’”) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U. S. 286, 292 (1980)); *Engle v. Isaac*, — U. S. —, — (1982) (discussing “the States’ sovereign power to punish offenders”); *Underwriters National Assurance Co. v. North Carolina Life & Accident & Health Ins. Guaranty Assn.*, 455 U. S. 691, 704 (1982) (recognizing “the structure of our Nation as a union of States, each possessing equal sovereign powers”); *Cabell v. Chavez-Salido*, 454 U. S. 432, 444–447 (1982) (relying on State’s “sovereign” police powers); *Fair Assessment in Real Estate Assn. v. McNary*, 454 U. S. 100, 108 (1981) (state courts are those “of a different, though paramount sovereignty”) (quoting *Matthews v. Rodgers*, 284 U. S. 521, 525 (1932)).

violation of the Tenth Amendment," *id.*, at ——. Although the Court upheld the statute, it was clear that state sovereignty was an essential element to be considered in reaching that conclusion. See *id.*, at ———.

In sum, all of the evidence reminds us of the importance of the principles of federalism in our constitutional system. The Founding Fathers, and those who participated in the earliest phases of constitutional development, understood the States' reserved powers to be a limitation on Congress's power—including its power under the Commerce Clause. And the Court has recognized and accepted this fact for almost two hundred years.¹²

IV

JUSTICE STEVENS' concurring opinion recognizes no limitation on the ability of Congress to override state sovereignty in exercising its powers under the Commerce Clause. His opinion does not mention explicitly either federalism or state sovereignty. Instead it declares that "[t]he *only* basis for questioning the federal statute at issue here is the pure judicial fiat found in this Court's opinion in *National League of Cities v. Usery*." *Ante*, at 4 (emphasis added). Under this view it is not easy to think of any state function—however sovereign—that could not be preempted.¹³

¹² Of course I do not denigrate the importance of the Commerce Clause. It is essential to the functioning of our National Government. It is, however, only one provision of a Constitution that embodies strong principles of federalism.

¹³ This case illustrates how far the Federal Government, with the Court's approval, has departed from the principles upon which our federal union was formed. The authority relied upon today is a provision of the Constitution giving Congress the power to "regulate Commerce . . . among the several States. . . ." The perceived "Commerce," incredible as it would have seemed even a few years ago, is the effect on *trade among the States* of Wyoming's requirement that its game wardens retire at age 65 rather than 70.

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FEB 17 1983

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Powell

Circulated: FEB 17 1983

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-554

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, APPELLANT *v.* WYOMING ET AL.

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[February —, 1983]

JUSTICE POWELL, dissenting.

I join THE CHIEF JUSTICE's dissenting opinion, but write separately to record a personal dissent from JUSTICE STEVENS' revisionist view of our Nation's history.

I

JUSTICE STEVENS begins his concurring opinion with the startling observation that the Commerce Clause "was the Framers' response to the *central problem* that gave rise to the Constitution itself." *Ante*, at 1 (emphasis added). At a subsequent point in his opinion, he observes that "this Court has construed the Commerce Clause to reflect the *intent of the Framers . . .* to confer a power on the national government adequate to discharge its *central mission*." *Ante*, at 3 (emphasis added).¹ JUSTICE STEVENS further states that "*National League of Cities* not only was incorrectly decided, but also is inconsistent with the *central purpose* of the Con-

¹The authority on which JUSTICE STEVENS primarily relies is an extrajudicial lecture delivered by Justice Rutledge in 1946. *Ante*, at 1-2. Justice Rutledge declared that the "proximate cause of our national existence" was not the desire to assure the great "democratic freedoms"; rather it was the need "to secure freedom of trade" within the former colonies. W. Rutledge, *A Declaration of Legal Faith* 25 (1947).

stitution itself. . . ." *Ante*, at 5 (emphasis added).

No one would deny that removing trade barriers between the States was *one* of the Constitution's purposes. I suggest, however, that there were other purposes of equal or greater importance motivating the statesmen who assembled in Philadelphia and the delegates who debated the ratification issue in the state conventions. No doubt there were differences of opinion as to the principal shortcomings of the Articles of Confederation. But one can be reasonably sure that few of the Founding Fathers thought that trade barriers among the States were "the central problem," or that their elimination was the "central mission" of the Constitutional Convention. Creating a national government within a federal system was far more central than any 18th century concern for interstate commerce.

It is true, of course, that this Court properly has construed the Commerce Clause, and extended its reach, to accommodate the unanticipated and unimaginable changes, particularly in transportation and communication, that have occurred in our country since the Constitution was ratified. If JUSTICE STEVENS had written that the Founders' intent in adopting the Commerce Clause nearly two centuries ago is of little relevance to the world in which we live today, I would not have disagreed. But his concurring opinion purports to rely on their intent. *Ante*, at 3. I therefore write—briefly, in view of the scope of the subject—to place the Commerce Clause in proper historical perspective, and further to suggest that even today federalism is not, as JUSTICE STEVENS appears to believe, utterly subservient to that Clause.

II

The Constitution's central purpose was, as the name implies, to constitute a government. The most important provisions, therefore, are those in the first three Articles relating to the establishment of that government. The system of checks and balances, for example, is far more central to the

larger perspective than any single power conferred on any branch. Indeed, the Virginia Plan, the initial proposal from which the entire Convention began its work, focuses on the framework of the national government without even mentioning the power to regulate commerce.²

Apart from the framework of government itself, the Founders stated their motivating purposes in the Preamble to the Constitution:

“to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty. . . .”

These purposes differ little from the concerns motivating the States in the Articles of Confederation: “their common defence, the security of their liberties, and their mutual and general welfare.” Art. III. Although the “general Welfare” recognized by the Constitution could embrace the free

² Whatever may have sparked the Annapolis Convention, see *ante*, at 1, it is clear that the focus of attention at the Constitutional Convention in Philadelphia was the formation of a new government. Madison’s report of the proceedings begins, “Monday May 14th 1787 was the day fixed for the meeting of the deputies in Convention for revising the federal system of Government.” 1 M. Farrand, *The Records of the Federal Convention of 1787*, p. 3 (rev. ed. 1937) (footnote omitted). After dealing with several preliminary matters, see *id.*, at 1–17, the “main business,” *id.*, at 18 (J. Madison), opened on May 29 with Edmund Randolph’s speech proposing the Virginia Plan. Almost all of the Plan’s resolutions dealt with the appropriate structure for the new government. Only the sixth resolution dealt with legislative powers at all. And far from stressing any power to regulate interstate commerce, it simply declared, in relevant part, “that the National Legislature ought to be empowered to enjoy the Legislative Rights vested in Congress by the Confederation & moreover to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation. . . .” *Id.*, at 21. While this language was, no doubt, broad enough to include the power to regulate interstate commerce, there was certainly no emphasis on that particular power.

flow of trade among States (despite the fact that the same language in the Articles of Confederation did not), it is clear that security "against foreign invasion [and] against dissensions between members of the Union" was of at least equal importance. See Speech by Edmund Randolph (May 29, 1787), *reprinted in* 1 M. Farrand, *The Records of the Federal Convention of 1787*, p. 18 (rev. ed. 1937) (J. Madison).³

The power to achieve the purposes identified in the Preamble was not delegated solely to Congress. If, however, one looks at the powers that were so delegated, the position of the Commerce Clause hardly suggests that it was "central" among the concerns of the patriots who formed our Union. The enumeration of powers in Article I, § 8 begins with the "Power To lay and collect Taxes."⁴ This is followed by the power "to pay the Debts" of the United States. Then, consistent with the Preamble, comes the power to "provide for the common Defence and general Welfare." See note 3, *supra*. The perceived need for a national legislature with the power to tax, and to maintain an army and navy for the common defense, loomed far larger in the Founders' thinking than the need to eliminate barriers to the fledgling commerce among the States. Among the remaining enumerated powers, the power to regulate interstate commerce is only one

³ No one in the ratification debate doubted that the power to defend the country was essential, and must be given to the central government. See *The Federalist* No. 41, pp. 269-276 (J. Cooke ed. 1961) (J. Madison). Even under the Articles of Confederation, it was considered necessary to give Congress "the sole and exclusive right and power of determining on peace and war." Art. IX. All of the evidence indicates that this most basic purpose of government was far more important to the Founders than the regulation of interstate commerce.

⁴ A major weakness of the system created by the Articles of Confederation was the central government's inability to collect taxes directly. See 1 Farrand, *supra* n. 2, at 284 (remarks of A. Hamilton). Remedying this defect was thus one of the most important purposes of the Constitutional Convention. See R. Paul, *Taxation in the United States* 4-5 (1954); *The Federalist* No. 30 (A. Hamilton).

among roughly a score. It is given no place of particular prominence. So much for what the Constitution's language and structure teach about the Framers' intent.

III

One would never know from the concurring opinion that the Constitution formed a federal system, comprising a national government with delegated powers and state governments that retained a significant measure of sovereign authority. This is clear from the Constitution itself, from the debates surrounding its adoption and ratification, from the early history of our constitutional development, and from the decisions of this Court. It is impossible to believe that the Constitution would have been recommended by the Convention, much less ratified, if it had been understood that the Commerce Clause embodied the national government's "central mission," a mission to be accomplished even at the expense of regulating the personnel practices of state and local governments.

A

The Bill of Rights imposes express limitations on national powers. The Tenth Amendment, in particular, explicitly recognizes the retained power of the States: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." This limitation was, of course, implicit in the Constitution as originally ratified. Even those who opposed the adoption of a Bill of Rights did not dispute the propriety of such a limitation. Rather, they argued that it was unnecessary, for the Constitution delegated certain powers to the central government, and those not delegated were necessarily retained by the States or the people.⁵ Fur-

⁵ Alexander Hamilton, for example, made this argument in *The Federalist* No. 84, pp. 578-579 (J. Cooke ed. 1961). See also *United States v.*

thermore, the inherent federal nature of the system is clear from the structure of the national government itself. Members of Congress and presidential electors are chosen by States. Representation in the Senate is apportioned by States, regardless of population. The Full Faith and Credit Clause gives particular recognition to the States' "public Acts, Records, and judicial Proceedings." Article IV, § 4 requires a republican form of government in each State. The initial ratification of the Constitution was accomplished on a state-by-state basis, and subsequent amendments require approval by three fourths of the States.

It was also clear from the contemporary debates that the Founding Fathers intended the Constitution to establish a federal system. As James Madison, "the Father of the Constitution," explained to the people of New York:

"The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce The powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State." The Federalist No. 45, p. 313 (J. Cooke ed. 1961).

There can be no doubt that Madison's contemporaries shared

Darby, 312 U. S. 100, 124 (1941) (Tenth Amendment "declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment"); *United States v. Sprague*, 282 U. S. 716, 733 (1931) ("The Tenth Amendment was intended to confirm the understanding of the people at the time the Constitution was adopted, that powers not granted to the United States were reserved to the States or to the people. It added nothing to the instrument as originally ratified. . . .").

this view. See, *e. g.*, Letter of Roger Sherman & Oliver Ellsworth to the Governor of Connecticut (Sept. 26, 1787), *reprinted in* 3 Farrand, *supra*, at 99 (description of proposed Constitution) (The "powers [vested in Congress] extend only to matters respecting the common interests of the union, and are specially defined, so that the particular states retain their sovereignty in all other matters.").

During the earliest years of our constitutional development, principles of federalism were not only well recognized, they formed the basis for virtually every State in the Union to assert its rights as a State against the Federal Government. In 1798, for example, Thomas Jefferson drafted the Kentucky Resolutions,⁶ which were passed by the Kentucky legislature to protest the unpopular Alien and Sedition Acts, Act of June 18, 1798, c. 54, 1 Stat. 566; Act of June 25, 1798, c. 58, 1 Stat. 570; Act of July 6, 1798, c. 66, 1 Stat. 577; Act of July 14, 1798, c. 74, 1 Stat. 596. At the same time, Madison drafted similar Virginia Resolutions, which were adopted by the Virginia General Assembly. See 4 J. Elliot, *Debates on the Federal Constitution* 528-529 (2d ed. 1863). In both cases it was clear that the powers reserved to the States were treated as a substantive limitation on the authority of Congress. It was asserted that these powers enabled a State to interpose its will against *any* action by the National Government. Thirty years later, Jefferson and Madison's

⁶ In the first resolution, Jefferson explained

"[t]hat the several states composing the United States of America are not united on the principle of unlimited submission to their general government; but that, by compact, under the style and title of a Constitution for the United States, and of amendments thereto, they constituted a general government for special purposes, delegated to that government certain definite powers, reserving, each state to itself, the residuary mass of right to their own self-government; and that whensoever the general government assumes undelegated powers, its acts are unauthoritative, void, and of no force." Kentucky Resolution of 1798, *reprinted in* 4 J. Elliot, *Debates on the Federal Constitution* 540 (2d ed. 1863).

views were expanded by John C. Calhoun in his nullification doctrine—the extreme view that eventually led to the War Between the States.⁷ See 6 The Works of John C. Calhoun 1-57 (R. Crallé ed. 1859) (original draft of South Carolina Exposition of 1828).

The view that the reserved powers of the States limited the delegated powers of the National Government was not confined to the South. The New England States, for example, vehemently opposed the Embargo Act of Dec. 22, 1807, c. 5, 2 Stat. 451, and they turned to their rights as States in defense. In 1809, the Governor of Connecticut, with the support of the legislature, refused to comply with the Act of Jan. 9, 1809, c. 5, 2 Stat. 506, which Congress passed to enforce the embargo.⁸ In Massachusetts the story was simi-

⁷ In referring to this early and interesting history, I do not suggest that either the doctrine of interposition or that of nullification was constitutionally sound. In any event, they were laid to rest in one of history's bloodiest fratricides, ending at Appomattox in 1865. The views of these great figures in our history are, however, directly pertinent to the question whether there was ever any *intention* that the Commerce Clause would empower the Federal Government to intrude expansively upon the sovereign powers reserved to the States. And no power is more "sovereign" than the right of a government to determine the terms and conditions of employment of the officers and employees who constitute the government.

⁸ The Governor explained to a special session of the state legislature that "[w]henver our national legislature is led to overleap the prescribed bounds of their [*sic*] constitutional powers, on the State Legislatures, in great emergencies, devolves the arduous task—it is their right—it becomes their duty, to interpose their protecting shield between the right and liberty of the people, and the assumed power of the General Government." Speech of Governor Jonathan Trumbull (Feb. 23, 1809), *reprinted in* H. Ames, *State Documents on Federal Relations* 40 (1906). The Assembly promptly passed resolutions supporting the Governor's position and concluding that the embargo legislation was "incompatible with the constitution of the United States, and encroach[ed] upon the immunities of [the] State." Resolutions of the General Assembly (Feb. 23, 1809), *reprinted in* Ames, *supra*, at 41. In view of its duty to support the Constitution, the legislature declined "to assist, or concur in giving effect to the

lar: The legislature denounced the enforcement Act as "unjust, oppressive and unconstitutional, and not legally binding on the citizens of this state." Resolutions of the Massachusetts Legislature (Feb. 15, 1809), *reprinted in* H. Ames, *State Documents on Federal Relations* 35 (1906). When Congress enacted the Embargo Act of Dec. 17, 1813, c. 1, § 3 Stat. 88, the Massachusetts legislature declared it "a manifest . . . abuse of power" that infringed the "sovereignty reserved to the States"⁹ and justified the legislature in "interpos[ing] its power" to protect its citizens from "oppression," Resolutions of the Massachusetts Legislature (Feb. 22, 1814), *reprinted in* Ames, *supra*, at 71-72. Even Daniel Webster, famous for his defense of the rights of the National Government, recognized that principles of federalism limit Congress's power.¹⁰

B

It is clear beyond question fact that state sovereignty always has been a basic assumption of American political theory. Although its contours have changed over two centuries, state sovereignty remains a fundamental component of our system that this Court has recognized time and time again. Even to refer to the highlights would go far beyond the scope of this dissent. I therefore mention only a few of the decisions from last Term alone in which the Court ex-

aforesaid unconstitutional act, passed, to enforce the Embargo." *Ibid.*

⁹The legislature explained that the State's sovereignty was reserved, in part, to protect its citizens from excessive federal power. Resolutions of the Massachusetts Legislature (Feb. 22, 1814), *reprinted in* Ames, *supra* n. 8, at 71.

¹⁰During a debate in Congress on a conscription bill and a bill for the enlistment of minors, Webster declared that if these measures were enacted it would be "the solemn duty of the State Governments" to interpose their authority to prevent enforcement. In his view, this was "among the objects for which the State Governments exist." Speech on the Conscription Bill (Dec. 9, 1814), *reprinted in* 14 *The Writings and Speeches of Daniel Webster* 55, 68 (1903).

pressly noted that States retain significant sovereign powers.¹¹ In *Community Communications Co. v. City of Boulder*, 455 U. S. 40 (1982), we considered the state action exemption from the antitrust laws. Since “‘under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority,’” *id.*, at 49 (quoting *Parker v. Brown*, 317 U. S. 341, 351 (1943)), we had previously recognized an antitrust exemption for States acting “in the exercise of [their] sovereign powers,” *id.*, at 48. We held that this exemption does not extend to cities, but in so doing we repeatedly stressed the sovereign nature of States. See *id.*, at 48–54. In *United Transportation Union v. Long Island R. Co.*, 455 U. S. 678 (1982), we unanimously upheld the application of the Railway Labor Act to a state-owned railroad. We reached this conclusion, however, only by finding that operation of the railroad was not one of the State’s “constitutionally preserved sovereign function[s].” *Id.*, at 683. And in *Federal Energy Regulatory Comm’n v. Mississippi*, — U. S. — (1982), we considered whether parts of the Public Utility Regulatory Policies Act “constituted an invasion of state sovereignty in violation

¹¹ See, e. g., *Rivera-Rodriguez v. Popular Democratic Party*, — U. S. —, — (1982) (“Puerto Rico, like a State, is an autonomous political entity, ‘sovereign over matters not ruled by the Constitution.’”) (quoting *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U. S. 663, 673 (1974)); *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinée*, — U. S. —, —, n. 10 (1982) (States are “‘coequal sovereigns in a federal system’”) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U. S. 286, 292 (1980)); *Engle v. Isaac*, — U. S. —, — (1982) (discussing “the States’ sovereign power to punish offenders”); *Underwriters National Assurance Co. v. North Carolina Life & Accident & Health Ins. Guaranty Assn.*, 455 U. S. 691, 704 (1982) (recognizing “the structure of our Nation as a union of States, each possessing equal sovereign powers”); *Cabell v. Chavez-Salido*, 454 U. S. 432, 444–447 (1982) (relying on State’s “sovereign” police powers); *Fair Assessment in Real Estate Assn. v. McNary*, 454 U. S. 100, 108 (1981) (state courts are those “of a different, though paramount sovereignty”) (quoting *Matthews v. Rodgers*, 284 U. S. 521, 525 (1932)).

of the Tenth Amendment," *id.*, at ——. Although the Court upheld the statute, it was clear that state sovereignty was an essential element to be considered in reaching that conclusion. See *id.*, at ———.

