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). 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 ...."

\(^2\)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). 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 dissentions 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).

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."
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-
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, negociation, 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 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, 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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"[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 whenever 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. See 6 The Works of John C. Calhoun 1-57 (R. Craile 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.

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.

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." Message of Governor Trumbull (???), reprinted in H. Ames, State Documents on Federal Relations, 1789-1861, at pp. 39-40 (1907).

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Massachusetts the story was similar. The Massachusetts 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 (??), 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" and justified the legislature in "interposing 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 (Feb. 23, 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 note 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).
Few perceptions of history are clearer than the fact that state sovereignty was a basic assumption of American political theory. Although its contours changed with conditions, 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. 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)), there is an

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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

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.
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.
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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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

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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

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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). Remediying this defect was thus one of the Footnote continued on next page.
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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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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. 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

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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. 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 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 Gov-
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.

It is, however, only one provision of a Constitution that embodies strong principles of federalism.
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 be even a few decades ago, is the effect on trade among the states of Wyoming's requirement that game wardens retire at 65 rather than 70 years of age.
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.