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.

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.

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.

LPP, Jr.
February 17, 1983

No. 81-554  EEOC v. Wyoming

Dear Lewis,

Please join me in your dissent.

Sincerely,

[Signature]

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.
2.

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.
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
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. 201 (1959); and 31 Miss. L.J. 50 (1959); continued with State Sovereignty and the Drafting of the Constitution, 31 Miss. L.J. 209 (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 (1961); and 33 Miss. L.J. 294 (1962).

*Professor of Law, University of Mississippi.
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 invisible 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 fairly that none of these doctrines—strict construction of the Constitution, interposition or nullification, and secession—can find support for ratification of the Constitution without from the United States. And yet, most famous impact upon which men for the reason state sovereignty aries of, the draft aware of the un Madison and Je became operating forth a con­ sidering the exit complete turmoil.

But any ex­ the fact that met­ forms and policy advance their on part of the study: The Confederation as were defeated in. Similarly, the op­ they accepted na­ as inevitable in pe­ the Constitution nal. They orga­ national power which would pro­

ment.

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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 1870. From this it might be suggested that state sovereignty doctrines were able to thrive because their documentary refutation remained undiscovered 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 most 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 edity. 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 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 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." 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 1911 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

*JENSEN, THE ARTICLES OF CONFEDERATION 265 (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 simply true 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 lacking historic legitimacy, feelings, and form but also a connective tissue.

Speaking in that the "great moments was that the respective objectives. The objective was that the general power in throughout to get the general government out the cooperating less free as men small ones." 

Remembering the Plan of which the members of the Constitution had an "absolute power of independence of the middle ground," the national author can be subdued.

There has been a Constitution was "to be adapted to the being abolished respective sovereignty as we seem finally Madison. McCulloch v. Maryland. 4 FARRAND, TITERS, AN

1862]
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." 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." 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." The grand design has not been abandoned. It is continually being fulfilled.

32 LETTERS AND OTHER WRITINGS OF JAMES MADISON 287 (1846 ed.).
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