In sum, all of the evidence reminds us of the importance of the principles of federalism in our constitutional system. The Founding Fathers, and those who participated in the earliest phases of constitutional development, understood the States' reserved powers to be a limitation on Congress's power—including its power under the Commerce Clause. And the Court has recognized and accepted this fact for almost 200 years.¹²

IV

JUSTICE STEVENS' concurring opinion recognizes no limitation on the ability of Congress to override state sovereignty in exercising its powers under the Commerce Clause. His opinion does not mention explicitly either federalism or state sovereignty. Instead it declares that "[t]he *only* basis for questioning the federal statute at issue here is the pure judicial fiat found in this Court's opinion in *National League of Cities v. Usery*." *Ante*, at 4 (emphasis added). Under this view it is not easy to think of any state function—however sovereign—that could not be preempted.¹³

¹² Of course I do not denigrate the importance of the Commerce Clause. It is essential to the functioning of our National Government. It is, however, only one provision of a Constitution that embodies strong principles of federalism.

¹³ This case illustrates how far the Federal Government, with the Court's approval, has departed from the principles upon which our federal union was formed. The authority relied upon today is a provision of the Constitution giving Congress the power to "regulate Commerce . . . among the several States. . . ." The perceived "Commerce," incredible as it would have seemed even a few years ago, is the effect on *trade among the States* of Wyoming's requirement that its game wardens retire at age 65 rather than 70.

FEB 22 1983

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Powell

Circulated: did not circulate

Recirculated: _____

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-554

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, APPELLANT *v.* WYOMING ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF WYOMING

[February —, 1983]

JUSTICE POWELL, with whom JUSTICE O'CONNOR joins,
dissenting.

I join THE CHIEF JUSTICE's dissenting opinion, but write
separately to record a personal dissent from JUSTICE STE-
VENS' revisionist view of our Nation's history.

I

JUSTICE STEVENS begins his concurring opinion with the
startling observation that the Commerce Clause "was the
Framers' response to the *central problem* that gave rise to
the Constitution itself." *Ante*, at 1 (emphasis added). At a
subsequent point in his opinion, he observes that "this Court
has construed the Commerce Clause to reflect the *intent of
the Framers . . . to confer a power on the national govern-
ment adequate to discharge its central mission.*" *Ante*, at 3
(emphasis added).¹ JUSTICE STEVENS further states that
"*National League of Cities* not only was incorrectly decided,

¹The authority on which JUSTICE STEVENS primarily relies is an extra-
judicial lecture delivered by Justice Rutledge in 1946. *Ante*, at 1-2. Jus-
tice Rutledge declared that the "proximate cause of our national existence"
was not the desire to assure the great "democratic freedoms"; rather it was
the need "to secure freedom of trade" within the former colonies. W. Rut-
ledge, *A Declaration of Legal Faith* 25 (1947).

but also is inconsistent with the *central purpose* of the Constitution itself” *Ante*, at 6 (emphasis added).

No one would deny that removing trade barriers between the States was *one* of the Constitution’s purposes. I suggest, however, that there were other purposes of equal or greater importance motivating the statesmen who assembled in Philadelphia and the delegates who debated the ratification issue in the state conventions. No doubt there were differences of opinion as to the principal shortcomings of the Articles of Confederation. But one can be reasonably sure that few of the Founding Fathers thought that trade barriers among the States were “the central problem,” or that their elimination was the “central mission” of the Constitutional Convention. Creating a national government within a federal system was far more central than any 18th century concern for interstate commerce.

It is true, of course, that this Court properly has construed the Commerce Clause, and extended its reach, to accommodate the unanticipated and unimaginable changes, particularly in transportation and communication, that have occurred in our country since the Constitution was ratified. If JUSTICE STEVENS had written that the Founders’ intent in adopting the Commerce Clause nearly two centuries ago is of little relevance to the world in which we live today, I would not have disagreed. But his concurring opinion purports to rely on their intent. *Ante*, at 3. I therefore write—briefly, in view of the scope of the subject—to place the Commerce Clause in proper historical perspective, and further to suggest that even today federalism is not, as JUSTICE STEVENS appears to believe, utterly subservient to that Clause.

II

The Constitution’s central purpose was, as the name implies, to constitute a government. The most important provisions, therefore, are those in the first three Articles relating to the establishment of that government. The system of

checks and balances, for example, is far more central to the larger perspective than any single power conferred on any branch. Indeed, the Virginia Plan, the initial proposal from which the entire Convention began its work, focuses on the framework of the national government without even mentioning the power to regulate commerce.²

Apart from the framework of government itself, the Founders stated their motivating purposes in the Preamble to the Constitution:

“to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty. . . .”

These purposes differ little from the concerns motivating the States in the Articles of Confederation: “their common defence, the security of their liberties, and their mutual and general welfare.” Art. III. Although the “general Wel-

² Whatever may have sparked the Annapolis Convention, see *ante*, at 1-2, & 2-3 n. 1, it is clear that the focus of attention at the Constitutional Convention in Philadelphia was the formation of a new government. Madison's report of the proceedings begins, “Monday May 14th 1787 was the day fixed for the meeting of the deputies in Convention for revising the federal system of Government.” 1 M. Farrand, *The Records of the Federal Convention of 1787*, p. 3 (rev. ed. 1937) (footnote omitted). After dealing with several preliminary matters, see *id.*, at 1-17, the “main business,” *id.*, at 18 (J. Madison), opened on May 29 with Edmund Randolph's speech proposing the Virginia Plan. Almost all of the Plan's resolutions dealt with the appropriate structure for the new government. Only the sixth resolution dealt with legislative powers at all. And far from stressing any power to regulate interstate commerce, it simply declared, in relevant part, “that the National Legislature ought to be impowered to enjoy the Legislative Rights vested in Congress by the Confederation & moreover to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation. . . .” *Id.*, at 21. While this language was, no doubt, broad enough to include the power to regulate interstate commerce, there was certainly no emphasis on that particular power.

fare" recognized by the Constitution could embrace the free flow of trade among States (despite the fact that the same language in the Articles of Confederation did not), it is clear that security "against foreign invasion [and] against dissensions between members of the Union" was of at least equal importance. See Speech by Edmund Randolph (May 29, 1787), *reprinted in* 1 M. Farrand, *The Records of the Federal Convention of 1787*, p. 18 (rev. ed. 1937) (J. Madison).³

The power to achieve the purposes identified in the Preamble was not delegated solely to Congress. If, however, one looks at the powers that were so delegated, the position of the Commerce Clause hardly suggests that it was the "central" concern of the patriots who formed our Union. The enumeration of powers in Article I, §8 begins with the "Power To lay and collect Taxes."⁴ This is followed by the power "to pay the Debts" of the United States. Then, consistent with the Preamble, comes the power to "provide for the common Defence and general Welfare." See note 3, *supra*. The power to regulate interstate commerce is only one among nearly a score of other powers that followed. It is evident that the authority to tax and to "provide for the common Defence" loomed larger among the concerns of the Founders than other powers granted Congress. The Commerce Clause was given no place of particular prominence.

³No one in the ratification debate doubted that the power to defend the country was essential, and must be given to the central government. See *The Federalist* No. 41, pp. 269-276 (J. Cooke ed. 1961) (J. Madison). Even under the Articles of Confederation, it was considered necessary to give Congress "the sole and exclusive right and power of determining on peace and war." Art. IX.

⁴A major weakness of the system created by the Articles of Confederation was the central government's inability to collect taxes directly. See 1 Farrand, *supra* n. 2, at 284 (remarks of A. Hamilton). Remedying this defect was thus one of the most important purposes of the Constitutional Convention. See R. Paul, *Taxation in the United States* 4-5 (1964); *The Federalist* No. 30 (A. Hamilton).

So much for what the Constitution's language and structure teach about the Framers' intent.

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A

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It was also clear from the contemporary debates that the Founding Fathers intended the Constitution to establish a federal system. As James Madison, "the Father of the Constitution," explained to the people of New York:

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“[t]hat the several states composing the United States of America are not united on the principle of unlimited submission to their general government; but that, by compact, under the style and title of a Constitution for the United States, and of amendments thereto, they constituted a general government for special purposes, delegated to that government certain definite powers, reserving, each state to itself, the residuary mass of right to their own self-government; and that whensoever the general government assumes undelegated powers, its acts are unauthoritative, void, and of no force.” Kentucky Resolution of 1798, *reprinted in* 4 J. Elliot, *Debates on the Federal Constitution* 540 (2d ed. 1863).

Between the States.⁷ See 6 The Works of John C. Calhoun 1-57 (R. Cralle ed. 1859) (original draft of South Carolina Exposition of 1828).

The view that the reserved powers of the States limited the delegated powers of the National Government was not confined to the South. The New England States, for example, vehemently opposed the Embargo Act of Dec. 22, 1807, c. 5, 2 Stat. 451, and they turned to their rights as States in defense. In 1809, the Governor of Connecticut, with the support of the legislature, refused to comply with the Act of Jan. 9, 1809, c. 5, 2 Stat. 506, which Congress passed to enforce the embargo.⁸ In Massachusetts the story was similar: The legislature denounced the enforcement Act as "un-

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B

It is clear beyond question that state sovereignty always has been a basic assumption of American political theory. Although its contours have changed over two centuries, state sovereignty remains a fundamental component of our system that this Court has recognized time and time again. Even to refer to the highlights would go far beyond the scope of this dissent. I therefore mention only a few of the decisions from last Term alone in which the Court expressly noted that States retain significant sovereign powers.¹¹ In *Community*

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that state sovereignty was an essential element to be considered in reaching that conclusion. See *id.*, at — — —.

In sum, all of the evidence reminds us of the importance of the principles of federalism in our constitutional system. The Founding Fathers, and those who participated in the earliest phases of constitutional development, understood the States' reserved powers to be a limitation on Congress's power—including its power under the Commerce Clause. And the Court has recognized and accepted this fact for almost 200 years.¹²

IV

JUSTICE STEVENS' concurring opinion recognizes no limitation on the ability of Congress to override state sovereignty in exercising its powers under the Commerce Clause. His opinion does not mention explicitly either federalism or state sovereignty. Instead it declares that "[t]he *only* basis for questioning the federal statute at issue here is the pure judicial fiat found in this Court's opinion in *National League of Cities v. Usery*." *Ante*, at 5 (emphasis added). Under this view it is not easy to think of any state function—however sovereign—that could not be preempted.¹³

¹² Of course I do not denigrate the importance of the Commerce Clause. It is essential to the functioning of our National Government. It is, however, only one provision of a Constitution that embodies strong principles of federalism.

¹³ This case illustrates how far the Federal Government, with the Court's approval, has departed from the principles upon which our federal union was formed. The authority relied upon today is a provision of the Constitution giving Congress the power to "regulate Commerce . . . among the several States. . . ." The perceived "Commerce," incredible as it would have seemed even a few years ago, is the effect on *trade among the States* of Wyoming's requirement that its game wardens retire at age 65 rather than 70.

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

FEB 24 1983

changes 1-12
particularly p. 5 n. 5

From: Justice Powell

Circulated: _____

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-554

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, APPELLANT *v.* WYOMING ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF WYOMING

[February —, 1983]

JUSTICE POWELL, with whom JUSTICE O'CONNOR joins,
dissenting.

I join THE CHIEF JUSTICE's dissenting opinion, but write
separately to record a personal dissent from JUSTICE STE-
VENS' revisionist view of our Nation's history.

I

JUSTICE STEVENS begins his concurring opinion with the
startling observation that the Commerce Clause "was the
Framers' response to the *central problem* that gave rise to
the Constitution itself." *Ante*, at 1 (emphasis added). At a
subsequent point in his opinion, he observes that "this Court
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cided, but also is inconsistent with the *central purpose* of the Constitution itself” *Ante*, at 6 (emphasis added).

No one would deny that removing trade barriers between the States was *one* of the Constitution’s purposes. I suggest, however, that there were other purposes of equal or greater importance motivating the statesmen who assembled in Philadelphia and the delegates who debated the ratification issue in the state conventions. No doubt there were differences of opinion as to the principal shortcomings of the Articles of Confederation. But one can be reasonably sure that few of the Founding Fathers thought that trade barriers among the States were “the central problem,” or that their elimination was the “central mission” of the Constitutional Convention. Creating a national government within a federal system was far more central than any 18th century concern for interstate commerce.

It is true, of course, that this Court properly has construed the Commerce Clause, and extended its reach, to accommodate the unanticipated and unimaginable changes, particularly in transportation and communication, that have occurred in our country since the Constitution was ratified. If JUSTICE STEVENS had written that the Founders’ intent in adopting the Commerce Clause nearly two centuries ago is of little relevance to the world in which we live today, I would not have disagreed. But his concurring opinion purports to rely on their intent. *Ante*, at 3. I therefore write—briefly, in view of the scope of the subject—to place the Commerce Clause in proper historical perspective, and further to suggest that even today federalism is not, as JUSTICE STEVENS appears to believe, utterly subservient to that Clause.

II

The Constitution’s central purpose was, as the name implies, to constitute a government. The most important provisions, therefore, are those in the first three Articles relating to the establishment of that government. The system of

checks and balances, for example, is far more central to the larger perspective than any single power conferred on any branch. Indeed, the Virginia Plan, the initial proposal from which the entire Convention began its work, focuses on the framework of the national government without even mentioning the power to regulate commerce.²

Apart from the framework of government itself, the Founders stated their motivating purposes in the Preamble to the Constitution:

“to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty. . . .”

These purposes differ little from the concerns motivating the States in the Articles of Confederation: “their common defence, the security of their liberties, and their mutual and general welfare.” Art. III. Although the “general Wel-

² Whatever may have sparked the Annapolis Convention, see *ante*, at 1-2, & 2-3 n. 1, it is clear that the focus of attention at the Constitutional Convention in Philadelphia was the formation of a new government. Madison's report of the proceedings begins, “Monday May 14th 1787 was the day fixed for the meeting of the deputies in Convention for revising the federal system of Government.” 1 M. Farrand, *The Records of the Federal Convention of 1787*, p. 3 (rev. ed. 1937) (footnote omitted). After dealing with several preliminary matters, see *id.*, at 1-17, the “main business,” *id.*, at 18 (J. Madison), opened on May 29 with Edmund Randolph's speech proposing the Virginia Plan. Almost all of the Plan's resolutions dealt with the appropriate structure for the new government. Only the sixth resolution dealt with legislative powers at all. And far from stressing any power to regulate interstate commerce, it simply declared, in relevant part, “that the National Legislature ought to be impowered to enjoy the Legislative Rights vested in Congress by the Confederation & moreover to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation. . . .” *Id.*, at 21. While this language was, no doubt, broad enough to include the power to regulate interstate commerce, there was certainly no emphasis on that particular power.

fare" recognized by the Constitution could embrace the free flow of trade among States (despite the fact that the same language in the Articles of Confederation did not), it is clear that security "against foreign invasion [and] against dissensions between members of the Union" was of at least equal importance. See Speech by Edmund Randolph (May 29, 1787), *reprinted in* 1 M. Farrand, *The Records of the Federal Convention of 1787*, p. 18 (rev. ed. 1937) (J. Madison).³

The power to achieve the purposes identified in the Preamble was not delegated solely to Congress. If, however, one looks at the powers that were so delegated, the position of the Commerce Clause hardly suggests that it was the "central" concern of the patriots who formed our Union. The enumeration of powers in Article I, §8 begins with the "Power To lay and collect Taxes."⁴ This is followed by the power "to pay the Debts" of the United States. Then, consistent with the Preamble, comes the power to "provide for the common Defence and general Welfare." See note 3, *supra*. The power to regulate interstate commerce is only one among nearly a score of other powers that followed. It is evident that the authority to tax and to "provide for the common Defence" loomed larger among the concerns of the Founders than other powers granted Congress. The Commerce Clause was given no place of particular prominence.

³ No one in the ratification debate doubted that the power to defend the country was essential, and must be given to the central government. See *The Federalist* No. 41, pp. 269-276 (J. Cooke ed. 1961) (J. Madison). Even under the Articles of Confederation, it was considered necessary to give Congress "the sole and exclusive right and power of determining on peace and war." Art. IX.

⁴ A major weakness of the system created by the Articles of Confederation was the central government's inability to collect taxes directly. See 1 Farrand, *supra* n. 2, at 284 (remarks of A. Hamilton). Remedying this defect was thus one of the most important purposes of the Constitutional Convention. See R. Paul, *Taxation in the United States* 4-5 (1954); *The Federalist* No. 30 (A. Hamilton).

omission

So much for what the Constitution's language and structure teach about the Framers' intent.

III

One would never know from the concurring opinion that the Constitution formed a federal system, comprising a national government with delegated powers and state governments that retained a significant measure of sovereign authority. This is clear from the Constitution itself, from the debates surrounding its adoption and ratification, from the early history of our constitutional development, and from the decisions of this Court. It is impossible to believe that the Constitution would have been recommended by the Convention, much less ratified, if it had been understood that the Commerce Clause embodied the national government's "central mission," a mission to be accomplished even at the expense of regulating the personnel practices of state and local governments.⁵

⁵ JUSTICE STEVENS' citation of *Gibbons v. Ogden*, 22 U. S. (9 Wheat.) 1 (1824), in support of his position, see *ante*, at 5-6, n. 8, is essentially irrelevant, for Chief Justice Marshall was not concerned with a State's sovereign power. *Gibbons* carried passengers between New Jersey and New York on two steamboats licensed under an Act of Congress, while *Ogden* claimed the benefit of a New York law granting an exclusive right to navigate steamboats on New York waters. The power to grant such a monopoly clearly is not one of a State's traditional sovereign powers. On the contrary, it is part of the power to regulate interstate navigation that lies within the very core of the Commerce Clause. I certainly do not suggest that principles of federalism should prevent Congress from regulating navigation. The present case, however, concerns the power to determine the terms and conditions of employment for the officers and employees who constitute a State's government. This is as sovereign a power as any that a State possesses, and it is far removed from the original concerns of the Commerce Clause. Indeed, this case illustrates how far the Federal Government, with the Court's approval, has departed from the principles upon which our federal union was formed. The "commerce" at issue, incredible as it would have seemed even a few years ago, let alone in Chief Justice Marshall's day, is the effect on trade among the States of Wyoming's re-

A

The Bill of Rights imposes express limitations on national powers. The Tenth Amendment, in particular, explicitly recognizes the retained power of the States: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." This limitation was, of course, implicit in the Constitution as originally ratified. Even those who opposed the adoption of a Bill of Rights did not dispute the propriety of such a limitation. Rather, they argued that it was unnecessary, for the Constitution delegated certain powers to the central government, and those not delegated were necessarily retained by the States or the people.⁶ Furthermore, the inherent federal nature of the system is clear from the structure of the national government itself. Members of Congress and presidential electors are chosen by States. Representation in the Senate is apportioned by States, regardless of population. The Full Faith and Credit Clause gives particular recognition to the States' "public Acts, Records, and judicial Proceedings." Article IV, § 4 requires a republican form of government in each State. The initial ratification of the Constitution was accomplished on a state-by-state basis, and subsequent amendments require approval by three fourths of the States.

It was also clear from the contemporary debates that the

quirement that its game wardens retire at age 65 rather than 70.

⁶Alexander Hamilton, for example, made this argument in *The Federalist* No. 84, pp. 578-579 (J. Cooke ed. 1961). See also *United States v. Darby*, 312 U. S. 100, 124 (1941) (Tenth Amendment "declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment"); *United States v. Sprague*, 282 U. S. 716, 733 (1931) ("The Tenth Amendment was intended to confirm the understanding of the people at the time the Constitution was adopted, that powers not granted to the United States were reserved to the States or to the people. It added nothing to the instrument as originally ratified. . . .").

Founding Fathers intended the Constitution to establish a federal system. As James Madison, "the Father of the Constitution," explained to the people of New York:

"The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce The powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State." The Federalist No. 45, p. 313 (J. Cooke ed. 1961).

There can be no doubt that Madison's contemporaries shared this view. See, *e. g.*, Letter of Roger Sherman & Oliver Ellsworth to the Governor of Connecticut (Sept. 26, 1787), reprinted in 3 Farrand, *supra*, at 99 (description of proposed Constitution) (The "powers [vested in Congress] extend only to matters respecting the common interests of the union, and are specially defined, so that the particular states retain their sovereignty in all other matters.").

During the earliest years of our constitutional development, principles of federalism were not only well recognized, they formed the basis for virtually every State in the Union to assert its rights as a State against the Federal Government. In 1798, for example, Thomas Jefferson drafted the Kentucky Resolutions,⁷ which were passed by the Kentucky

⁷ In the first resolution, Jefferson explained

"[t]hat the several states composing the United States of America are not united on the principle of unlimited submission to their general government; but that, by compact, under the style and title of a Constitution for the United States, and of amendments thereto, they constituted a general government for special purposes, delegated to that government certain definite powers, reserving, each state to itself, the residuary mass of right

legislature to protest the unpopular Alien and Sedition Acts, Act of June 18, 1798, c. 54, 1 Stat. 566; Act of June 25, 1798, c. 58, 1 Stat. 570; Act of July 6, 1798, c. 66, 1 Stat. 577; Act of July 14, 1798, c. 74, 1 Stat. 596. At the same time, Madison drafted similar Virginia Resolutions, which were adopted by the Virginia General Assembly. See 4 J. Elliot, *Debates on the Federal Constitution* 528-529 (2d ed. 1863). In both cases it was clear that the powers reserved to the States were treated as a substantive limitation on the authority of Congress. It was asserted that these powers enabled a State to interpose its will against *any* action by the National Government. Thirty years later, Jefferson and Madison's views were expanded by John C. Calhoun in his nullification doctrine—the extreme view that eventually led to the War Between the States.⁸ See 6 *The Works of John C. Calhoun* 1-57 (R. Crallé ed. 1859) (original draft of South Carolina Exposition of 1828).

The view that the reserved powers of the States limited the delegated powers of the National Government was not confined to the South. The New England States, for example, vehemently opposed the Embargo Act of Dec. 22, 1807, c. 5, 2 Stat. 451, and they turned to their rights as States in defense. In 1809, the Governor of Connecticut, with the support of the legislature, refused to comply with the Act of Jan. 9, 1809, c. 5, 2 Stat. 506, which Congress passed to en-

to their own self-government; and that whensoever the general government assumes undelegated powers, its acts are unauthoritative, void, and of no force." Kentucky Resolution of 1798, *reprinted in* 4 J. Elliot, *Debates on the Federal Constitution* 540 (2d ed. 1863).

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force the embargo.⁹ In Massachusetts the story was similar: The legislature denounced the enforcement Act as “unjust, oppressive and unconstitutional, and not legally binding on the citizens of this state.” Resolutions of the Massachusetts Legislature (Feb. 15, 1809), *reprinted in* H. Ames, *State Documents on Federal Relations* 35 (1906). When Congress enacted the Embargo Act of Dec. 17, 1813, c. 1, 3 Stat. 88, the Massachusetts legislature declared it “a manifest . . . abuse of power” that infringed the “sovereignty reserved to the States”¹⁰ and justified the legislature in “interpos[ing] its power” to protect its citizens from “oppression,” Resolutions of the Massachusetts Legislature (Feb. 22, 1814), *reprinted in* Ames, *supra*, at 71-72. Even Daniel Webster, famous for his defense of the rights of the National Government, recognized that principles of federalism limit Congress’s power.¹¹

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It is true, of course, that this Court properly has construed the Commerce Clause, and extended its reach, to accommodate the unanticipated and unimaginable changes, particularly in transportation and communication, that have occurred in our country since the Constitution was ratified. If JUSTICE STEVENS had written that the Founders’ intent in adopting the Commerce Clause nearly two centuries ago is of little relevance to the world in which we live today, I would not have disagreed. But his concurring opinion purports to rely on their intent. *Ante*, at 3. I therefore write—briefly, in view of the scope of the subject—to place the Commerce Clause in proper historical perspective, and further to suggest that even today federalism is not, as JUSTICE STEVENS appears to believe, utterly subservient to that Clause.

II

The Constitution’s central purpose was, as the name implies, to constitute a government. The most important provisions, therefore, are those in the first three Articles relating to the establishment of that government. The system of

checks and balances, for example, is far more central to the larger perspective than any single power conferred on any branch. Indeed, the Virginia Plan, the initial proposal from which the entire Convention began its work, focuses on the framework of the national government without even mentioning the power to regulate commerce.²

Apart from the framework of government itself, the Founders stated their motivating purposes in the Preamble to the Constitution:

“to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty. . . .”

These purposes differ little from the concerns motivating the States in the Articles of Confederation: “their common defence, the security of their liberties, and their mutual and general welfare.” Art. III. Although the “general Wel-

² Whatever may have sparked the Annapolis Convention, see *ante*, at 1-2, & 2-3 n. 1, it is clear that the focus of attention at the Constitutional Convention in Philadelphia was the formation of a new government. Madison's report of the proceedings begins, “Monday May 14th 1787 was the day fixed for the meeting of the deputies in Convention for revising the federal system of Government.” 1 M. Farrand, *The Records of the Federal Convention of 1787*, p. 3 (rev. ed. 1937) (footnote omitted). After dealing with several preliminary matters, see *id.*, at 1-17, the “main business,” *id.*, at 18 (J. Madison), opened on May 29 with Edmund Randolph's speech proposing the Virginia Plan. Almost all of the Plan's resolutions dealt with the appropriate structure for the new government. Only the sixth resolution dealt with legislative powers at all. And far from stressing any power to regulate interstate commerce, it simply declared, in relevant part, “that the National Legislature ought to be impowered to enjoy the Legislative Rights vested in Congress by the Confederation & moreover to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation. . . .” *Id.*, at 21. While this language was, no doubt, broad enough to include the power to regulate interstate commerce, there was certainly no emphasis on that particular power.

fare" recognized by the Constitution could embrace the free flow of trade among States (despite the fact that the same language in the Articles of Confederation did not), it is clear that security "against foreign invasion [and] against dissensions between members of the Union" was of at least equal importance. See Speech by Edmund Randolph (May 29, 1787), *reprinted in* 1 M. Farrand, *The Records of the Federal Convention of 1787*, p. 18 (rev. ed. 1937) (J. Madison).³

The power to achieve the purposes identified in the Preamble was not delegated solely to Congress. If, however, one looks at the powers that were so delegated, the position of the Commerce Clause hardly suggests that it was the "central" concern of the patriots who formed our Union. The enumeration of powers in Article I, §8 begins with the "Power To lay and collect Taxes."⁴ This is followed by the power "to pay the Debts" of the United States. Then, consistent with the Preamble, comes the power to "provide for the common Defence and general Welfare." See note 3, *supra*. The power to regulate interstate commerce is only one among nearly a score of other powers that followed. It is evident that the authority to tax and to "provide for the common Defence" loomed larger among the concerns of the Founders than other powers granted Congress. The Commerce Clause was given no place of particular prominence.

³ No one in the ratification debate doubted that the power to defend the country was essential, and must be given to the central government. See *The Federalist* No. 41, pp. 269-276 (J. Cooke ed. 1961) (J. Madison). Even under the Articles of Confederation, it was considered necessary to give Congress "the sole and exclusive right and power of determining on peace and war." Art. IX.

⁴ A major weakness of the system created by the Articles of Confederation was the central government's inability to collect taxes directly. See 1 Farrand, *supra* n. 2, at 284 (remarks of A. Hamilton). Remedying this defect was thus one of the most important purposes of the Constitutional Convention. See R. Paul, *Taxation in the United States* 4-5 (1954); *The Federalist* No. 30 (A. Hamilton).

So much for what the Constitution's language and structure teach about the Framers' intent.

III

One would never know from the concurring opinion that the Constitution formed a federal system, comprising a national government with delegated powers and state governments that retained a significant measure of sovereign authority. This is clear from the Constitution itself, from the debates surrounding its adoption and ratification, from the early history of our constitutional development, and from the decisions of this Court. It is impossible to believe that the Constitution would have been recommended by the Convention, much less ratified, if it had been understood that the Commerce Clause embodied the national government's "central mission," a mission to be accomplished even at the expense of regulating the personnel practices of state and local governments.⁵

⁵ JUSTICE STEVENS' citation of *Gibbons v. Ogden*, 22 U. S. (9 Wheat.) 1 (1824), in support of his position, see *ante*, at 5-6, n. 8, is essentially irrelevant, for Chief Justice Marshall was not concerned with a State's sovereign power. *Gibbons* carried passengers between New Jersey and New York on two steamboats licensed under an Act of Congress, while *Ogden* claimed the benefit of a New York law granting an exclusive right to navigate steamboats on New York waters. The power to grant such a monopoly clearly is not one of a State's traditional sovereign powers. On the contrary, it is part of the power to regulate interstate navigation that lies within the very core of the Commerce Clause. I certainly do not suggest that principles of federalism should prevent Congress from regulating navigation. The present case, however, concerns the power to determine the terms and conditions of employment for the officers and employees who constitute a State's government. This is as sovereign a power as any that a State possesses, and it is far removed from the original concerns of the Commerce Clause. Indeed, this case illustrates how far the Federal Government, with the Court's approval, has departed from the principles upon which our federal union was formed. The "commerce" at issue, incredible as it would have seemed even a few years ago, let alone in Chief Justice Marshall's day, is the effect on trade among the States of Wyoming's re-

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The Bill of Rights imposes express limitations on national powers. The Tenth Amendment, in particular, explicitly recognizes the retained power of the States: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." This limitation was, of course, implicit in the Constitution as originally ratified. Even those who opposed the adoption of a Bill of Rights did not dispute the propriety of such a limitation. Rather, they argued that it was unnecessary, for the Constitution delegated certain powers to the central government, and those not delegated were necessarily retained by the States or the people.⁶ Furthermore, the inherent federal nature of the system is clear from the structure of the national government itself. Members of Congress and presidential electors are chosen by States. Representation in the Senate is apportioned by States, regardless of population. The Full Faith and Credit Clause gives particular recognition to the States' "public Acts, Records, and judicial Proceedings." Article IV, § 4 requires a republican form of government in each State. The initial ratification of the Constitution was accomplished on a state-by-state basis, and subsequent amendments require approval by three fourths of the States.

It was also clear from the contemporary debates that the

quirement that its game wardens retire at age 65 rather than 70.

⁶ Alexander Hamilton, for example, made this argument in *The Federalist* No. 84, pp. 578-579 (J. Cooke ed. 1961). See also *United States v. Darby*, 312 U. S. 100, 124 (1941) (Tenth Amendment "declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment"); *United States v. Sprague*, 282 U. S. 716, 733 (1931) ("The Tenth Amendment was intended to confirm the understanding of the people at the time the Constitution was adopted, that powers not granted to the United States were reserved to the States or to the people. It added nothing to the instrument as originally ratified. . . .").

Founding Fathers intended the Constitution to establish a federal system. As James Madison, "the Father of the Constitution," explained to the people of New York:

"The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce The powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State." The Federalist No. 45, p. 313 (J. Cooke ed. 1961).

There can be no doubt that Madison's contemporaries shared this view. See, *e. g.*, Letter of Roger Sherman & Oliver Ellsworth to the Governor of Connecticut (Sept. 26, 1787), reprinted in 3 Farrand, *supra*, at 99 (description of proposed Constitution) (The "powers [vested in Congress] extend only to matters respecting the common interests of the union, and are specially defined, so that the particular states retain their sovereignty in all other matters.").

During the earliest years of our constitutional development, principles of federalism were not only well recognized, they formed the basis for virtually every State in the Union to assert its rights as a State against the Federal Government. In 1798, for example, Thomas Jefferson drafted the Kentucky Resolutions,⁷ which were passed by the Kentucky

⁷ In the first resolution, Jefferson explained

"[t]hat the several states composing the United States of America are not united on the principle of unlimited submission to their general government; but that, by compact, under the style and title of a Constitution for the United States, and of amendments thereto, they constituted a general government for special purposes, delegated to that government certain definite powers, reserving, each state to itself, the residuary mass of right

legislature to protest the unpopular Alien and Sedition Acts, Act of June 18, 1798, c. 54, 1 Stat. 566; Act of June 25, 1798, c. 58, 1 Stat. 570; Act of July 6, 1798, c. 66, 1 Stat. 577; Act of July 14, 1798, c. 74, 1 Stat. 596. At the same time, Madison drafted similar Virginia Resolutions, which were adopted by the Virginia General Assembly. See 4 J. Elliot, *Debates on the Federal Constitution* 528-529 (2d ed. 1863). In both cases it was clear that the powers reserved to the States were treated as a substantive limitation on the authority of Congress. It was asserted that these powers enabled a State to interpose its will against *any* action by the National Government. Thirty years later, Jefferson and Madison's views were expanded by John C. Calhoun in his nullification doctrine—the extreme view that eventually led to the War Between the States.⁸ See 6 *The Works of John C. Calhoun* 1-57 (R. Cralle ed. 1859) (original draft of South Carolina Exposition of 1828).

The view that the reserved powers of the States limited the delegated powers of the National Government was not confined to the South. The New England States, for example, vehemently opposed the Embargo Act of Dec. 22, 1807, c. 5, 2 Stat. 451, and they turned to their rights as States in defense. In 1809, the Governor of Connecticut, with the support of the legislature, refused to comply with the Act of Jan. 9, 1809, c. 5, 2 Stat. 506, which Congress passed to en-

to their own self-government; and that whensoever the general government assumes undelegated powers, its acts are unauthoritative, void, and of no force." Kentucky Resolution of 1798, *reprinted in* 4 J. Elliot, *Debates on the Federal Constitution* 540 (2d ed. 1863).

⁸ In referring to this early and interesting history, I do not suggest that either the doctrine of interposition or that of nullification was constitutionally sound. In any event, they were laid to rest in one of history's bloodiest fratricides, ending at Appomattox in 1865. The views of these great figures in our history are, however, directly pertinent to the question whether there was ever any *intention* that the Commerce Clause would empower the Federal Government to intrude expansively upon the sovereign powers reserved to the States. See note 5, *supra*.

force the embargo.⁹ In Massachusetts the story was similar: The legislature denounced the enforcement Act as “unjust, oppressive and unconstitutional, and not legally binding on the citizens of this state.” Resolutions of the Massachusetts Legislature (Feb. 15, 1809), *reprinted in* H. Ames, *State Documents on Federal Relations* 35 (1906). When Congress enacted the Embargo Act of Dec. 17, 1813, c. 1, 3 Stat. 88, the Massachusetts legislature declared it “a manifest . . . abuse of power” that infringed the “sovereignty reserved to the States”¹⁰ and justified the legislature in “interpos[ing] its power” to protect its citizens from “oppression,” Resolutions of the Massachusetts Legislature (Feb. 22, 1814), *reprinted in* Ames, *supra*, at 71–72. Even Daniel Webster, famous for his defense of the rights of the National Government, recognized that principles of federalism limit Congress’s power.¹¹

⁹The Governor explained to a special session of the state legislature that “[w]henver our national legislature is led to overleap the prescribed bounds of their [*sic*] constitutional powers, on the State Legislatures, in great emergencies, devolves the arduous task—it is their right—it becomes their duty, to interpose their protecting shield between the right and liberty of the people, and the assumed power of the General Government.” Speech of Governor Jonathan Trumbull (Feb. 23, 1809), *reprinted in* H. Ames, *State Documents on Federal Relations* 40 (1906). The Assembly promptly passed resolutions supporting the Governor’s position and concluding that the embargo legislation was “incompatible with the constitution of the United States, and encroach[ed] upon the immunities of [the] State.” Resolutions of the General Assembly (Feb. 23, 1809), *reprinted in* Ames, *supra*, at 41. In view of its duty to support the Constitution, the legislature declined “to assist, or concur in giving effect to the aforesaid unconstitutional act, passed, to enforce the Embargo.” *Ibid.*

¹⁰The legislature explained that the State’s sovereignty was reserved, in part, to protect its citizens from excessive federal power. Resolutions of the Massachusetts Legislature (Feb. 22, 1814), *reprinted in* Ames, *supra* n. 9, at 71.

¹¹During a debate in Congress on a conscription bill and a bill for the enlistment of minors, Webster declared that if these measures were enacted it would be “the solemn duty of the State Governments” to interpose their authority to prevent enforcement. In his view, this was “among the

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It is clear beyond question that state sovereignty always has been a basic assumption of American political theory. Although its contours have changed over two centuries, state sovereignty remains a fundamental component of our system that this Court has recognized time and time again. Even to refer to the highlights would go far beyond the scope of this dissent. I therefore mention only a few of the decisions from last Term alone in which the Court expressly noted that States retain significant sovereign powers.¹² In *Community Communications Co. v. City of Boulder*, 455 U. S. 40 (1982), we considered the state action exemption from the antitrust laws. Since “‘under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority,’” *id.*, at 49 (quoting *Parker v. Brown*, 317 U. S. 341, 351 (1943)), we had previously recognized an antitrust exemption for States acting “in the exercise of

objects for which the State Governments exist.” Speech on the Conscription Bill (Dec. 9, 1814), reprinted in 14 *The Writings and Speeches of Daniel Webster* 55, 68 (1903).

¹² See, e. g., *Rivera-Rodriguez v. Popular Democratic Party*, 457 U. S. 1, 8 (1982) (“Puerto Rico, like a state, is an autonomous political entity, ‘sovereign over matters not ruled by the Constitution.’”) (quoting *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U. S. 663, 673 (1974)); *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinée*, 456 U. S. 694, 703, n. 10 (1982) (States are “‘coequal sovereigns in a federal system’”) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U. S. 286, 292 (1980)); *Engle v. Isaac*, 456 U. S. 107, 128 (1982) (discussing “the States’ sovereign power to punish offenders”); *Underwriters National Assurance Co. v. North Carolina Life & Accident & Health Ins. Guaranty Assn.*, 455 U. S. 691, 704 (1982) (recognizing “the structure of our Nation as a union of States, each possessing equal sovereign powers”); *Cabell v. Chavez-Salido*, 454 U. S. 432, 444–447 (1982) (relying on State’s “sovereign” police powers); *Fair Assessment in Real Estate Assn. v. McNary*, 454 U. S. 100, 108 (1981) (state courts are those “of a different, though paramount sovereignty”) (quoting *Matthews v. Rodgers*, 284 U. S. 521, 525 (1932)).

[their] sovereign powers," *id.*, at 48. We held that this exemption does not extend to cities, but in so doing we repeatedly stressed the sovereign nature of States. See *id.*, at 48-54. In *United Transportation Union v. Long Island R. Co.*, 455 U. S. 678 (1982), we unanimously upheld the application of the Railway Labor Act to a state-owned railroad. We reached this conclusion, however, only by finding that operation of the railroad was not one of the State's "constitutionally preserved sovereign function[s]." *Id.*, at 683. And in *Federal Energy Regulatory Comm'n v. Mississippi*, 456 U. S. 742 (1982), we considered whether parts of the Public Utility Regulatory Policies Act "constituted an invasion of state sovereignty in violation of the Tenth Amendment," *id.*, at 752. Although the Court upheld the statute, it was clear that state sovereignty was an essential element to be considered in reaching that conclusion. See *id.*, at 758-771.

In sum, all of the evidence reminds us of the importance of the principles of federalism in our constitutional system. The Founding Fathers, and those who participated in the earliest phases of constitutional development, understood the States' reserved powers to be a limitation on Congress's power—including its power under the Commerce Clause. And the Court has recognized and accepted this fact for almost 200 years.¹³

IV

JUSTICE STEVENS' concurring opinion recognizes no limitation on the ability of Congress to override state sovereignty in exercising its powers under the Commerce Clause. His opinion does not mention explicitly either federalism or state sovereignty. Instead it declares that "[t]he *only* basis for

¹³ Of course I do not denigrate the importance of the Commerce Clause. It is essential to the functioning of our National Government. It is, however, only one provision of a Constitution that embodies strong principles of federalism.

questioning the federal statute at issue here is the pure judicial fiat found in this Court's opinion in *National League of Cities v. Usery*." *Ante*, at 5 (emphasis added). Under this view it is not easy to think of any state function—however sovereign—that could not be preempted.

1. citation check
2. fledgling commerce?
3. unanticipated developments
in ~~the~~ transportation &
communication.

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

L.F.P.

2/14

From: **Justice Powell**

Circulated: _____

Recirculated: _____

CHAMBERS DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-554

EQUAL EMPLOYMENT OPPORTUNITY COMMIS-
SION, APPELLANT *v.* WYOMING, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF WYOMING

[February —, 1983]

JUSTICE POWELL, dissenting.

I join THE CHIEF JUSTICE's dissenting opinion, but write
separately to record a personal dissent from JUSTICE STE-
VENS' revisionist view of our Nation's history.

I

JUSTICE STEVENS begins his concurring opinion with the
startling observation that the Commerce Clause "was the
Framers' response to the *central problem* that gave rise to
the Constitution itself." *Ante*, at 1 (emphasis added). At a
subsequent point in his opinion, he observes that "this Court
has construed the Commerce Clause to reflect the *intent of
the Framers . . .* to confer a power on the national govern-
ment adequate to discharge its *central mission*." *Ante*, at 3
(emphasis added).¹ JUSTICE STEVENS further states that
"*National League of Cities* not only was incorrectly decided,
but also is inconsistent with the *central purpose* of the Con-
stitution itself. . . ." *Ante*, at 5 (emphasis added).

¹The authority on which JUSTICE STEVENS primarily relies is an extra-
judicial lecture delivered by Justice Rutledge in 1946. *Ante*, at 1-2. Jus-
tice Rutledge declared that the "proximate cause of our national existence"
was not to assure the great "democratic freedoms"; rather it was "to secure
freedom of trade" within the former colonies. W. Rutledge, *A Declaration
of Legal Faith* 25 (1947).

8

File

No one would deny that removing trade barriers between the States was *one* of the Constitution's purposes. I suggest, however, that there were other purposes of equal or greater importance motivating the statesmen who assembled in Philadelphia and the delegates who debated the issue in the state ratification conventions. No doubt there were differences of opinion as to the principal shortcomings of the Articles of Confederation. But one can be reasonably sure that few of the Founding Fathers thought that trade barriers among the States were "the central problem," or that their elimination was the "central mission" of the Constitutional Convention. Creating a national government within a federal system was far more central than any eighteenth-century concern for interstate commerce.

It is true, of course, that this Court properly has construed the Commerce Clause, and extended its reach, to accommodate the changes that have occurred in our country since the Constitution was ratified. If JUSTICE STEVENS had written that the Founders' intent in adopting the Commerce Clause nearly two centuries ago is of little relevance to the world in which we live today, I would not have disagreed. But his concurring opinion purports to rely on their contemporary intent. *Ante* at 3. I therefore write—briefly in view of the scope of the subject—to place the Commerce Clause in proper historical perspective, and further to suggest that even today federalism is not, as JUSTICE STEVENS appears to believe, utterly subservient to that Clause.

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The Constitution's central purpose was, as the name implies, to constitute a government. The most important provisions, therefore, are those in the first three Articles relating to the establishment of that government. The system of checks and balances, for example, is far more central to the larger perspective than any single power conferred on any branch. Indeed, the Virginia Plan, the initial proposal from

which the entire Convention began its work, focuses on the framework of government without even mentioning the power to regulate commerce.²

Apart from the framework of government itself, the Framers stated their motivating purposes in the Preamble to the Constitution:

“to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty. . . .”

These purposes differ little from the concerns motivating the States in the Articles of Confederation: “their common defence, the security of their liberties, and their mutual and general welfare.” Art. III. Although the “general Welfare” recognized by the Constitution could embrace the free flow of trade among States (despite the fact that the same

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“that the National Legislature ought to be empowered to enjoy the Legislative Rights vested in Congress by the Confederation & moreover to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation. . . .” 1 Farrand, *supra*, at 21.

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The power to achieve these purposes was not delegated solely to Congress. If, however, one looks at the powers that were so delegated, the position of the Commerce Clause hardly suggests that it was "central" among the concerns of the patriots who formed our union. The enumeration of powers in Article I, section 8 begins with the "Power To lay and collect Taxes."⁴ This is followed by the power "to pay the Debts" of the United States. Then, consistent with the Preamble, comes the power to "provide for the common Defence and general Welfare." See note 3, *supra*. The perceived need for a national legislature with the power to tax, and to maintain an army and navy for the common defense, loomed far larger in the Founders' thinking than the need to eliminate trade barriers. Among the remaining enumerated powers, the power to regulate interstate commerce is only one among roughly a score. It is given no place of particular prominence. So much for what the Constitution's language and structure teaches about the Framers' intent.

³ No one in the ratification debate doubted that the power to defend the country was essential, and must be given to the central government. See *The Federalist* No. 41, pp. 269-276 (J. Cooke ed. 1961) (J. Madison). Even under the Articles of Confederation, it was considered necessary to give Congress "the sole and exclusive right and power of determining on peace and war." Art. IX. All of the evidence indicates that this most basic purpose of government was far more important to the Founders than the regulation of interstate commerce.

⁴ A major weakness of the system created by the Articles of Confederation was the central government's inability to collect taxes directly. See 1 Farrand, *supra* n. 2, at 284 (remarks of Alexander Hamilton). Remedying this defect was thus one of the most important purposes of the Constitutional Convention. See R. Paul, *Taxation in the United States* 4-5 (1954); *The Federalist* No. 30 (A. Hamilton).

III

One would never know from the concurring opinion that the Constitution formed a federal system, comprising a national government with delegated powers and state governments that retained a significant measure of sovereign authority. This is clear from the Constitution itself, from the debates surrounding its adoption and ratification, from the early history of our constitutional development, and from the decisions of this Court. It is impossible to believe that the Constitution would have been adopted, much less ratified, if it had been understood that the Commerce Clause embodied the national government's "central mission," a mission to be accomplished even at the expense of regulating the personnel practices of state and local governments.

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⁵ Alexander Hamilton, for example, made this argument in *The Federalist* No. 84, pp. 578-579 (J. Cooke ed. 1961). See also *United States v. Darby*, 312 U. S. 100, 124 (1941) (Tenth Amendment "declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment"); *United States v. Sprague*, 282 U. S. 716, 733 (1931) ("The Tenth Amendment was intended to confirm the understanding of the people at the time the Constitution was adopted, that powers not granted to the United States were reserved to the States or to the people. It added nothing to the instrument as origi-

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It was also clear from the contemporary debates that the Founding Fathers intended the Constitution to establish a federal system. As James Madison, "the Father of the Constitution," explained to the people of New York:

"The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce The powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State." The Federalist No. 45, p. 313 (J. Cooke ed. 1961).

There can be no doubt that Madison's contemporaries shared this view. See, *e. g.*, Letter of Roger Sherman & Oliver Elsworth to the Governor of Connecticut (Sept. 26, 1787), *reprinted in* 3 Farrand, *supra*, at 99 (description of proposed Constitution) (The "powers [vested in Congress] extend only to matters respecting the common interests of the union, and

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are specially defined, so that the particular states retain their sovereignty in all other matters.”).

During the earliest years of our constitutional development, principles of federalism were not only well recognized, they formed the basis for virtually every State in the Union to assert its rights as a State against the federal government. In 1798, for example, Thomas Jefferson drafted the Kentucky Resolutions,⁶ which were passed by the Kentucky legislature to protest the unpopular Alien and Sedition Acts, Act of June 18, 1798, c. 54, 1 Stat. 566; Act of June 25, 1798, c. 58, 1 Stat. 570; Act of July 6, 1798, c. 66, 1 Stat. 577; Act of July 14, 1798, c. 74, 1 Stat. 596. At the same time, Madison drafted similar Virginia Resolutions, which were adopted by the Virginia General Assembly. See 4 J. Elliot, *Debates on the Federal Constitution* 528-529 (2d ed. 1863). In both cases it was clear that the powers reserved to the States were treated as a substantive limitation on Congress's authority. It was asserted that these powers enabled a State to interpose its will against *any* action by the Federal Government. Thirty years later, Jefferson and Madison's views were expanded by John C. Calhoun in his nullification doctrine—the extreme view that eventually led to the War Between the States.⁷ See 6 *The Works of John C. Calhoun* 1-57 (R.

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“[t]hat the several states composing the United States of America are not united on the principle of unlimited submission to their general government; but that, by compact, under the style and title of a Constitution for the United States, and of amendments thereto, they constituted a general government for special purposes, delegated to that government certain definite powers, reserving, each state to itself, the residuary mass of right to their own self-government; and that whensoever the general government assumes undelegated powers, its acts are unauthoritative, void, and of no force.” Kentucky Resolution of 1798, *reprinted in* 4 J. Elliot, *Debates on the Federal Constitution* 540 (2d ed. 1863).

⁷ In referring to this early and interesting history, I do not suggest that either the doctrine of interposition or that of nullification was constitution-

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The view that the reserved powers of the States limited the delegated powers of the Federal Government was ~~hardly~~ ^{not} confined to the South. The New England States, for example, vehemently opposed the Embargo Act of Dec. 22, 1807, c. 5, 2 Stat. 451, and they turned to their rights as States in defense. In 1809, the Governor of Connecticut, with the support of the legislature, refused to comply with the Act of Jan. 9, 1809, c. 5, 2 Stat. 506, which Congress passed to enforce the embargo.⁸ In Massachusetts the story was similar: The legislature denounced the enforcement Act as "unjust, oppressive, and unconstitutional, and not legally binding on the citizens of this state." Resolution of the Massachusetts Legislature (Feb. 15, 1809), *reprinted in H.*

ally sound. In any event, they were laid to rest in one of history's bloodiest fratricides, ending at Appomattox in 1865. The views of these great figures in our history are, however, directly pertinent to the question whether there was ever any *intention* that the Commerce Clause would empower the Federal Government to intrude expansively upon the sovereign powers reserved to the States.

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"[w]henver our national legislature is led to overleap the prescribed bounds of their [*sic*] constitutional powers, on the state legislatures, in great emergencies, devolve the arduous task—it is their right—it becomes their duty, to interpose their protecting shield between the right and liberty of the people, and the assumed power of the general government." Message of Governor Trumbull (Feb. 25, 1809), *reprinted in H. Ames, State Documents on Federal Relations, 1789-1861, at pp. 39-40 (1907).*

The Assembly promptly passed resolutions supporting the Governor's position and concluding that the embargo legislation was "incompatible with the constitution of the United States, and encroach[ed] upon the immunities of [the] State." Resolution of the Connecticut General Assembly (Special Session Feb. 1809), *reprinted in Ames, supra*, at —. In view of its duty to support the Constitution, the legislature declined "to assist, or concur in giving effect to the aforesaid unconstitutional act, passed, to enforce the Embargo." *Ibid.*

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B

Few perceptions of history are clearer than the fact that state sovereignty has always been a basic assumption of American political theory. Although its contours have changed over two centuries, state sovereignty remains a fundamental component of our system that this Court has recognized time and time again. Even to refer to the highlights would go far beyond the scope of this dissent. I therefore mention only a few of the decisions from last Term alone in which the Court expressly noted that States retain significant sovereign powers.¹¹ In *Community Communications*

⁹ The legislature explained that the State's sovereignty was reserved, in part, to protect its citizens from excessive federal power. Resolution of the Massachusetts Legislature (Feb. 4, 1814), *reprinted in* Ames, *supra* n. 8, at 72.

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In sum, all of the evidence reminds us of the importance of the principles of federalism in our constitutional system. The Founding Fathers, and those who participated in the earliest phases of constitutional development, understood the States' reserved powers to be a limitation on Congress's power—including its power under the Commerce Clause. And the Court has recognized and accepted this fact for almost two hundred years.¹²

IV

JUSTICE STEVENS' concurring opinion recognizes no limitation on Congress's ability to override state sovereignty in exercising its powers under the Commerce Clause. His opinion does not mention either federalism or state sovereignty. Instead it declares that "[t]he *only* basis for questioning the federal statute at issue here is the pure judicial fiat found in this Court's opinion in *National League of Cities v. Usery*." *Ante*, at 4 (emphasis added). Under this view it is not easy to think of any state function that could not be preempted. B13/

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¹² Of course I do not denigrate the importance of the Commerce Clause. It is essential to the functioning of our National Government. It is, however, only one provision of a Constitution that embodies strong principles of federalism.

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JUSTICE POWELL, dissenting.

I join THE CHIEF JUSTICE's dissenting opinion, but write separately to record a personal dissent from JUSTICE STEVENS's revisionist view of our country's history.

I

JUSTICE STEVENS begins his concurring opinion with the startling observation that the Commerce Clause "was the Framers' response to the central problem that gave rise to the Constitution itself." Ante, at 1 (emphasis added). At a subsequent point in his opinion, he observes that "this Court has construed the Commerce Clause to reflect the intent of the Framers ... to confer a power on the national government adequate to discharge its central mission." Ante, at 3 (emphasis added).¹ JUSTICE STEVENS further states that "National League of Cities not only was incorrectly decided, but also is inconsistent with the central purpose of the Constitution itself" Ante, at 5 (emphasis added).

No one would deny that removing trade barriers between the States was one of the Constitution's central purposes. I suggest, however, that there were other purposes of equal or

¹The authority on which JUSTICE STEVENS primarily relies is an extrajudicial lecture delivered by Justice Rutledge in 1946. Ante, at 1-2. Justice Rutledge declared that the "proximate cause of our national existence" was not to assure the great "democratic freedoms"; rather it was "to secure freedom of trade" within the former colonies. W. Rutledge, A Declaration of Legal Faith 25 (1947).

greater importance motivating the statesmen who assembled in Philadelphia and the delegates who debated the issue in the state ratification conventions. No doubt there were differences of opinion as to the primacy of the various purposes. But one can be reasonably sure that few of the Founding Fathers thought that trade barriers were "the central problem," or that their elimination was the "central mission" of the Constitutional Convention. Creating a national government within a federal system was far more central than any eighteenth-century concern for interstate commerce.

It is true, of course, that this Court properly has construed the Commerce Clause, and extended its reach, to accommodate the changes that have occurred in our country since the Constitution was ratified. If JUSTICE STEVENS had written that the Founders' intent in adopting the Commerce Clause nearly two centuries ago is of little relevance to the world in which we live today, I would not have disagreed. But his concurring opinion purports to rely on their contemporary intent. Ante at 3. I therefore write--briefly in view of the scope of the subject--to place the Commerce Clause in proper historical perspective, and further to suggest that even today federalism is not, as JUSTICE STEVENS appears to believe, utterly subservient to that Clause.

II

The central purpose of the Constitution was, as the name implies, to constitute a government. The most important provisions, therefore, are those in the first three Articles relating

to the establishment of the government. The system of checks and balances, for example, is far more central to the larger perspective than any single power conferred on any branch. Indeed, the Virginia Plan, the initial proposal on which the entire Convention was based, focuses on the framework of government without even mentioning the power to regulate commerce.²

Apart from the framework of government itself, the Framers stated their motivating purposes in the Preamble to the Constitution:

"to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty"

²Whatever may have sparked the Annapolis Convention, it is clear that the focus of attention at the Constitutional Convention in Philadelphia was the formation of a new government. Madison's report of the proceedings begins, "Monday May 14th 1787 was the day fixed for the meeting of the deputies in Convention for revising the federal system of Government." 1 M. Farrand, *The Records of the Federal Convention of 1787*, p. 3 (rev. ed. 1937). After dealing with several preliminary matters, see *id.*, at 1-17, the "main business," *id.*, at 18 (J. Madison), opened on May 29 with Edmund Randolph's speech proposing the Virginia Plan. Almost all of the Plan's resolutions dealt with the appropriate structure for the new government. Only the sixth resolution dealt with legislative powers at all. And far from stressing any power to regulate interstate commerce, it simply declared, in relevant part,

"that the National Legislature ought to be impowered to enjoy the Legislative Rights vested in Congress by the Confederation & moreover to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation" 1 Farrand, *supra*, at 21.

While this language was, no doubt, broad enough to include the power to regulate interstate commerce, there was certainly no emphasis on that particular power.

These purposes differ little from the concerns motivating the States in the Articles of Confederation: "their common defence, the security of their liberties, and their mutual and general welfare." Article III. Although the "general Welfare" recognized by the Constitution could embrace the free flow of trade among States (despite the fact that the same language in the Articles of Confederation did not), it is clear that security "against foreign invasion [and] against dissensions between members of the Union" was of at least equal importance. See Speech by Edmund Randolph (May 29, 1787), reprinted in 1 M. Farrand, The Records of the Federal Convention of 1787, p. 18 (rev. ed. 1937) (J. Madison).³

The power to achieve these purposes was not delegated solely to Congress. If, however, one looks at the powers that were so delegated, the position of the Commerce Clause hardly suggests that it was "central" among the concerns of the patriots who formed our union. The enumeration of powers in Article I, section 8 begins with the "Power To lay and collect Taxes."⁴

³No one in the ratification debate doubted that the power to defend the country was essential, and must be given to the central government. See The Federalist No. 41, pp. 269-276 (J. Cooke ed. 1961) (J. Madison). Even under the Articles of Confederation, it was considered necessary to give Congress "the sole and exclusive right and power of determining on peace and war." Art. IX. All of the evidence indicates that this most basic purpose of government was far more important to the Founders than the regulation of interstate commerce.

⁴A major weakness of the system created by the Articles of Confederation was the central government's inability to collect taxes directly. See 1 Farrand, *supra* note 2, at 284 (remarks of Alexander Hamilton). Remedying this defect was thus one of the

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This is followed by the power "to pay the Debts" of the United States. Then, consistent with the Preamble, comes the power to "provide for the common Defence and general Welfare." See note 3, supra. The perceived need for a government with the power to tax, and to maintain an army and navy for the common defense, loomed far larger in the Founders' thinking than the need to eliminate trade barriers. Among the remaining enumerated powers, the power to regulate interstate commerce is only one among roughly a score. It is given no place of particular prominence. So much for what the Constitution's language and structure teaches about the Framers' intent.

III

One would never know from the concurring opinion that the Constitution formed a federal system, composed of the central government and States that retained a significant measure of sovereign authority. This is clear from the Constitution itself, from the debates surrounding its adoption and ratification, from the early history of our constitutional development, and from the decisions of this Court. It is impossible to believe that the Constitution would have been adopted, much less ratified, if it had been understood that the Commerce Clause embodied the nation-

principal purposes of the Constitutional Convention. See R. Paul, *Taxation in the United States* 4-5 (1954). The importance of the taxing power in the minds of the Founding Fathers is obvious from the Convention and the ratification debates. See, e.g., *The Federalist* No. 30 (A. Hamilton).

al government's "central mission," a mission to be accomplished even at the expense of regulating the personnel practices of state and local governments.

A

The Bill of Rights imposes express limitations on national powers. The Tenth Amendment, in particular, explicitly recognizes the retained power of the States: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." This limitation was, of course, implicit in the Constitution as originally ratified. Even those who opposed the adoption of a Bill of Rights did not dispute the propriety of such a limitation. Rather, they argued that it was unnecessary, for the Constitution delegated certain powers to the central government, and those not delegated were necessarily retained by the States or the people.⁵ Furthermore, the inherent federal nature of the system is clear from the structure of government itself. Members of Congress and presidential electors are chosen by

⁵Alexander Hamilton, for example, made this argument in The Federalist No. 84, pp. 578-579 (J. Cooke ed. 1961). See also United States v. Darby, 312 U.S. 100, 124 (1941) (Tenth Amendment "declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment"); United States v. Sprague, 282 U.S. 716, 733 (1931) ("The Tenth Amendment was intended to confirm the understanding of the people at the time the Constitution was adopted, that powers not granted to the United States were reserved to the States or to the people. It added nothing to the instrument as originally ratified").

States. Representation in the Senate is apportioned by States, regardless of population. The Full Faith and Credit Clause gives particular recognition to the States' "public Acts, Records, and judicial Proceedings." Article IV, section 4 requires a republican form of government in each State. The initial ratification of the Constitution was accomplished on a state-by-state basis, and subsequent amendments require approval by three fourths of the States.

It was also clear from the contemporary debates that the Founding Fathers intended the Constitution to establish a federal system. As James Madison, "the Father of the Constitution," explained to the people of New York:

"The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce The powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State." The Federalist No. 45, p. 313 (J. Cooke ed. 1961).

There can be no doubt that Madison's contemporaries shared this view. See, e.g., Letter of Roger Sherman & Oliver Ellsworth to the Governor of Connecticut (Sept. 26, 1787), reprinted in 3 Farrand, supra, at 99 (description of proposed Constitution) (The "powers [vested in Congress] extend only to matters respecting the common interests of the union, and are specially defined, so that the particular states retain their sovereignty in all other matters.").

During the earliest years of our constitutional development, principles of federalism were not only well recognized, they formed the basis for virtually every State in the union to assert its rights as a State against the federal government. In 1798, for example, Thomas Jefferson drafted the Kentucky Resolutions,⁶ which were passed by the Kentucky legislature to protest the unpopular Alien and Sedition Acts, Act of June 18, 1798, c. 54, 1 Stat. 566; Act of June 25, 1798, c. 58, 1 Stat. 570; Act of July 6, 1798, c. 66, 1 Stat. 577; Act of July 14, 1798, c. 74, 1 Stat. 596. At the same time, Madison drafted similar Virginia Resolutions, which were adopted by the Virginia General Assembly. See 4 J. Elliot, *Debates on the Federal Constitution* 528-529 (2d ed. 1863). In both cases it was clear that the powers reserved to the States were treated as a substantive limitation on Congress's authority. It was asserted that these powers enabled a State to interpose its will against any action by the Federal Government. Thirty years later, Jefferson's and Madison's views

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PUBLICATIONS
JUSTICE POWELL, dissenting.

Chambers Draft

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I

JUSTICE STEVENS begins his concurring opinion with the startling observation that the Commerce Clause "was the Framers' response to the central problem that gave rise to the Constitution itself." Ante, at 1 (emphasis added). At a subsequent point in his opinion, he observes that "this Court has construed the Commerce Clause to reflect the intent of the Framers ... to confer a power on the national government adequate to discharge its central mission." Ante, at 3 (emphasis added).¹ JUSTICE STEVENS further states that "National League of Cities not only was incorrectly decided, but also is inconsistent with the central purpose of the Constitution itself" Ante, at 5 (emphasis added).

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Apart from the framework of government itself, the Framers stated their motivating purposes in the Preamble to the Constitution:

"to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty"

²Whatever may have sparked the Annapolis Convention, it is clear that the focus of attention at the Constitutional Convention in Philadelphia was the formation of a new government. Madison's report of the proceedings begins, "Monday May 14th 1787 was the day fixed for the meeting of the deputies in Convention for revising the federal system of Government." 1 M. Farrand, *The Records of the Federal Convention of 1787*, p. 3 (rev. ed. 1937) (footnote omitted). After dealing with several preliminary matters, see *id.*, at 1-17, the "main business," *id.*, at 18 (J. Madison), opened on May 29 with Edmund Randolph's speech proposing the Virginia Plan. Almost all of the Plan's resolutions dealt with the appropriate structure for the new government. Only the sixth resolution dealt with legislative powers at all. And far from stressing any power to regulate interstate commerce, it simply declared, in relevant part,

"that the National Legislature ought to be impowered to enjoy the Legislative Rights vested in Congress by the Confederation & moreover to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation" 1 Farrand, *supra*, at 21.

While this language was, no doubt, broad enough to include the power to regulate interstate commerce, there was certainly no emphasis on that particular power.

These purposes differ little from the concerns motivating the States in the Articles of Confederation: "their common defence, the security of their liberties, and their mutual and general welfare." Art. III. Although the "general Welfare" recognized by the Constitution could embrace the free flow of trade among States (despite the fact that the same language in the Articles of Confederation did not), it is clear that security "against foreign invasion [and] against dissensions between members of the Union" was of at least equal importance. See Speech by Edmund Randolph (May 29, 1787), reprinted in 1 M. Farrand, The Records of the Federal Convention of 1787, p. 18 (rev. ed. 1937) (J. Madison).³

The power to achieve these purposes was not delegated solely to Congress. If, however, one looks at the powers that were so delegated, the position of the Commerce Clause hardly suggests that it was "central" among the concerns of the patriots who formed our union. The enumeration of powers in Article I, section 8 begins with the "Power To lay and collect Taxes."⁴

³No one in the ratification debate doubted that the power to defend the country was essential, and must be given to the central government. See The Federalist No. 41, pp. 269-276 (J. Cooke ed. 1961) (J. Madison). Even under the Articles of Confederation, it was considered necessary to give Congress "the sole and exclusive right and power of determining on peace and war." Art. IX. All of the evidence indicates that this most basic purpose of government was far more important to the Founders than the regulation of interstate commerce.

⁴A major weakness of the system created by the Articles of Confederation was the central government's inability to collect taxes directly. See 1 Farrand, supra n. 2, at 284 (remarks of Alexander Hamilton). Remedying this defect was thus one of the

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This is followed by the power "to pay the Debts" of the United States. Then, consistent with the Preamble, comes the power to "provide for the common Defence and general Welfare." See note 3, supra. The perceived need for a national legislature with the power to tax, and to maintain an army and navy for the common defense, loomed far larger in the Founders' thinking than the need to eliminate trade barriers. Among the remaining enumerated powers, the power to regulate interstate commerce is only one among roughly a score. It is given no place of particular prominence. So much for what the Constitution's language and structure teaches about the Framers' intent.

III

One would never know from the concurring opinion that the Constitution formed a federal system, comprising a national government with delegated powers and state governments that retained a significant measure of sovereign authority. This is clear from the Constitution itself, from the debates surrounding its adoption and ratification, from the early history of our constitutional development, and from the decisions of this Court. It is impossible to believe that the Constitution would have been adopted, much less ratified, if it had been understood that the Commerce Clause embodied the national government's "central mis-

most important purposes of the Constitutional Convention. See R. Paul, *Taxation in the United States* 4-5 (1954); *The Federalist* No. 30 (A. Hamilton).

sion," a mission to be accomplished even at the expense of regulating the personnel practices of state and local governments.

A

The Bill of Rights imposes express limitations on national powers. The Tenth Amendment, in particular, explicitly recognizes the retained power of the States: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." This limitation was, of course, implicit in the Constitution as originally ratified. Even those who opposed the adoption of a Bill of Rights did not dispute the propriety of such a limitation. Rather, they argued that it was unnecessary, for the Constitution delegated certain powers to the central government, and those not delegated were necessarily retained by the States or the people.⁵ Furthermore, the inherent federal nature of the system is clear from the structure of the national government itself. Members of Congress and presidential electors are chosen by States. Representation in the Senate is apportioned by

⁵Alexander Hamilton, for example, made this argument in The Federalist No. 84, pp. 578-579 (J. Cooke ed. 1961). See also United States v. Darby, 312 U.S. 100, 124 (1941) (Tenth Amendment "declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment"); United States v. Sprague, 282 U.S. 716, 733 (1931) ("The Tenth Amendment was intended to confirm the understanding of the people at the time the Constitution was adopted, that powers not granted to the United States were reserved to the States or to the people. It added nothing to the instrument as originally ratified").

States, regardless of population. The Full Faith and Credit Clause gives particular recognition to the States' "public Acts, Records, and judicial Proceedings." Article IV, section 4 requires a republican form of government in each State. The initial ratification of the Constitution was accomplished on a state-by-state basis, and subsequent amendments require approval by three fourths of the States.

It was also clear from the contemporary debates that the Founding Fathers intended the Constitution to establish a federal system. As James Madison, "the Father of the Constitution," explained to the people of New York:

"The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce The powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State." The Federalist No. 45, p. 313 (J. Cooke ed. 1961).

There can be no doubt that Madison's contemporaries shared this view. See, e.g., Letter of Roger Sherman & Oliver Ellsworth to the Governor of Connecticut (Sept. 26, 1787), reprinted in 3 Farrand, supra, at 99 (description of proposed Constitution) (The "powers [vested in Congress] extend only to matters respecting the common interests of the union, and are specially defined, so that the particular states retain their sovereignty in all other matters.").

During the earliest years of our constitutional development, principles of federalism were not only well recognized, they formed the basis for virtually every State in the Union to assert its rights as a State against the federal government. In 1798, for example, Thomas Jefferson drafted the Kentucky Resolutions,⁶ which were passed by the Kentucky legislature to protest the unpopular Alien and Sedition Acts, Act of June 18, 1798, c. 54, 1 Stat. 566; Act of June 25, 1798, c. 58, 1 Stat. 570; Act of July 6, 1798, c. 66, 1 Stat. 577; Act of July 14, 1798, c. 74, 1 Stat. 596. At the same time, Madison drafted similar Virginia Resolutions, which were adopted by the Virginia General Assembly. See 4 J. Elliot, Debates on the Federal Constitution 528-529 (2d ed. 1863). In both cases it was clear that the powers reserved to the States were treated as a substantive limitation on Congress's authority. It was asserted that these powers enabled a State to interpose its will against any action by the Federal Government. Thirty years later, Jefferson and Madison's views

⁶In the first resolution, Jefferson explained

"[t]hat the several states composing the United States of America are not united on the principle of unlimited submission to their general government; but that, by compact, under the style and title of a Constitution for the United States, and of amendments thereto, they constituted a general government for special purposes, delegated to that government certain definite powers, reserving, each state to itself, the residuary mass of right to their own self-government; and that whensoever the general government assumes undelegated powers, its acts are unauthoritative, void, and of no force." Kentucky Resolution of 1798, reprinted in 4 J. Elliot, Debates on the Federal Constitution 540 (2d ed. 1863).

were expanded by John C. Calhoun in his nullification doctrine--the extreme view that eventually led to the War Between the States.⁷ See 6 The Works of John C. Calhoun 1-57 (R. Cralle ed. 1859) (original draft of South Carolina Exposition of 1828).

The view that the reserved powers of the States limited the delegated powers of the Federal Government was hardly confined to the South. The New England States, for example, vehemently opposed the Embargo Act of Dec. 22, 1807, c. 5, 2 Stat. 451, and they turned to their rights as States in defense. In 1809, the Governor of Connecticut, with the support of the legislature, refused to comply with the Act of Jan. 9, 1809, c. 5, 2 Stat. 506, which Congress passed to enforce the embargo.⁸ In

⁷In referring to this early and interesting history, I do not suggest that either the doctrine of interposition or that of nullification was constitutionally sound. In any event, they were laid to rest in one of history's bloodiest fratricides, ending at Appomattox in 1865. The views of these great figures in our history are, however, directly pertinent to the question whether there was ever any intention that the Commerce Clause would empower the Federal Government to intrude expansively upon the sovereign powers reserved to the States.

⁸The Governor explained to a special session of the state legislature that

"[w]henver our national legislature is led to overleap the prescribed bounds of their [sic] constitutional powers, on the state legislatures, in great emergencies, devolve the arduous task--it is their right--it becomes their duty, to interpose their protecting shield between the right and liberty of the people, and the assumed power of the general government." Message of Governor Trumbull (Feb. 25, 1809), reprinted in H. Ames, State Documents on Federal Relations, 1789-1861, at pp. 39-40 (1907).

The Assembly promptly passed resolutions supporting the Governor's position and concluding that the embargo legislation

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Massachusetts the story was similar: The legislature denounced the enforcement Act as "unjust, oppressive, and unconstitutional, and not legally binding on the citizens of this state." Resolution of the Massachusetts Legislature (Feb. 15, 1809), reprinted in H. Ames, State Documents on Federal Relations, 1789-1861, at p. 27 (1907). When Congress enacted the Embargo Act of Dec. 17, 1813, c. 1, 3 Stat. 88, the Massachusetts legislature declared it "a manifest ... abuse of power" that infringed the "sovereignty reserved to the States"⁹ and justified the legislature in "interpos[ing] its power" to protect its citizens from "oppression," Resolution of the Massachusetts Legislature (Feb. 4, 1814), reprinted in Ames, supra, at 72. Even Daniel Webster, famous for his defense of the national government's powers, recognized that principles of federalism limit Congress's power.¹⁰

was "incompatible with the constitution of the United States, and encroach[ed] upon the immunities of [the] State." Resolution of the Connecticut General Assembly (Special Session Feb. 1809), reprinted in Ames, supra, at _____. In view of its duty to support the Constitution, the legislature declined "to assist, or concur in giving effect to the aforesaid unconstitutional act, passed, to enforce the Embargo." Ibid.

⁹The legislature explained that the State's sovereignty was reserved, in part, to protect its citizens from excessive federal power. Resolution of the Massachusetts Legislature (Feb. 4, 1814), reprinted in Ames, supra n. 8, at 72.

¹⁰During a debate in Congress on a conscription bill and a bill for the enlistment of minors, Webster declared that if these measures were enacted it would be "the solemn duty of the State Governments" to interpose their authority to prevent enforcement. In his view, this was "among the objects for which the State Governments exist." Speech on the Conscription Bill (Dec. 9, 1814), reprinted in 14 The Writings and Speeches of Daniel Webster 55, 68 (1903).

B

Few perceptions of history are clearer than the fact that state sovereignty has always been a basic assumption of American political theory. Although its contours have changed over two centuries, state sovereignty remains a fundamental component of our system that this Court has recognized time and time again. Even to refer to the highlights would go far beyond the scope of this dissent. I therefore mention only a few of the decisions from last Term alone in which the Court expressly noted that States retain significant sovereign powers.¹¹ In Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982), we considered the state action exemption from the antitrust laws. Since "'under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority,'" id., at 49 (quoting Parker v. Brown, 317 U.S. 341, 351

¹¹See also Rivera-Rodriguez v. Popular Democratic Party, ___ U.S. ___, ___ (1982) ("Puerto Rico, like a State, is an autonomous political entity, 'sovereign over matters not ruled by the Constitution.'") (quoting Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 673 (1974)); Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinea, ___ U.S. ___, ___ n. 10 (1982) (States are "'coequal sovereigns in a federal system'") (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980)); Engle v. Isaac, ___ U.S. ___, ___ (1982) (discussing "the States' sovereign power to punish offenders"); Underwriters National Assurance Co. v. North Carolina Life & Accident & Health Ins. Guaranty Assn., 455 U.S. 691, 704 (1982) (recognizing "the structure of our Nation as a union of States, each possessing equal sovereign powers"); Cabell v. Chavez-Salido, 454 U.S. 432, 444-447 (1982) (relying on State's "sovereign" police powers); Fair Assessment in Real Estate Assn. v. McNary, 454 U.S. 100, 108 (1981) (state courts are those "of a different, though paramount sovereignty") (quoting Matthews v. Rodgers, 284 U.S. 521, 525 (1932)).

(1943)), we had previously recognized an antitrust exemption for States acting "in the exercise of [their] sovereign powers," id., at 48. We held that this exemption does not extend to cities, but in so doing we repeatedly stressed the sovereign nature of States. See id., at 48-54. In United Transportation Union v. Long Island R. Co., 455 U.S. 678 (1982), we unanimously upheld the application of the Railway Labor Act to a state-owned railroad. We reached this conclusion, however, only by finding that operation of the railroad was not one of the State's "constitutionally preserved sovereign function[s]." Id., at 683. And in Federal Energy Regulatory Comm'n v. Mississippi, ___ U.S. ___ (1982), we considered whether parts of the Public Utility Regulatory Policies Act "constituted an invasion of state sovereignty in violation of the Tenth Amendment," id., at ___. Although the Court upheld the statute, it was clear that state sovereignty was an essential element to be considered in reaching that conclusion. See id., at ___-___.

In sum, all of the evidence reminds us of the importance of the principles of federalism in our constitutional system. The Founding Fathers, and those who participated in the earliest phases of constitutional development, understood the States' reserved powers to be a limitation on Congress's power--including its power under the Commerce Clause. And the Court has recognized and accepted this fact for almost two hundred years.¹²

¹²Of course I do not denigrate the importance of the Commerce Clause. It is essential to the functioning of our National Government.
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IV

JUSTICE STEVENS's concurring opinion recognizes no limitation on Congress's ability to override state sovereignty in exercising its powers under the Commerce Clause. His opinion does not mention either federalism or state sovereignty. Instead it declares that "[t]he only basis for questioning the federal statute at issue here is the pure judicial fiat found in this Court's opinion in National League of Cities v. Usery." Ante, at 4 (emphasis added). Under this view it is not easy to think of any state function that could not be preempted.

ernment. It is, however, only one provision of a Constitution that embodies strong principles of federalism.

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The case today illustrates how far the Federal
Government, with this Court's approval, has departed from
the principles upon which our federal union was formed.

The authority relied upon is a single provision of the
Constitution: to "regulate Commerce . . . among the
several States . . ." The perceived "Commerce", as
incredible as it would ^{have been years} ~~be~~ even a few ~~decades~~ ago, is the
effect on trade among the states of Wyoming's requirement
that ^{its} ~~game~~ wardens retire at 65 rather than 70 years of
age.

¹³This case illustrates how far the Federal Government, with the Court's approval, has departed from the principles upon which our federal union was formed. The authority relied upon today is a provision of the Constitution giving Congress the power to "regulate Commerce ... among the several States" The perceived "Commerce," incredible as it would have seemed even a few years ago, is the effect on trade among the States of Wyoming's requirement that its game wardens retire at age 65 rather than 70.

file
H.F.P. Master
(curb)
Readers

JUSTICE POWELL, dissenting.

I join THE CHIEF JUSTICE's dissenting opinion, ^{and} ~~but~~ write separately to record a personal dissent from JUSTICE STEVENS's revisionist view of the history of our country. ^I JUSTICE STEVENS commences his concurring opinion with the startling observation that the Commerce Clause "was the Framers' response to the central problem that gave rise to the Constitution itself." Ante, at 1 (emphasis added). At a subsequent point in his opinion, he observes that "this Court has construed the Commerce Clause to reflect the intent of the Framers ... to confer a power on the national government adequate to discharge its central mission." Ante, at 3 (emphasis added).¹ JUSTICE STEVENS further states that "National League of Cities not only was incorrectly decided, but also is inconsistent with the central purpose of the Constitution itself" Ante, at 5 (emphasis added).

I

~~JUSTICE STEVENS and I must have read different history~~
~~books.~~ Although ~~No~~ one would deny that removing barriers to the free flow of trade was one of the purposes of the Constitution, ^{however,} I suggest [^] that there were a number of other purposes of equal or

¹The authority on which JUSTICE STEVENS primarily relies is an extrajudicial lecture delivered by Justice Rutledge in 1946. Ante, at 1-2. Justice Rutledge declared that the "proximate cause of our national existence" was not to assure the great "democratic freedoms"; rather it was "to secure freedom of trade" within the former colonies. W. Rutledge, A Declaration of Legal Faith 25 (1947).

greater importance in the contemplation of the statesmen who assembled in Philadelphia, and the delegates who debated the issue of ratification at the conventions in the several States. No doubt there were differences of opinion as to the primacy of the various purposes. But one can be reasonably sure that few of the Founding Fathers thought that trade barriers were "the central problem," or that their elimination was the "central mission" of the Constitutional Convention. *By creating a federal system*

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If JUSTICE STEVENS had written that the Founders' intent in adopting the Commerce Clause nearly two centuries ago is irrelevant to the world in which we live today, I would not have disagreed. But his concurring opinion purports to rely on their temporary intent. It is true that this Court ~~has~~ properly construed the Commerce Clause, and extended its reach, to accommodate unanticipated and indeed unimaginable changes--primarily in transportation and communication--that have occurred over the decades. I would not have thought until today, however, that anyone would suppose that the time and circumstances of a game warden's retirement in Wyoming were of the slightest consequence to commerce and trade. Surely a suggestion that this was within the central purpose of the Constitution, if seriously made in 1787, would have foreclosed ratification.

these four

I refer to the dissenting opinion of THE CHIEF JUSTICE for a response to the Court's opinion on the basis of constitutional doctrine. I write--briefly in view of the scope of the subject--^I to place the Commerce Clause in the proper perspective of history, and to suggest that even today federalism is not ^{further}

feather

so utterly subservient to that Clause as JUSTICE STEVENS appears to believe.

II

The central purpose of the Constitution was, as the name implies, to constitute a government. The central provisions, therefore, are those relating to the establishment of the government. The system of checks and balances, for example, is far more central to the larger perspective than any single power conferred on Congress. But apart from the framework of government itself, the Framers stated their motivating purposes in the Preamble to the Constitution:

"to form a more perfect Union, establish Justice, ensure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty"

The power to achieve these purposes was not delegated solely to the Congress. If one looks at the powers that were so delegated, however, the position of the Commerce Clause hardly suggests that it was "central" among the concerns of the patriots who formed our union. Article I, section 8 begins with the power to tax and to pay debts.² Then, consistent with the Preamble, ~~is~~ ^{comes}

²A major weakness of the system created by the Articles of Confederation was the central government's inability to collect taxes directly. Remedying this defect was thus one of the principal purposes of the Constitutional Convention. See R. Paul, *Taxation in the United States* 4-5 (1954). The importance of the taxing power in the minds of the Founding Fathers is obvious from the Convention and the ratification debates. See, e.g., The Fed-
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It is given no place of prominence.

the power to "provide for the common Defence and general Welfare."³ Among the following enumerated powers, the Commerce Clause is only one among nearly a score. So much for what the language and structure of the Constitution itself teaches about the intent of the Framers.

III

One would never know from ~~my friend's and colleague's~~^{the} concurring opinion that the Constitution formed a federal system, composed of the central government and States that retained a significant measure of sovereign authority. This is clear from the Constitution itself, from the debates surrounding its adoption and ratification, from the early history of our constitutional development, and from the decisions of this Court. It is impossible to believe that the Constitution would have been adopted, much less ratified, if it had been understood that the "central mission" of the national government was embodied in the Commerce Clause, a mission to be accomplished even at the expense of regulating the personnel practices of state and local governments.

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was essential, and

³Both sides of the constitutional debate recognized that the power to defend the country must be given to the central government. See The Federalist No. 41, pp. 269-276 (J. Cooke ed. 1961) (J. Madison). Even under the Articles of Confederation, it was considered essential to give Congress "the sole and exclusive right and power of determining on peace and war." Art. IX.

~~Footnote(s) 4 will appear on following pages.~~

apart from the purpose of forming a ~~federal~~ government that included both state and federal components.

A.

The retained power of the States is recognized explicitly in the Tenth Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." This limitation was implicit in the Constitution as originally ratified. Even those who opposed the adoption of a Bill of Rights did not dispute the propriety of such a limitation. Rather, they argued that it was unnecessary, for the Constitution delegated certain powers to the central government, and those not delegated were necessarily retained by the States or the people.⁸⁴ Furthermore, the inherent federal nature of the system is clear from the structure of government itself. Members of Congress and presidential electors are chosen by States. Representation in the Senate is apportioned by States, regardless of population.

JUSTICE STEVENS's concurring opinion recognizes no limit to Congress's power to override state sovereignty in exercising its powers under the Commerce Clause. The opinion does not mention either federalism or state sovereignty. It instead declares that "[t]he only basis for questioning the federal statute at issue here is the pure judicial fiat found in this Court's opinion in National League of Cities v. Usery." Ante, at 4. Under this view it is not easy to think of any function of state or local government that could not be preempted, ~~including a State's criminal laws.~~

⁴⁵ Alexander Hamilton, for example, made this argument in The Federalist No. 84, pp. 578-581 (J. Cooke ed. 1961). See also United States v. Darby, 312 U.S. 100, 124 (1941) (Tenth Amendment "declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment"); United States v. Sprague, 282 U.S. 716, 733 (1931) ("The Tenth Amendment was intended to confirm the understanding of the people at the time the Constitution was adopted, that powers not granted to the United States were reserved to the States or to the people. It added nothing to the instrument as originally ratified").

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IV

The Full Faith and Credit Clause gives particular recognition to the "public Acts, Records, and judicial Proceedings" of the States. Article IV, section 4 requires a republican form of government in each State. The initial ratification of the Constitution was accomplished on a state-by-state basis, and subsequent amendments require approval by three fourths of the States.

It was also clear from the contemporary debates that the Founding Fathers intended the Constitution to establish a federal system. As James Madison, "the Father of the Constitution," explained to the people of New York:

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Growth*

"The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce The powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State." The Federalist No. 45, p. 313 (J. Cooke ed. 1961).

There can be no doubt that this view was shared by ~~all~~ of Madison's contemporaries. See, e.g., Letter of Roger Sherman & Oliver Ellsworth to the Governor of Connecticut (Sept. 26, 1787), reprinted in 3 M. Farrand, The Records of the Federal Convention of 1787, p. 99 (1911) (description of proposed Constitution) (The "powers [vested in Congress] extend only to matters respecting the common interests of the union, and are specially defined, so that the particular states retain their sovereignty in all other matters.").

During the earliest years of our constitutional development, principles of federalism were not only well recognized, they formed the basis for virtually every State in the union to assert its rights as a State against the federal government. In 1798, for example, Thomas Jefferson drafted the Kentucky Resolutions, which were passed by the Kentucky legislature to protest the unpopular Alien and Sedition Acts, [citation].⁵ At the same time, Madison drafted similar Virginia Resolutions, which were adopted by the Virginia General Assembly. [citation] In both cases it was clear that the reserved powers of the States were treated as a substantive limitation on Congress's authority.

A Thirty years later, Jefferson's and Madison's views were adopted by John C. Calhoun in the South Carolina Exposition of 1828, [citation], which set forth the nullification doctrine. In essence, Calhoun argued that each State had the power to determine whether an act of the national government complied with the Constitution; and if not, whether the act should be enforced within the limits of the State.

5.8 In the first resolution, Jefferson explained

"[t]hat the several States composing the United States of America are not united on the principle of unlimited submission to their general government; but that, by compact, under the style and title of a Constitution for the United States, and of amendments thereto, they constituted a general government for special purposes, delegated to that government certain definite powers, reserving, each State to itself, the residuary mass of right to their own self-government; and that whensoever the general government assumes undelegated powers, its acts are unauthoritative, void, and of no force." [citation]

6.

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The view that the reserved powers of the States placed limits on the powers of the federal government was hardly confined to the South. The New England States, for example, were vehement in their opposition to the Embargo Act of 1807, [citation], and they turned to their rights as States in defense. In 1809, the governor of Connecticut, with the support of the legislature, refused to assist the Secretary of War in enforcing the Act.⁷ In Massachusetts the story was similar. When Congress passed an Act to enforce the embargo in 1809, [citation], the Massachusetts legislature denounced it as "unjust, oppressive, and unconstitutional, and not legally binding on the citizens of this state." [citation] When Congress enacted another embargo in 1813, [citation], the Massachusetts legislature declared it "a manifest ... abuse of power" that infringed the "sovereignty reserved to the States"⁸ and justified the legislature in

⁷ The governor explained to a special session of the state legislature that

"[w]henever our national legislature is led to overleap the prescribed bounds of their [sic] constitutional powers, on the state legislatures, in great emergencies, devolve the arduous task--it is their right--it becomes their duty, to interpose their protecting shield between the right and liberty of the people, and the assumed power of the general government." [citation]

The legislature promptly passed resolutions supporting the governor's position, and concluding that the Embargo Act was "incompatible with the constitution of the United States, and encroach[ed] upon the immunities of [the] state." [citation] In view of its duty to support the Constitution, the legislature declined "to assist, or concur in giving effect to the aforesaid unconstitutional acts." [citation]

Footnote(s) ⁷ 8 will appear on following pages.

"interpos[ing] its power" to protect its citizens from "oppression," [citation]. Even Daniel Webster, who is famous for his defense of the powers of the federal government, recognized that principles of federalism limit Congress's power.⁸ *skt*

A ✓ The sovereignty of the States in their respective spheres, however, is not simply a matter of history. The historical support is so overwhelming⁹ that state sovereignty has become a basic assumption of American political theory ^{that} which this Court has recognized time and time again. Even to refer to the highlights would go far beyond the scope of this ~~short~~ dissent, ^{therefore} so I mention only a few of the decisions from last Term alone in which the Court expressly noted that States have significant sovereign powers.¹⁰ In Community Communications Co. v. City of

skt ⁸The legislature explained that the State's sovereignty was reserved, in part, to protect its citizens from excessive federal power. [citation].

⁹During a debate in Congress on a conscription bill and a bill for the enlistment of minors, Webster declared that if these measures were enacted it would be "the solemn duty of the State Governments" to interpose their authority to prevent enforcement. In his view, this was "among the objects for which the State Governments exist." Speech on the Conscription Bill (Dec. 9, 1814), reprinted in 14 The Writings and Speeches of Daniel Webster 55, 68 (1903).

¹⁰See also Rivera-Rodriguez v. Popular Democratic Party, U.S. ___, ___ [for cite-checking: 50 U.S.L.W., at 4601] (1982) ("Puerto Rico, like a State, is an autonomous political entity, 'sovereign over matters not ruled by the Constitution.'") (quoting Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 673 (1974)); Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinée, ___ U.S. ___, ___ [4556] n. 10 (1982) (States are "'coequal sovereigns in a federal system'") (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980)); Engle v. Isaac, ___ U.S. ___, ___ [4382] (1982) (discussing "the States' sovereign power to punish offenders"); Underwriters Na-
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Boulder, 455 U.S. 40 (1982), we considered the state action exemption from the antitrust laws. Since "'under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority,'" id., at 49 (quoting Parker v. Brown, 317 U.S. 341, 350-351 (1943)), there is an antitrust exemption for States acting "in the exercise of [their] sovereign powers," id., at 48. We held that this exemption does not extend to cities, but in so doing we repeatedly stressed the sovereign nature of States. See id., at 48-54. In United Transportation Union v. Long Island R. Co., 455 U.S. 678 (1982), we unanimously upheld the application of the Railway Labor Act to a state-owned railroad. We reached this conclusion, however, only by finding that operation of the railroad was not one of the State's "constitutionally preserved sovereign function[s]," id., at 683. And in Federal Energy Regulatory Comm'n v. Mississippi, ___ U.S. ___ (1982), we considered whether parts of the Public Utility Regulatory Policies Act "constituted an invasion of state sovereignty in violation of the Tenth Amendment," id., at ___ [102 S.Ct., at 2133]. Although the Court upheld the statute, it was clear that state sovereignty was an essential element to be considered in

tional Assurance Co. v. North Carolina Life & Accident & Health Ins. Guaranty Assn., 455 U.S. 691, 704 (1982) (recognizing "the structure of our nation as a union of States, each possessing equal sovereign powers"); Cabell v. Chavez-Salido, 454 U.S. 432, 444-447 (1982) (relying on State's "sovereign" police powers); Fair Assessment in Real Estate Assn. v. McNary, 454 U.S. 100, 108 (1982) (state courts are those "of a different, though paramount sovereign") (quoting Matthews v. Rodgers, 284 U.S. 521, 525 (1932)).

reaching that conclusion. Id., at ____-____ [2137-2143].

In sum, all of the evidence reminds us of the importance of the principles of federalism in our constitutional system. The Founding Fathers, and those who participated in the earliest phases of constitutional development, considered Congress's power--including its power under the Commerce Clause--to be limited by the powers reserved to the States. This is a fact that has been recognized and accepted by this Court for almost two hundred years. 11

IV

I raise these points not to denigrate the importance of the Commerce Clause, nor to suggest that ~~extreme~~ states' rights arguments (such as Interposition or Nullification) are, or ever were, acceptable constitutional doctrines. Rather I consider it important to stress the federal nature of the Constitution, and to emphasize that all of Congress's powers--including its powers under the Commerce Clause--must be exercised consistently with basic principles of federalism. This was the true intention of the Founding Fathers.

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Add → 11. Of course I do not denigrate the importance of the Commerce Clause. It is essential to the functioning of our national government. It was not intended, as the concurring opinion ~~is~~ suggests, is, however, only one provision of a Constitution that embodies strong principles of federalism.

February 9, 1983

EEOC4 GINA-POW

Rider A - page 2

No 4

It is true, of course, that this Court over the intervening years has properly construed the Commerce Clause, and extended its reach, to accommodate unanticipated and indeed unimaginable changes that have occurred primarily in transportation and communication.

If Justice Stevens had written that the ⁷~~f~~ounders intent in adopting the Commerce Clause nearly two centuries ^{ago} is

^{of little relevance}
~~is~~ irrelevant

to the world in which we live today, I would

not have disagreed. But his concurring opinion proports

to rely on their contemporary intent. Ante at 3.

February 9, 1983

EEOC5 GINA-POW

RIDER A, page 4

Add the following to the end of n. 3:

Apart from the purpose of forming a government that included both state and federal components, the perceived need for a government with power to tax, and to maintain an army and navy for the common defense, loomed far larger in the ^{thinking} ~~minds~~ of the ⁴ founders than the need to eliminate barriers to the fledgling commerce among the states.

February 9, 1983

EEOC6 GINA-POW

RIDER A, page 7

It was asserted that these powers enabled a ~~S~~^{State} to
interpose its will against any action by the federal
government. Thirty years later, Jefferson's and Madison's
views were expanded by John C. Calhoun in the South
Carolina Exposition of 1828 that set forth the
nullification doctrine - the extreme view that ^{eventually} led to the
W B war between the S states. * 6

6. In referring to this early and interesting history, I do
not suggest that either the doctrine of interposition or
that of nullification was constitutionally sound.
^{In any event,}
~~Fortunately,~~ they were laid to rest in one of the

bloodiest fratricides in history that ended at Appomattox in 1865. The views of these great figures in our history are, however, directly pertinent to the question whether there was ever any intension that the Commerce Clause was paramount to the reserve powers of the states.

would empower the Federal Government to intrude expansively upon the sovereign powers reserved to the States.

February 9, 1983

EEOC7 GINA-POW

RIDER A, page 9

B

4 Few perceptions of history are clearer than the fact that state sovereignty was a basic assumption of American political theory. Although its contours have not remained the same as conditions have changed, state sovereignty remains a fundamental component of our system that this Court has recognized time and time again.

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JUSTICE POWELL, dissenting.

I join THE CHIEF JUSTICE's dissenting opinion, but write separately to record a personal dissent from JUSTICE STEVENS's revisionist view of the history of our country.

I

JUSTICE STEVENS commences his concurring opinion with the startling observation that the Commerce Clause "was the Framers' response to the central problem that gave rise to the Constitution itself." Ante, at 1 (emphasis added). At a subsequent point in his opinion, he observes that "this Court has construed the Commerce Clause to reflect the intent of the Framers ... to confer a power on the national government adequate to discharge its central mission." Ante, at 3 (emphasis added).¹ JUSTICE STEVENS further states that "National League of Cities not only was incorrectly decided, but also is inconsistent with the central purpose of the Constitution itself" Ante, at 5 (emphasis added).

No one would deny that removing barriers to the free flow of trade was one of the purposes of the Constitution. I suggest, however, that there were a number of other purposes of

¹The authority on which JUSTICE STEVENS primarily relies is an extrajudicial lecture delivered by Justice Rutledge in 1946. Ante, at 1-2. Justice Rutledge declared that the "proximate cause of our national existence" was not to assure the great "democratic freedoms"; rather it was "to secure freedom of trade" within the former colonies. W. Rutledge, A Declaration of Legal Faith 25 (1947).

equal or greater importance in the contemplation of the statesmen who assembled in Philadelphia, and the delegates who debated the issue of ratification at the conventions in the several States. No doubt there were differences of opinion as to the primacy of the various purposes. But one can be reasonably sure that few of the Founding Fathers thought that trade barriers were "the central problem," or that their elimination was the "central mission" of the Constitutional Convention. Creating a federal system was far more central than any eighteenth century perception of interstate commerce. It is true, of course, that this Court over the intervening years properly has construed the Commerce Clause, and extended its reach, to accommodate unanticipated and indeed unimaginable changes that have occurred primarily in transportation and communication. If JUSTICE STEVENS had written that the Founders' intent in adopting the Commerce Clause nearly two centuries ago is of little relevance to the world in which we live today, I would not have disagreed. But his concurring opinion purports to rely on their contemporary intent. Ante at 3. I therefore write--briefly in view of the scope of the subject--to place the Commerce Clause in the proper perspective of history, and further to suggest that even today federalism is not so utterly subservient to that Clause as JUSTICE STEVENS appears to believe.

II

The central purpose of the Constitution was, as the name implies, to constitute a government. The central provi-

sions, therefore, are those relating to the establishment of the government. The system of checks and balances, for example, is far more central to the larger perspective than any single power conferred on Congress. But apart from the framework of government itself, the Framers stated their motivating purposes in the Preamble to the Constitution:

"to form a more perfect Union, establish Justice, ensure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty"

The power to achieve these purposes was not delegated solely to the Congress. If, however, one looks at the powers that were so delegated, the position of the Commerce Clause hardly suggests that it was "central" among the concerns of the patriots who formed our union. Article I, section 8 begins with the power to tax and to pay debts.² Then, consistent with the Preamble, comes the power to "provide for the common Defence and general Welfare."³ Among the following enumerated powers, the

²A major weakness of the system created by the Articles of Confederation was the central government's inability to collect taxes directly. Remedying this defect was thus one of the principal purposes of the Constitutional Convention. See R. Paul, *Taxation in the United States* 4-5 (1954). The importance of the taxing power in the minds of the Founding Fathers is obvious from the Convention and the ratification debates. See, e.g., *The Federalist* No. 30 (A. Hamilton).

³Both sides of the constitutional debate recognized that the power to defend the country was essential, and must be given to the central government. See *The Federalist* No. 41, pp. 269-276 (J. Cooke ed. 1961) (J. Madison). Even under the Articles of Confederation, it was considered necessary to give Congress "the sole and exclusive right and power of determining on peace and

Footnote continued on next page.

Commerce Clause is only one among nearly a score. It is given no place of prominence. So much for what the language and structure of the Constitution itself teaches about the intent of the Framers.

III

One would never know from the concurring opinion that the Constitution formed a federal system, composed of the central government and States that retained a significant measure of sovereign authority. This is clear from the Constitution itself, from the debates surrounding its adoption and ratification, from the early history of our constitutional development, and from the decisions of this Court. It is impossible to believe that the Constitution would have been adopted, much less ratified, if it had been understood that the "central mission" of the national government was embodied in the Commerce Clause, a mission to be accomplished even at the expense of regulating the personnel practices of state and local governments.

A

The retained power of the States is recognized explicitly in the Tenth Amendment: "The powers not delegated to the

war." Art. IX. Apart from the purpose of forming a government that included both state and federal components, the perceived need for a government with power to tax, and to maintain an army and navy for the common defense, loomed far larger in the thinking of the Founders than the need to eliminate barriers to the fledgling commerce among the states.

United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." This limitation was implicit in the Constitution as originally ratified. Even those who opposed the adoption of a Bill of Rights did not dispute the propriety of such a limitation. Rather, they argued that it was unnecessary, for the Constitution delegated certain powers to the central government, and those not delegated were necessarily retained by the States or the people.⁴ Furthermore, the inherent federal nature of the system is clear from the structure of government itself. Members of Congress and presidential electors are chosen by States. Representation in the Senate is apportioned by States, regardless of population. The Full Faith and Credit Clause gives particular recognition to the "public Acts, Records, and judicial Proceedings" of the States. Article IV, section 4 requires a republican form of government in each State. The initial ratification of the Constitution was accomplished on a state-by-state basis, and subsequent amendments require approval by three fourths of the States.

It was also clear from the contemporary debates that

⁴Alexander Hamilton, for example, made this argument in *The Federalist* No. 84, pp. 578-581 (J. Cooke ed. 1961). See also *United States v. Darby*, 312 U.S. 100, 124 (1941) (Tenth Amendment "declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment"); *United States v. Sprague*, 282 U.S. 716, 733 (1931) ("The Tenth Amendment was intended to confirm the understanding of the people at the time the Constitution was adopted, that powers not granted to the United States were reserved to the States or to the people. It added nothing to the instrument as originally ratified").

the Founding Fathers intended the Constitution to establish a federal system. As James Madison, "the Father of the Constitution," explained to the people of New York:

"The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce The powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State." The Federalist No. 45, p. 313 (J. Cooke ed. 1961).

There can be no doubt that this view was shared by Madison's contemporaries. See, e.g., Letter of Roger Sherman & Oliver Ellsworth to the Governor of Connecticut (Sept. 26, 1787), reprinted in 3 M. Farrand, The Records of the Federal Convention of 1787, p. 99 (1911) (description of proposed Constitution) (The "powers [vested in Congress] extend only to matters respecting the common interests of the union, and are specially defined, so that the particular states retain their sovereignty in all other matters.").

During the earliest years of our constitutional development, principles of federalism were not only well recognized, they formed the basis for virtually every State in the union to assert its rights as a State against the federal government. In 1798, for example, Thomas Jefferson drafted the Kentucky Resolutions, which were passed by the Kentucky legislature to protest the unpopular Alien and Sedition Acts, [citation].⁵ At the same

Footnote(s) 5 will appear on following pages.

time, Madison drafted similar Virginia Resolutions, which were adopted by the Virginia General Assembly. [citation] In both cases it was clear that the reserved powers of the States were treated as a substantive limitation on Congress's authority. It was asserted that these powers enabled a State to interpose its will against any action by the Federal Government. Thirty years later, Jefferson's and Madison's views were expanded by John C. Calhoun in the South Carolina Exposition of 1828, [citation], ~~which~~ ^{that} set forth the nullification doctrine--the extreme view that eventually led to the War Between the States.⁶

The view that the reserved powers of the States placed limits on the powers of the Federal Government was hardly confined to the South. The New England States, for example, were

⁵In the first resolution, Jefferson explained

"[t]hat the several States composing the United States of America are not united on the principle of unlimited submission to their general government; but that, by compact, under the style and title of a Constitution for the United States, and of amendments thereto, they constituted a general government for special purposes, delegated to that government certain definite powers, reserving, each State to itself, the residuary mass of right to their own self-government; and that whensoever the general government assumes undelegated powers, its acts are unauthoritative, void, and of no force." [citation]

⁶In referring to this early and interesting history, I do not suggest that either the doctrine of interposition or that of nullification was constitutionally sound. In any event, they were laid to rest in one of history's bloodiest fratricides, ending at Appomattox in 1865. The views of these great figures in our history are, however, directly pertinent to the question whether there was ever any intention that the Commerce Clause would empower the Federal Government to intrude expansively upon the sovereign powers reserved to the States.

vehement in their opposition to the Embargo Act of 1807, [citation], and they turned to their rights as States in defense. In 1809, the governor of Connecticut, with the support of the legislature, refused to assist the Secretary of War in enforcing the Act.⁷ In Massachusetts the story was similar. When Congress passed an Act to enforce the embargo in 1809, [citation], the Massachusetts legislature denounced it as "unjust, oppressive, and unconstitutional, and not legally binding on the citizens of this state." [citation] When Congress enacted another embargo in 1813, [citation], the Massachusetts legislature declared it "a manifest ... abuse of power" that infringed the "sovereignty reserved to the States"⁸ and justified the legislature in "interpos[ing] its power" to protect its citizens from "oppres-

⁷The governor explained to a special session of the state legislature that

"[w]henever our national legislature is led to overleap the prescribed bounds of their [sic] constitutional powers, on the state legislatures, in great emergencies, devolve the arduous task--it is their right--it becomes their duty, to interpose their protecting shield between the right and liberty of the people, and the assumed power of the general government." [citation]

The legislature promptly passed resolutions supporting the governor's position, and concluding that the Embargo Act was "incompatible with the constitution of the United States, and encroach[ed] upon the immunities of [the] state." [citation] In view of its duty to support the Constitution, the legislature declined "to assist, or concur in giving effect to the aforesaid unconstitutional acts." [citation]

⁸The legislature explained that the State's sovereignty was reserved, in part, to protect its citizens from excessive federal power. [citation].

sion," [citation]. Even Daniel Webster, ~~who~~^{is} famous for his defense of the powers of the federal government, recognized that principles of federalism limit Congress's power.⁹

B

Few perceptions of history are clearer than the fact that state sovereignty was a basic assumption of American political theory. Although its contours have not remained the same as conditions have changed, state sovereignty remains a fundamental component of our system that this Court has recognized time and time again. Even to refer to the highlights would go far beyond the scope of this dissent. I therefore mention only a few of the decisions from last Term alone in which the Court expressly noted that States have significant sovereign powers.¹⁰ In Community

⁹During a debate in Congress on a conscription bill and a bill for the enlistment of minors, Webster declared that if these measures were enacted it would be "the solemn duty of the State Governments" to interpose their authority to prevent enforcement. In his view, this was "among the objects for which the State Governments exist." Speech on the Conscription Bill (Dec. 9, 1814), reprinted in 14 The Writings and Speeches of Daniel Webster 55, 68 (1903).

¹⁰See also Rivera-Rodriguez v. Popular Democratic Party, ___ U.S. ___, ___ [for cite-checking: 50 U.S.L.W., at 4601] (1982) ("Puerto Rico, like a State, is an autonomous political entity, 'sovereign over matters not ruled by the Constitution.'") (quoting Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 673 (1974)); Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinée, ___ U.S. ___, ___ [4556] n. 10 (1982) (States are "'coequal sovereigns in a federal system'") (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980)); Engle v. Isaac, ___ U.S. ___, ___ [4382] (1982) (discussing "the States' sovereign power to punish offenders"); Underwriters National Assurance Co. v. North Carolina Life & Accident & Health Ins. Guaranty Assn., 455 U.S. 691, 704 (1982) (recognizing "the

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structure of our nation as a union of States, each possessing equal sovereign powers"); Cabell v. Chavez-Salido, 454 U.S. 432, 444-447 (1982) (relying on State's "sovereign" police powers); Fair Assessment in Real Estate Assn. v. McNary, 454 U.S. 100, 108 (1982) (state courts are those "of a different, though paramount sovereign") (quoting Matthews v. Rodgers, 284 U.S. 521, 525 (1932)).

sion. Id., at ____-____ [2137-2143].

In sum, all of the evidence reminds us of the importance of the principles of federalism in our constitutional system. The Founding Fathers, and those who participated in the earliest phases of constitutional development, considered Congress's power--including its power under the Commerce Clause--to be limited by the powers reserved to the States. This is a fact that has been recognized and accepted by this Court for almost two hundred years.¹¹

IV

JUSTICE STEVENS's concurring opinion recognizes no limit to Congress's power to override state sovereignty in exercising its powers under the Commerce Clause. The opinion does not mention either federalism or state sovereignty. ~~it~~ Instead declares that "[t]he only basis for questioning the federal statute at issue here is the pure judicial fiat found in this Court's opinion in National League of Cities v. Usery." Ante, at 4. Under this view it is not easy to think of any function of state or local government that could not be preempted.

¹¹Of course I do not denigrate the importance of the Commerce Clause. It is essential to the functioning of our National Government. It is, however, only one provision of a Constitution that embodies strong principles of federalism.

mfs 01/30/83

preliminary draft: EEOC v. Wyoming, No. 81-554

JUSTICE POWELL, dissenting.

Use the substance of my introduction

I join ~~THE~~ CHIEF JUSTICE's dissenting opinion, and write separately only to stress my disagreement with some of the assertions and implications found in JUSTICE STEVENS's concurring opinion. To read JUSTICE STEVENS's opinion, one would think that the Commerce Clause was the centerpiece around which the Constitution was built, and that principles of federalism have no weight in constitutional analysis. Both of these propositions are, in my view, wrong.

I

No one today could seriously challenge the importance of the Commerce Clause, but it is--and always has been--only one of many important provisions in the Constitution. The central purpose of the Constitution was, as the name implies, to constitute a government. The central provisions, therefore, are those relating to the establishment of the government. ~~I thus consider~~ *any single* the Constitution's system of checks and balances, for example, ~~to~~ *was* ^{be} far more important in the larger perspective than the Commerce Clause.

one

nick- 9 start with preamble & then come to Art I

Even if ~~I~~ ^{one} looked only at Article I, section 8, which enumerates certain powers granted to Congress, I would not place the Commerce Clause above the rest. ~~It~~ ^{cannot be} strikes me as no accident, for example, that section 8 begins by granting Congress the

authority conferred on Congress

"Power to lay and collect Taxes, Duties, Imposts and Excises." If one power were to be viewed as central, the taxing power seems to be the obvious candidate.¹ Congress's powers to "declare War," "raise and support Armies," and "provide and maintain a Navy," all of which are found in section 8, were also at least as important as the commerce powers in the minds of the Founding Fathers.² Their desire to "provide for the common defence," after all, was one of the explicit concerns mentioned in the Preamble.

II

Principles of federalism are also an important aspect of our constitutional theory, and this fact has been recognized from the nation's earliest years. Chief Justice Marshall's contributions to the growth of the power of the federal government are well known. Less well recognized is the fact that virtually every state in the country asserted its rights as a state against the federal government during the same period. In several cases these assertions were directed at acts of Congress.³ As the Con-

¹The delegates at the Constitutional Convention certainly paid more attention to Congress's power to tax than to its power to regulate interstate commerce. [citation] And at the state ratifying conventions, the extent of the taxing power was the more frequent subject of debate. [citation]

²[Put something here about the need to defend against common enemies. No one disputed that this was a ~~power~~ *one of the dominant* for the central government.]

³The states were also jealous to defend their rights against what were viewed as encroachments by the federal judiciary. The Footnote continued on next page.

*reasons
for adopting*

stitution developed, it is clear that principles of federalism played an important role in restricting Congress's power.

In 1798, Thomas Jefferson drafted the Kentucky Resolutions, which were passed by the Kentucky legislature to protest the unpopular Alien and Sedition Acts, [citation]. In the first resolution he explained

"[t]hat the several States composing the United States of America are not united on the principle of unlimited submission to their general government; but that, by compact, under the style and title of a Constitution for the United States, and of amendments thereto, they constituted a general government for special purposes, delegated to that government certain definite powers, reserving, each State to itself, the residuary mass of right to their own self-government; and that whensoever the general government assumes undelegated powers, its acts are unauthoritative, void, and of no force." [citation]

At the same time, James Madison, "the Father of the Constitution," drafted similar Virginia Resolutions, which were adopted by the Virginia General Assembly. [citation] In both cases it was clear that the reserved powers of the states were treated as a substantive limitation on Congress's authority.

This view of federalism was hardly limited to the South. Within a decade, the New England states were vehement in their opposition to the Embargo Act of 1807, [citation], and they

classic example, of course, is the Eleventh Amendment, a reaction to Chisholm v. Georgia, 2 U.S. 419 (1793). Other examples from this early period may be found in Pennsylvania's reactions to Huidekoper's Lessee v. Douglass, 7 U.S. 1 (1805), and United States v. Peters, 9 U.S. 115 (1809), and in Georgia's reaction to Worcester v. Georgia, 31 U.S. 515 (1832).

turned to their rights as states in defense. In 1809, for example, the Secretary of War sought assistance from the governor of Connecticut in enforcing the Embargo Act. The governor flatly refused, and summoned a special session of the state legislature. He explained to the legislature that

"[w]henever our national legislature is led to overleap the prescribed bounds of their [sic] constitutional powers, on the state legislatures, in great emergencies, devolve the arduous task--it is their right--it becomes their duty, to interpose their protecting shield between the right and liberty of the people, and the assumed power of the general government." [citation]

The legislature promptly passed resolutions supporting the governor's position, and concluding that the Embargo Act was "incompatible with the constitution of the United States, and encroach[ed] upon the immunities of [the] state." [citation] In view of its duty to support the Constitution, the legislature declined "to assist, or concur in giving effect to the aforesaid unconstitutional acts." [citation]

In Massachusetts the story was similar. When Congress passed an Act to enforce the embargo in 1809, [citation], the Massachusetts legislature denounced it as "unjust, oppressive, and unconstitutional, and not legally binding on the citizens of this state." [citation] When Congress enacted another embargo in 1813, [citation], the Massachusetts legislature again reacted strongly. After receiving complaints from forty towns in the state, it declared:

"A power to regulate Commerce is abused when employed to destroy it; and a manifest and voluntary abuse of power sanctions the right of resistance, as much as a direct and palpable usurpation. The sovereignty reserved to the States, was reserved to protect the Citizens from acts of violence by the United States, as well as for purposes of domestic regulation. We spurn the idea that the free, sovereign and independent State of Massachusetts is reduced to a mere municipal corporation, without power to protect its people, and to defend them from oppression, from whatever quarter it comes. Whenever the national compact is violated, and the citizens of this state are oppressed by cruel and unauthorized law, this legislature is bound to interpose its power, and wrest from the oppressor his victim." [citation]

There can be little doubt that early New Englanders⁴ considered Congress's powers under the Commerce Clause to be limited by principles of federalism.

The most extreme assertion of states' rights in this period can be found in the South Carolina Exposition of 1828, which sets out John C. Calhoun's nullification doctrine. [citation] In essence, Calhoun argued that each state had the power to determine whether an act of the national government complied with the Constitution; and if not, whether the act should be enforced within the limits of the state. The doctrine was first asserted by South Carolina four years later in reaction to the

⁴During this period even Daniel Webster, who is famous for his defense of the powers of the federal government, recognized that principles of federalism limit Congress's power. During a debate in Congress on a conscription bill and a bill for the enlistment of minors, he declared that if these measures were enacted it would be the duty of the states to interpose their authority to prevent enforcement. In his view, this was one of the purposes for which state governments existed. 1 H. Hockett, *The Constitutional History of the United States* 337 (1939).

Tariff Acts of 1828 and 1832, [citation].⁵ A state convention passed an ordinance nullifying the Acts with the declaration that they were "unauthorized by the Constitution of the United States, and violate the true meaning and intent thereof, and are null, void, and no law, nor binding upon this State, its officers, or citizens." [citation]

In sum, there are numerous examples from our early history that demonstrate the importance of the principles of federalism. The Founding Fathers, and those who participated in the earliest phases of constitutional development, considered Congress's power--including its power under the Commerce Clause--to be limited by the powers reserved to the States.

III

I raise these points not to suggest that Interposition or Nullification are, or ever were, viable doctrines. Rather I consider it important to stress the federal nature of the Constitution, and to emphasize that all of Congress's powers--including its powers under the Commerce Clause--must be exercised consistently with basic principles of federalism.

⁵Almost all of the southern states passed resolutions during this period condemning protective tariffs as unconstitutional. See, e.g., Resolution of March 4, 1826, [1825-26] Acts of Virginia 114.

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preliminary draft: EEOC v. Wyoming, No. 81-554

JUSTICE POWELL, dissenting.

I join THE CHIEF JUSTICE's dissenting opinion, and write separately only to stress my disagreement with some of the assertions and implications found in JUSTICE STEVENS's concurring opinion. To read JUSTICE STEVENS's opinion, one would think that the Commerce Clause was the centerpiece around which the Constitution was built, and that principles of federalism have no weight in constitutional analysis. Both of these propositions are, in my view, wrong.

I

No one today could seriously challenge the importance of the Commerce Clause, but it is--and always has been--only one of many important provisions in the Constitution. The central purpose of the Constitution was, as the name implies, to constitute a government. The central provisions, therefore, are those relating to the establishment of the government. I thus consider the Constitution's system of checks and balances, for example, to be far more important in the larger perspective than the Commerce Clause.

Even if I looked only at Article I, section 8, which enumerates certain powers granted to Congress, I would not place the Commerce Clause above the rest. It strikes me as no accident, for example, that section 8 begins by granting Congress the

"Power to lay and collect Taxes, Duties, Imposts and Excises." If one power were to be viewed as central, the taxing power seems to be the obvious candidate.¹ Congress's powers to "declare War," "raise and support Armies," and "provide and maintain a Navy," all of which are found in section 8, were also at least as important as the commerce powers in the minds of the Founding Fathers.² Their desire to "provide for the common defence," after all, was one of the explicit concerns mentioned in the Preamble.

II

Principles of federalism are also an important aspect of our constitutional theory, and this fact has been recognized from the nation's earliest years. Chief Justice Marshall's contributions to the growth of the power of the federal government are well known. Less well recognized is the fact that virtually every state in the country asserted its rights as a state against the federal government during the same period. In several cases these assertions were directed at acts of Congress.³ As the Con-

¹The delegates at the Constitutional Convention certainly paid more attention to Congress's power to tax than to its power to regulate interstate commerce. [citation] And at the state ratifying conventions, the extent of the taxing power was the more frequent subject of debate. [citation]

²[Put something here about the need to defend against common enemies. No one disputed that this was a power for the central government.]

³The states were also jealous to defend their rights against what were viewed as encroachments by the federal judiciary. The Footnote continued on next page.

stitution developed, it is clear that principles of federalism played an important role in restricting Congress's power.

In 1798, Thomas Jefferson drafted the Kentucky Resolutions, which were passed by the Kentucky legislature to protest the unpopular Alien and Sedition Acts, [citation]. In the first resolution he explained

"[t]hat the several States composing the United States of America are not united on the principle of unlimited submission to their general government; but that, by compact, under the style and title of a Constitution for the United States, and of amendments thereto, they constituted a general government for special purposes, delegated to that government certain definite powers, reserving, each State to itself, the residuary mass of right to their own self-government; and that whensoever the general government assumes undelegated powers, its acts are unauthoritative, void, and of no force." [citation]

At the same time, James Madison, "the Father of the Constitution," drafted similar Virginia Resolutions, which were adopted by the Virginia General Assembly. [citation] In both cases it was clear that the reserved powers of the states were treated as a substantive limitation on Congress's authority.

This view of federalism was hardly limited to the South. Within a decade, the New England states were vehement in their opposition to the Embargo Act of 1807, [citation], and they

classic example, of course, is the Eleventh Amendment, a reaction to Chisholm v. Georgia, 2 U.S. 419 (1793). Other examples from this early period may be found in Pennsylvania's reactions to Huidekoper's Lessee v. Douglass, 7 U.S. 1 (1805), and United States v. Peters, 9 U.S. 115 (1809), and in Georgia's reaction to Worcester v. Georgia, 31 U.S. 515 (1832).

turned to their rights as states in defense. In 1809, for example, the Secretary of War sought assistance from the governor of Connecticut in enforcing the Embargo Act. The governor flatly refused, and summoned a special session of the state legislature. He explained to the legislature that

"[w]henever our national legislature is led to overleap the prescribed bounds of their [sic] constitutional powers, on the state legislatures, in great emergencies, devolve the arduous task--it is their right--it becomes their duty, to interpose their protecting shield between the right and liberty of the people, and the assumed power of the general government." [citation]

The legislature promptly passed resolutions supporting the governor's position, and concluding that the Embargo Act was "incompatible with the constitution of the United States, and encroach[ed] upon the immunities of [the] state." [citation] In view of its duty to support the Constitution, the legislature declined "to assist, or concur in giving effect to the aforesaid unconstitutional acts." [citation]

In Massachusetts the story was similar. When Congress passed an Act to enforce the embargo in 1809, [citation], the Massachusetts legislature denounced it as "unjust, oppressive, and unconstitutional, and not legally binding on the citizens of this state." [citation] When Congress enacted another embargo in 1813, [citation], the Massachusetts legislature again reacted strongly. After receiving complaints from forty towns in the state, it declared:

"A power to regulate Commerce is abused when employed to destroy it; and a manifest and voluntary abuse of power sanctions the right of resistance, as much as a direct and palpable usurpation. The sovereignty reserved to the States, was reserved to protect the Citizens from acts of violence by the United States, as well as for purposes of domestic regulation. We spurn the idea that the free, sovereign and independent State of Massachusetts is reduced to a mere municipal corporation, without power to protect its people, and to defend them from oppression, from whatever quarter it comes. Whenever the national compact is violated, and the citizens of this state are oppressed by cruel and unauthorized law, this legislature is bound to interpose its power, and wrest from the oppressor his victim." [citation]

There can be little doubt that early New Englanders⁴ considered Congress's powers under the Commerce Clause to be limited by principles of federalism.

The most extreme assertion of states' rights in this period can be found in the South Carolina Exposition of 1828, which sets out John C. Calhoun's nullification doctrine. [citation] In essence, Calhoun argued that each state had the power to determine whether an act of the national government complied with the Constitution; and if not, whether the act should be enforced within the limits of the state. The doctrine was first asserted by South Carolina four years later in reaction to the

⁴During this period even Daniel Webster, who is famous for his defense of the powers of the federal government, recognized that principles of federalism limit Congress's power. During a debate in Congress on a conscription bill and a bill for the enlistment of minors, he declared that if these measures were enacted it would be the duty of the states to interpose their authority to prevent enforcement. In his view, this was one of the purposes for which state governments existed. 1 H. Hockett, *The Constitutional History of the United States* 337 (1939).

Tariff Acts of 1828 and 1832, [citation].⁵ A state convention passed an ordinance nullifying the Acts with the declaration that they were "unauthorized by the Constitution of the United States, and violate the true meaning and intent thereof, and are null, void, and no law, nor binding upon this State, its officers, or citizens." [citation]

In sum, there are numerous examples from our early history that demonstrate the importance of the principles of federalism. The Founding Fathers, and those who participated in the earliest phases of constitutional development, considered Congress's power--including its power under the Commerce Clause--to be limited by the powers reserved to the States.

III

I raise these points not to suggest that Interposition or Nullification are, or ever were, viable doctrines. Rather I consider it important to stress the federal nature of the Constitution, and to emphasize that all of Congress's powers--including its powers under the Commerce Clause--must be exercised consistently with basic principles of federalism.

⁵Almost all of the southern states passed resolutions during this period condemning protective tariffs as unconstitutional. See, e.g., Resolution of March 4, 1826, [1825-26] Acts of Virginia 114.

Justice Powell, dissenting.

I join the Chief Justice's dissenting opinion, and write separately to record a personal dissent from Justice Stevens' revisionist view of the history of our country. He commences his separate concurring opinion with the startling observation that the Commerce Clause "was the Framers' response to the central problem that gave rise to the Constitution itself". Ante, at 1. (emphasis added). Again, at a subsequent point in his opinion Justice Stevens observed that "this Court has construed the Commerce Clause to reflect the intent of the Framers . . . to confer a power on the national government adequate to discharge its central mission". Ante, at 3 (emphasis added).¹ Justice Stevens further states that

¹The authority primarily relied on by Justice Stevens are quotations from Justice Rutledge who did indeed write in 1947 that the "proximate cause of our national existence" was not to assure the great "democratic freedoms"; rather it was "to secure freedom of trade" within the former colonies. W. Rutledge, A Declaration of Legal Faith, at 25-26, (1947), ante, at 1,2.

"National League of Cities not only was incorrectly decided, but also is inconsistent with the central purpose of the Constitution itself" Ante, at 5. (emphasis added)

I

Justice Stevens and I must have read different history books. No one would suggest that removing barriers to the free flow of trade was not one of the purposes of the Constitution. I do suggest that there were a number of other purposes of equal or greater importance in the contemplation of the statesmen who assembled in Philadelphia and as evidenced by the debates in the several states on the issue of ratification. No doubt there were differences of opinion as to the primacy of the various purposes. But one can be reasonably sure that few among the Founding Fathers thought that trade barriers were "the central problem", or that their elimination was the "central mission" of the Constitutional Convention.

If Justice Stevens had written that the intent of the Founders, in adopting the Commerce Clause nearly two centuries ago, is irrelevant to the world in which we

live today, I would not have disagreed. But his concurring opinion purports to rely on their intent. The Commerce Clause properly has been construed, and its reach gradually extended, by this Court to accommodate unanticipated changes that have occurred over the decades primarily in transportation and communication. I would not have thought until today, however, that anyone would suppose that the time and circumstances of a game warden's retirement in Wyoming were of the slightest consequences to commerce and trade. Surely, such a suggestion, seriously made at the time that this was within the central purpose of the Constitution, would have foreclosed its ratification.

I refer to the dissenting opinion of the Chief Justice for a response to the Court's opinion on the basis of constitutional doctrine. I write only -- and briefly in view of the scope of the subject -- to place the Commerce Clause properly in the perspective of history, and to suggest that even today federalism is not as utterly subservient to that Clause as Justice Stevens appears to believe.

II

The central purpose of the Constitution was, as the name implies, to constitute a government. The central provisions, therefore, are those relating to the establishment of the government. The system of checks and balances, for example, was far more central to the larger perspective than any single power conferred on Congress. But apart from the framework of government itself, the motivating purposes of the Framers were stated in the preamble to the Constitution:

" . . . to form a more perfect Union, establish Justice, ensure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty . .
."

Achievement of these purposes was not delegated solely to the Congress. But if one looks at the powers that were so delegated, the position of the Commerce Clause hardly suggests that it was "central" among the concerns of the patriots who formed our union. Section 8 begins with the power to tax and to pay debts. Then, consistent with the preamble is the power to "provide for the common defense and general welfare". Among the following enumerated powers, the Commerce Clause is only one among nearly a score. So much for what the language

and structure of the Constitution itself teaches about the intent of the Framers.

III

One would never know from my friend's and colleague's concurring opinion that the Constitution formed a federal system, composed of the central government and states that retained a significant measure of sovereign authority. This is clear from the the Constitution itself, the debates at the Convention and particularly from the discussions that attended the ratification debates in the colonies. It is impossible to believe that the Constitution would have been adopted, much less ratified, if it had been understood that the "central mission" of the national government was embodied in the Commerce Clause, a mission to be accomplished even at the expense of regulating the personnel practices of state and local government.